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

BRIEF OF NATIONAL BLACK POLICE ASSOCIATION, NATIONAL ASSOCIATION OF BLACK LAW ENFORCEMENT OFFICERS, WOMEN IN FEDERAL LAW ENFORCEMENT, THE NATIONAL CENTER FOR WOMEN & POLICING, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTEREST OF THE AMICI CURIAE

The undersigned amici curiae are the National Black Police Association, National Association of Black Law Enforcement Officers, Women in Federal Law Enforcement, the National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc.[1] Amici are law enforcement membership and educational organizations. They share an interest in the outcome of this case because they are committed to improving police responses to domestic violence, and believe that, if the allegations in this case are correct, the conduct of the Castle Rock Police Department fell far beneath acceptable police standards. Amici seek to inform this Court about the widely recognized and adopted standard practices utilized by police around the country in responding to domestic violence, and to emphasize that the constitutional procedures adopted here would establish only a minimal floor that is far less burdensome than the "best practices" already typically employed by law enforcement in domestic violence cases.

STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Relevant state statutes are included in the appendix to this brief. *See* App. 1a-4a.

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[1] Letters from the parties providing consent were submitted to the Clerk of the Court. Pursuant to Rule 37.6, amici state that no counsel for any party has authored any part of this brief, and no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Respondent does not seek to relitigate *DeShaney*, which was a substantive due process case rejecting a fundamental constitutional right to protection. Hers is a procedural due process claim of the sort that *DeShaney* expressly distinguished. Petitioner's assertion that *DeShaney* precludes her claim would mean that states cannot create benefits that are entitled to constitutional due process protection.

2. As a protected person under a Colorado domestic violence protection order, Respondent had a legitimate entitlement to police enforcement of the order. Colorado law explicitly dictates that police employ "every reasonable means to enforce" domestic violence protection orders, and the legislative intent confirms the mandatory nature of the statutory requirement. The protection order made the statutory benefit concrete and personal to Respondent. She was entitled (and reasonably expected) to rely on the promise of enforcement.

3. Respondent's enforcement right is sufficiently certain to create a legitimate entitlement. The Colorado statute eliminates meaningful police discretion, and what remains is no more than this Court has repeatedly allowed while still finding an entitlement. Petitioner's suggestion that the Constitution cannot require more procedures than the State itself provides rehashes an argument this Court has repeatedly rejected.

4. The police ignored Respondent and denied her repeated pleas for enforcement without reasoned consideration. No matter how appropriate process is defined, she was not provided it.

5. The Respondent's interest, the risk of erroneous deprivation and value of additional process, and the government's interest, all militate in favor of establishing a procedural floor for these police decisions. Implementing such procedures would not detrimentally affect law enforcement. Current police practices in domestic violence cases far exceed the *en banc* court's constitutional minimum.

ARGUMENT

I. *DESHANEY* DOES NOT FORECLOSE RESPONDENT'S PROCEDURAL DUE PROCESS CLAIM.

A. The Due Process Claim At Issue Is Procedural, Not Substantive In Nature.

Petitioner seeks to conflate substantive and procedural due process by observing that "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." *See* Pet Br. 13. This observation is a mere truism because all due process claims, by definition, require an allegation that the state denied life, liberty, or property.[2] The difference between substantive and procedural claims is not in whether the plaintiff alleges that she was deprived of a substantive benefit (to have an injury, she always must). Rather, it is in whether the plaintiff alleges that the denial is caused by the failure of the state to employ adequate procedures to guard against

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[2] Were Petitioner correct, every complaint alleging a due process violation as a result of the denial of a substantive benefit would be a *de facto* substantive due process complaint, and no plaintiff could state a proper claim for denial of procedural due process. *See* U.S. Const. amend. XIV, § 1 (state may not "*deprive* any person of life, liberty, or property, without due process of law.") (emphasis added).

erroneous deprivation (procedural due process), or the failure of the state to provide an adequate justification for its action (substantive due process).

