UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1053

JESSICA GONZALEZ, individually and as next best friend of her deceased minor children REBECCA GONZALEZ, KATHRYN GONZALEZ, and LESLIE GONZALEZ,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK, and AARON AHLFINGER, R. S. BRINK, and MARC RUISI, Officers of the City of Castle Rock Police Department,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO,
THE HONORABLE WILEY Y. DANIEL – DISTRICT COURT JUDGE
D.C. NO. 00-D-1285

BRIEF RE: REHEARING EN BANC SUBMITTED BY AMICI CURIAE THE COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND THE COLORADO ASSOCIATION OF CHIEFS OF POLICE

AMICI CURIAE BRIEF SUBMITTED IN SUPPORT OF DEFENDANTS – APPELLEES THE TOWN OF CASTLE ROCK, AARON AHLFINGER, R. S. BRINK, and MARC RUISI

AMICI CURIAE REQUESTS THE COURT EN BANC REVERSE THE PANEL'S OPINION OF OCTOBER 15, 2002

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STATEMENT OF THE IDENTITY OF AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The Colorado Municipal League (the League) is a nonprofit, nonpartisan organization that represents the collective interests of Colorado's cities and towns. Currently, 265 of Colorado's 270 communities are members of the League, representing more than 99 percent of the municipal population of the State of Colorado. One of the purposes of the League is to represent its municipal members before the state and federal appellate courts in cases of statewide municipal concern.

Colorado Counties, Inc. is a nonprofit, nonpartisan organization that represents the collective interests of Colorado's counties. Currently, 61 of Colorado's 64 counties are members of CCI. One of the purposes of the CCI is to represent its County members before the state and federal appellate courts on cases of statewide county concern.

The Colorado Association of Chiefs of Police (CACP) is a nonprofit organization comprised of chiefs of police of Colorado municipalities. CACP has, as one of its purposes, representing the chiefs of police in matters of statewide concern to municipal law enforcement agencies, including representing its members before the state and federal appellate courts in Colorado.

The October 15, 2002 Panel Opinion of this Court is of great interest and concern to Amici Curiae because it may impose dramatic negative consequences for Colorado municipalities, counties, and law enforcement agencies. The Panel held that the language within § 18-6-803.5(3)(a), C.R.S. (Vol. 6, 2002) created a mandatory obligation to enforce a restraining order and constituted a constitutionally recognized property right entitled to due process protection under the Fourteenth Amendment to the U.S. Constitution. Given the limitations on their resources and the judgment calls that must be made on a moment-by-moment basis as to enforcement priorities, law enforcement agencies cannot, and should not be expected to, enforce every provision of every restraining order at all times. The Panel Opinion may expose Colorado municipalities, counties, and law enforcement agencies to liability for damages under 42 U.S.C. § 1983 and to attorney fees under 42 U.S.C. § 1988. The Panel's radical departure from the existing body of law in this area can be expected to cost taxpayer dollars with a resultant decline in services to citizens.

The authority of Amici Curiae to file this Brief is found within Fed. R. App. P. Rule 29, which allows Amici Curiae to seek leave to file this Brief upon motion. Submitted contemporaneously with this Brief of Amici Curiae is their Motion for Leave to File Brief of Amici Curiae.

ISSUES

On February 6, 2003, the Court entered an Order granting Defendants-Appellees' Petition for Rehearing En Banc, specifically requesting that the parties brief the following issues: (1) Whether C.R.S. § 18-6-803.5(3) in combination with the restraining order issued by the Colorado court created a property interest entitled to due process protection; and (2) if so, what process was due. This Brief is submitted in support of Defendants-Appellees' Petition for Rehearing en banc, and Amici Curiae respectfully request that this Court affirm the decision of the trial court and reverse the Panel's decision that § 18-6-803.5(3), C.R.S. creates a constitutionally protected property interest in the enforcement of a restraining order to which procedural due process applies.

ARGUMENT

In her Complaint, Plaintiff Jessica Gonzales brought two claims for relief, both asserting that the Defendants' conduct violated the Fourteenth Amendment's right to due process and claiming damages under 42 U.S.C. § 1983. In bringing such claims, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights secured by the Constitution or federal law. *Parratt*

v. Taylor, 451 U.S. 527, 535 (1981). Here, it is not disputed that the Defendants were acting under color of state law; the issue is whether the Plaintiff was deprived of property without due process of law.

The analysis of a due process claim considers (1) whether a property right has been identified; (2) whether governmental action with respect to the property right amounts to a deprivation; and (3) whether the deprivation, if one is found, was visited upon the plaintiff without due process of law. *Fusco v. Connecticut*, 815 F.2d 201, 205 (2nd Cir. 1987).

A. SECTION 18-6-803.5(3), C.R.S., COMBINED WITH THE RESTRAINING ORDER, DID NOT CREATE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST.

The relevant provisions of the statute, § 18-6-803