To be sure, Respondent believes that her pleas for enforcement should have been heeded and the murder of her three girls averted. But at base she claims that Petitioner ignored her requests for assistance. In fact, she alleges that Petitioner's policy and practice is to ignore requests like hers without employing any procedural protections at all. PA 129a. Had minimal fair process been employed, she would not have been erroneously deprived of the enforcement to which she was entitled. She stated a claim for denial of procedural due process that is separate entirely from her dismissed claim for denial of substantive due process.

B. States Have Power Under *DeShaney* To Create Property Rights In Police Protection.

Petitioner asks this Court to carve out a special exception to the states' historic ability to create property rights, asserting that *DeShaney* precludes states from "*ever* recognizing a non-traditional *Roth*-type property interest in police enforcement procedures." Pet. Br. 12. Petitioner's position is contradicted by the United States, which recognizes that "courts should recognize an entitlement to enforcement ... when the legislature has clearly indicated that to be its intent," U.S. Br. 9, and is unsupportable under *DeShaney* and this Court's due process jurisprudence.

States are always free to provide their citizens whatever benefits they choose and to create whatever property rights that follow. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of the claim of entitlement must be decided by reference to state law."); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (property rights may "stem from an independent source such as state law"). This Court's

jurisprudence is replete with examples of states creating protected property and liberty interests in rights that, like police protection, do not spring from the Constitution. *See Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("There is no 'constitutional or inherent right to parole,' but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revolve parole.") (citations omitted). Indeed, 30 years ago, this Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Roth*, 408 U.S. at 571.

Should they choose to do so, the states are no less able to create property rights in police enforcement than they are in previously recognized benefits. Police enforcement of domestic violence protection orders is at least as compelling as other so-called "*Roth*-type" property interests. *See* Br. of *Amici Curiae* Nat'l Network to End Domestic Violence ("NNEDV") at 7, 19-20, 25-29. The fact that police protection is a critical service of civil society that is monopolized by the State suggests that police protection should be more, not less, subject to the requirements of procedural due process. "[D]ue process of law ... command[s] that public agencies ... such as the police, which possesses broad and virtually monopolistic powers to use force and restraint upon the citizenry – act according to uniform, visible, and regular rules of law. When the extraordinary powers of the police are used unconstrainedly – that is, in the absence of such rules – they are used arbitrarily in a constitutional sense, in violation of due process" 1 ABA Standards for Criminal Justice, 1-4.5, comment. 1-124 (2d ed. 1980 & Supp. 1986) (quoting *Amsterdam*, The Supreme Court and the Rights of Suspects in Criminal Cases). *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (state monopolization of process for divorce requires it to make

process accessible to all); *Archie v. Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*) ("When a state cuts off sources of private aid, it must provide replacement protection"), *cert. denied*, 489 U.S. 1065, 1223 (1989); *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283, 1284 (7th Cir. 1991) (citing *Archie* for proposition that "state may constrain [liberty] indirectly as well as directly – by suppressing private alternatives as well as by preventing self-help").

Certainly, *DeShaney* does not restrain state power.[3] *DeShaney* held only that the Constitution does not "impose on state and local governments an affirmative obligation to prevent private-party violence." *DeShaney v. Winnebego Cnty Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). And as even Petitioner is forced to concede, Pet. Br. 15, *DeShaney* explicitly contemplated that a state might afford its citizens "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 ... *Roth*." *DeShaney*, 489 U.S. at 195 n.2.

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[3] Petitioner relies on two out-of-context quotations from legal commentators, both of whom support Respondent. *See* Pet. Br. 15-16 (citing Profs. Jones and Strauss). Jones concludes that plaintiffs who "were the holders of valid state orders of protection the police refused to enforce without first offering them procedural due process in the form of predeprivation notice and a hearing on the refusal, ... may have a viable procedural due process claim." *See* Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 W.Va. L. Rev. 251, 351 (1991) . Strauss, an outspoken *DeShaney* critic, recognized that its "limited" holding "left open the possibility that persons ... might recover under the procedural components if they could show that state law created an 'entitlement' to receive protective services in accordance with the terms of [a] statute." *See* Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 56 (1989) (quoting *DeShaney*, 489 U.S. at 195 n.2).

II. COLORADO VESTED RESPONDENT WITH A PROPERTY INTEREST IN ENFORCEMENT OF HER PROTECTION ORDER.

The state of Colorado conferred upon Respondent a protected property interest in police enforcement of her protection order. The interest originated in Colorado law -- which requires that police enforce domestic violence protection orders -- and was bestowed upon Respondent individually when a Colorado court determined that her estranged husband posed a threat to her and her children and issued to her a protection order with explicit instructions to police and notice to her that it must be enforced.

A person obtains a property interest in a state benefit when she has "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. The touchstone of entitlement is mutual expectation. *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 465 (1989) ("objective expectation"); *Vitek*, 445 U.S. at 489 ("justifiable expectations"); *see also Roth*, 408 U.S. at 577 ("more than a unilateral expectation"). States may create entitlements for a particular class of individuals if they define benefits and purposefully guide their officials to distribute those benefits to the class. *See Roth*, 408 U.S. at 577; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). States do not create entitlements if they merely allow officials to award or deny benefits "for whatever reason or for no reason at all." *Olim v. Wakinekoba*, 461 U.S. 238 (1983) (quotation marks and citation omitted); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543-44 & n.9 (1985) (recognizing property interest despite discretion).

A. Colorado Law Explicitly Mandates Enforcement of Protection Orders.

Colorado law authorizes courts to issue protection orders in family cases and unambiguously requires state police to

enforce them. Respondent obtained her protection order pursuant to Section 14-10-108(2)(b)-(c) of the Uniform Dissolution of Marriage Act, which authorizes state courts to award an order "enjoining a party from molesting or disturbing the peace of the other party or of any child [or] excluding a party from the family home ... upon a showing that physical or emotional harm would otherwise result." Colo. Rev. Stat. § 14-10-108(2)(b)-(c).

Once the state court awarded the protection order to Respondent and the order was served on Mr. Gonzales, its enforcement was made mandatory by Section 18-6-803.5. *See id.* § 14-10-109 ("the duties of police officers enforcing orders issued pursuant to ... 14-10-108 shall be in accordance with section 18-6-803.5"). That section requires that "[a] peace officer *shall* use *every* reasonable means to enforce a restraining order." *See id.* § 18-6-803.5(a) (emphasis added).

Petitioner and the United States contend that, despite the express terms of the statute, it does not create any mandatory benefit. This contention is unavailing for several reasons.

First, Petitioner and its supporting amici wrongly frame this case as concerning an entitlement to "arrest." U.S. Br. 15, *et seq.* In fact, Respondent's claim is for "every reasonable means to enforce" the protection order, PA 128a. "Enforcement," as used in the Colorado statute, may include arrest, and often must. But it may alternatively or additionally include obtaining a warrant or securing children.[4] While

[4] Police commonly understand that they play a critical protective role in domestic violence cases that is only partially defined by the power to arrest. *Cf. e.g.*, Int'l Ass'n of Chiefs of Police ("IACP"), *Model Policy* (rev. 1997) ("IACP Policy") (App. B 9a) (requiring officers to provide assistance to victims, batterers, and children, including to "[e]nsure the safety of the children"). The IACP Policy treats arrest as non-mandatory, but treats the obligation to ensure the safety of children and parties as

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amici believe an arrest was in fact mandated here, this Court need not decide whether Respondent had a protected property interest in an arrest *per se*. If, as the *en banc* court of appeals found, the state created an entitlement to "enforcement," regardless of the means chosen to effect it, she stated a claim.

Putting aside the specific duty to *arrest*, Petitioner and the United States concede that under the plain meaning of the statute, some *enforcement* is required. *See* Pet. Br. 28 (dismissing "shall arrest" language because seen as inconsistent with every "'reasonable means' requirement of the first sentence"); U.S. Br. 15 (reading arrest provision in context of "*command* that immediately precedes it, which provides that police 'shall use every reasonable means to enforce' a protection order") (emphasis altered).

Second, Petitioner and the United States ignore Colorado precedent regarding the meaning of the word "shall" in a statute. *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1982) ("shall" has a "mandatory connotation"); *People v. Clark*, 654 P.2d 847, 848 (Colo. 1982). Where the use of the mandatory "shall" is unambiguous, as it is here, the statute is presumed to be mandatory. *Morgan v. Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004) (applying presumption under Colorado law that "shall" is mandatory). Petitioner argues that this presumption is overcome on a showing that "the context indicates otherwise." Pet. Br. 29-30 (citing *DiMarco v. Department of Rev.*, 857 P.2d 1349, 1352 (Colo. App.

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mandatory. *Compare id.* 8a (officers "should" arrest), *with id.* 9a ("officers are required to assist ... the parties [and] ensure the safety of children"). Excerpts of various police policies, including the IACP Policy, are included in the appendices to this brief ("App."). Due to the number of the cited policies, amici have included only five in the appendix; most, however, are available in their entirety via the internet; the remainder are in the possession of counsel.

1993)). But in this context, Petitioner has made no such showing, nor can it. *See* Hearing on H.B. 1253 Before the House Judiciary Comm. ("Hearings"), 1994 Leg. Colo. 1994) (statement of Rep. Kerns, sponsor) ("The police must make probable cause arrests."); *cf.* Br. of *Amici Curiae* Nat'l Coalition Against Domestic Violence ("NCADV") at IV (domestic violence mandatory arrest statutes are intended to mandate arrest and terminate discretion).

Third, the legislative history of the statute confirms that the enforcement provisions are mandatory. *See Public Citizen v. United States*, 491 U.S. 440, 454-55 (1989) (referring to legislative history); *Grant v. People*, 48 P.3d 543, 546-47 (Colo. 2002). The Colorado legislature adopted the mandatory enforcement statute specifically to protect women and children (such as Respondent) against abusive spouses and to remedy the police's long history of refusing to intervene on behalf of victims of domestic violence. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders."). In 1994, when the mandatory enforcement provisions were enacted, it was understood that domestic violence was "the single largest cause of injury to women in the United States, more common than auto accidents, muggings, and rapes combined." *See* Fuller & Stansberry, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 Colo. Law. 2327 (Oct. 1994); Colo. Rev. Stat. § 18-6-801.5 (finding that "domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness"). Colorado's criminal justice system was seen by the statutes' primary sponsors in the legislature as inconsistent and flawed. *See* Hearings, *supra* (statement of Rep. DeGette, sponsor) (Colorado's "domestic violence laws are lagging behind"); *id.* (statement of Rep. Kerns, sponsor) ("[T]he entire criminal justice system must act in a consistent

manner, which does not now occur."). The legislature "wanted to put together a bill that would really attack the domestic violence problems ... and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe." *Id.* The legislature's solution, among other things, was to *mandate* enforcement of protection orders, thereby purposefully and intentionally empowering protected parties with the expectation of safety and statutorily reversing the history of police indifference. *See id.* ("The police must make probable cause arrests. The prosecutors must prosecute every case."); Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?*, 1996 U. Ill. L. Rev. 533, 541-542 (1996) (noting statutes only *permitting* arrest had little effect, leading to mandatory statutes); IACP National Law Enforcement Pol'y Ctr., *Domestic Violence Concepts and Issues Paper* (Rev. 1996) ("IACP Concept Paper") (App. C 23a) (discussing differences between mandatory and preferred arrest statutes).

In short, if the Colorado domestic violence statute, with its plain meaning and clear legislative purpose, does not mandate enforcement, it is difficult to imagine how a state legislature could ever do so.

B. The Protection Order Personally Defined Respondent's Enforcement Right.

Respondent had a property right in enforcement because the Colorado protection order personally defined for her an otherwise general right of police enforcement. *See Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) ("[W]hen a protective order exists, as in this case, there is a governmental duty to protect the individual."); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264-65 (E.D. Pa. 1990) (finding that ordinarily "the duty to protect is owed by

a municipality to the citizenry as a whole, rather to any individual," but "the orders of court create a property interest in police enforcement that is cognizable under *Roth*"). "The case for due process protection grows stronger as the identity of the persons affected by a governmental choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview." Tribe, *American Constitutional Law* § 10-7, 503-04 (1978).

In arguing that the order is not binding on police, Petitioner and the United States misapprehend its import, which was to take the ephemeral rights described in the statute and to make them concretely Respondent's. *See Siddle*, 761 F. Supp. at 509 (explaining effect of order); *Coffman*, 739 F. Supp. at 264-65 (same).

Petitioner and the United States wrongly assume that the order had only the effect of an injunction. The police are required to enforce the order, not because the protection order enjoined them, but because the *statute* required its enforcement. The statutory summary on the order's backside was not an injunction; it simply provided supplementary notice to Respondent and to police that the statute must be heeded. Respondent was entitled to rely on the order, the essence of which was enforcement. *See Roth,* 408 U.S. at 577 ("[I]t 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."). Indeed, both the police and the courts regularly instruct victims of domestic violence that protection orders will entitle them to increased police protection, and victims typically rely on this expectation. *See* Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 161 (NEU Press 1999).

The Respondent's protection order evinced a judicial determination that she was within the class of persons entitled to receive the statutory benefit of enforcement. Once that individualized determination was made, it could not be withdrawn without adequate procedures. Thus, the cases cited by Petitioner and the United States are distinguishable. In neither *Doe by Fein v.. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996), *Doe by Nelson v. Milwaukee Cnty*, 903 F.2d 499 (7th Cir. 1990), nor *Jones v. Union Cnty*, 296 F.3d 417 (6th Cir. 2002) was the court asked to determine whether a plaintiff had a property right in a protection order. Rather, the courts held only that their plaintiffs did not have a right "in the rare air" to government services, including protection under a general statute.[5]

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[5] In *Doe by Nelson*, for example, the court determined that a minor plaintiff could not base a procedural due process claim on the state's failure to investigate a child abuse complaint within 24 hours of its filing, as state law required. 903 F.2d at 502. Unlike in this case, where Respondent "securely and durably" holds the protective order and clearly benefits from its enforcement, the *Doe by Nelson* court reasoned that there was no clear beneficiary for the investigation. *Id.* at 504 ("it is impossible to say that the right to an investigation of a report of child abuse 'securely and durably' belongs to anyone at all"). These cases also demonstrate that the enforcement requirement here directs a substantive benefit, and not a precatory procedural guideline as Petitioner and the United States suggest. Pet. Br. 30-32; U.S. Br. 21. The plaintiff in *Doe by Nelson* claimed an entitlement to investigatory procedures on a timetable that was intended only to guide the internal processes of government and on which she did not rely. The *Doe by Nelson* court rejected the claim, in part, because the contingent derivative benefits that may derive from an investigation were too indirect. *Doe by Nelson*, 903 F.2d at 504. Here, by contrast, enforcement of the protective order is not a procedure, but a substantive result that confers a direct benefit relied on by the protected party.

C. Respondent's Property Interest Is Not Defeated by the Police's Limited Discretion.

Petitioner (at 25-30) and the United States (at 15-22) argue that police retain significant discretion under the statute for three reasons: 1) police discretion cannot be eliminated even by statutory mandates; 2) the statute itself contemplates substantial police discretion; and 3) a probable cause determination requires some discretion. These arguments vastly overstate whatever discretion remains in this purposefully mandatory statute, and underestimate the amount of discretion needed to defeat an entitlement.

First, the idea that police always retain discretion derives largely from treatises discussing only traditional criminal statutes using "shall."[6] Whether or not there is any validity to this notion in that context,[7] it cannot possibly apply to domestic violence enforcement statutes such as Colorado's, which were enacted for the specific purpose of eliminating the police's infamous history of abusing their discretion by failing to enforce protection orders. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining

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[6] The Petitioner notes Kenneth Culp Davis's theories of police discretion, cited by Judge Hartz. PA 92a-93a. While Davis does not think that police discretion can be entirely eliminated, he argues that discretion "should be confined, structured, and checked" because "discretion that is checked is obviously less likely to be arbitrary than discretion that is unchecked." Davis, *Police Discretion* 144-45 (West 1975). Davis's book predates domestic violence mandatory enforcement statutes; thus, it does not respond to statutes, such as this one, that purposefully eliminate discretion that has been systematically abused.

[7] LaFave acknowledges: "[a]rrest statutes are commonly drafted in mandatory terms, and on the infrequent occasions when courts are called upon to speak to the question they typically assert that the police lack authority not to invoke the criminal process when the evidence is sufficient to arrest." LaFave & Israel, *Crim. Procedure* 625 (2d ed. 1992).

orders."); *cf. Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983) (describing purpose of Oregon mandatory enforcement statute as "to negate any discretion...in enforcing restraining orders issued under Oregon's Abuse Prevention Act"). If the legislative command is to mean anything, it is that the Colorado police no longer have discretion regarding whether to enforce protection orders.

Second, Petitioner conflates the Colorado statute's various *means* (which include arrest, warrant, etc.) with its singular *end* (which in accordance with the plain language and legislative intent, is unambiguously to enforce protection orders by "every reasonable means"). Petitioner argues that the phrase "every reasonable means" contemplates discretion and that the police must use discretion to decline arrests when violations are *de minimis*. *See* Pet. Br. 28 ("step back" order in response to restrained person stepping one yard inside restricted zone). In objectively *de minimis* situations, arrest may or may not be required. But that does not dilute the absolute requirement of "*enforcement*," and the word "every" which precedes it makes clear that "enforcement" is absolutely required. In short, whatever discretion the police possess with respect to the statute is constrained to selecting the means but not the end of enforcement.[8] This is directly

[8] Petitioner further argues that because two options -- an arrest and a warrant for arrest -- may be construed as "reasonable means to enforce," enforcement is not a "particular" enough result to create a property interest. Pet. Br. 29 (citing *Thompson*, *Olim*, and *Sandin*). This argument misconstrues the cases. The particularity rule Petitioner seeks to impose is not the "holding" in *Sandin* as Petitioner represents, but rather the "undesirable" *Hewitt* methodology (followed by *Thompson* and *Olim*) that *Sandin* expressly rejects. *See Sandin v. Connor*, 515 U.S. 472, 482, 483 n.5 (1995) (citing *Hewitt v. Helms*, 482 U.S. 755 (1987)). Moreover, even before it was abandoned, the *Hewitt* methodology was typically employed only in prison liberty cases, where it wrongly "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Id.* at 481.
(continued...)

analogous to cases involving property rights (e.g. public education), where discretion to choose precise means (curricula) are left to decisionmakers (individual teachers), but the entitlement (education) is required. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

Every court we are aware of that has examined the effect of a court order awarded pursuant to a mandatory enforcement statute has agreed that the combination creates a property interest, even if discretion remains to determine "reasonable means." *See Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476-77 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Siddle*, 761 F. Supp. at 509; *Coffman,* 739 F. Supp. at 257, 263-66; *Burella v. City of Philadelphia*, No. 00-884, 2003 U.S. Dist. LEXIS 25170 (E.D. Pa. Dec. 17, 2003).

Third, contrary to Petitioner's claim, the probable cause determination, while sometimes requiring the exercise of limited discretion, does not undermine the entitlement. This Court routinely finds protected interests arising out of state statutes and policies that allow much more discretion than whatever discretion is implicit in a probable cause determination. In *Loudermill*, for example, the Court noted that an Ohio statute "plainly" created a property interest in continued public employment, despite the fact that it allowed removal for subjective "incompetency, inefficiency, dishonesty, . . . immoral conduct, insubordination, discourteous treatment . . . or any other failure of good

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Faced with negative inference prisoner liability claims, some courts required particular results. *See id.* Non-prisoner property cases based on positive law do not suffer from the same problems, and need not meet the same test. In this case, the particular result is adequately defined. There can be only one result -- that the precise terms of the protection order are enforced. Whether that is accomplished by means of arrest; retrieving the children; a "step-back" instruction, Pet. Br. 28; or otherwise, is irrelevant.

behavior." 470 U.S. at 538-39 & n.4. The Court expressly acknowledged that the decisionmaker retained "discretion" under the statute, and that the issues raised by *Loudermill* were "subjective." *Id.* at 543-44 & n.9. *See also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978) (receipt of services from public utility terminable for "good and sufficient cause"); *Bishop*, 426 U.S. at 345 n.8 (finding that public employment was terminable "at will," rather than for cause); *Goss*, 419 U.S. at 573-574 (public education may be suspended for "misconduct"); *Nearing*, 670 P.2d at 142 at n.7 (finding no discretion in similar statute's probable cause requirement).

D. Respondent's Property Interest Is Not Contingent Upon The State's Provision of Private Remedies.

The United States argues that Colorado law cannot be read to provide a property right in enforcement because it does not also provide a private right of action "to enforce the statute against the police officials." U.S. Br. 17 (punctuation marks removed) (quoting *Thompson*, 490 U.S. at 454, 460 (1989). The argument misconstrues *Thompson* and confuses the state's right to define property with its obligation to provide constitutional procedure.

Thompson did not, as the United States suggests (at 17), condition property rights on an ability "to enforce the[] [statute] against the [police] officials," and we are aware of no case that has so held. *Thompson* was a liberty case in which prisoners claimed to have an interest in open visitation stemming from a prison policy memorandum. After concluding that the policies were not mandatory such that they created a legitimate expectation of open visitation (an analytic dismissed by *Sandin*), the Court summarized that no inmate "could reasonably expect to enforce them against the prison officials." *Thompson*, 490 U.S. at 465. The court did

not purport to condition the liberty interest on the availability of procedures to enforce, and lower courts referencing the language have not done so either. *Taylor v. Armontrout*, 894 F.2d 961, 965 (8th Cir. 1989) (finding an "inmate, ... could reasonably expect to enforce [policy] against the prison officials," but not analyzing whether state cause of action existed).[9]

Moreover, a rule requiring a private cause of action or other post-deprivation process as a condition for finding a protected interest cannot be squared with this Court's jurisprudence which clearly indicates otherwise. *See e.g., Loudermill*, 470 U.S. at 541; *Vitek*, 445 U.S. at 491; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). In *Loudermill*, this Court clarified that "[t]he categories of substance and procedure are distinct.... 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." 470 U.S. at 541. Once the determination is made that state law creates a property interest, "the question remains what process is due," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but [t]he answer to that question is not to be found in the [state]

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[9] Because this Court has not conditioned the existence of protected interests on claimants' ability to enforce statutes against state decisionmakers, the Court need not reach the United States' standing or justiciability arguments. Nonetheless, both arguments fail. On the standing point, the United States cites *Gonzaga* to argue that there must be "rights-creating" language to support a claim, but in that case plaintiff sought to use § 1983 to enforce a federal statute, not to remedy a federal constitutional violation. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). The justiciability argument focuses on courts' disinclination to review *prosecutorial* discretion, not police discretion. *See LaFave & Israel, supra,* at 625 ("in the eyes of the law, discretion by the prosecutor is considered proper while discretion by the police is with rare exception viewed with disfavor"). This Court has not hesitated to review police conduct. *See e.g., County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (reviewing police discretion).

statute." *Loudermill*, 470 U.S. at 541. Petitioner's argument would negate due process entirely -- the right exists to ensure sufficient due process when the state fails to provide it.

III. RESPONDENT WAS DENIED CONSTITUTIONAL DUE PROCESS, EVEN THOUGH IT COULD EASILY HAVE BEEN PROVIDED.

A. Respondent's Pleas For Enforcement Were Arbitrarily Ignored Without Meaningful Process.

The essence of Respondent's complaint is that Petitioner arbitrarily ignored Respondent without employing *any valid process at all*. *See* PA 126a-127a. Petitioner did not truly engage in an "informal consultation" with Respondent (who was "the principal or only witness available to police at the time"), nor did Petitioner make "an initial enforcement decision" after meaningfully considering her request. U.S. Br. 29. Instead, while going through the motions of responding, Petitioner merely "repeatedly ignored and refused her requests for enforcement." PA 31a. Despite Respondent's five calls in five hours and midnight visit to the police station, Petitioner merely turned her away, telling Respondent that "there was nothing they could do"[10] and to "call back later." Indeed, the Complaint alleges that the Petitioner's police department maintains an "official policy or custom that recklessly disregards" its duty to enforce protection orders. PA 129a.

While it is true that Petitioner repeatedly took Respondent's calls, PA 126a-127a, and that Petitioner

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[10] Ptacek, *supra*, at 162 (police often tell women that they "can't do anything" to enforce protection orders or that police action is "waste of time," especially if the abuser is not present); Schecter, *Women & Male Violence* (1982) (police used to tell battered women "[t]here's nothing we can do. It's a family matter").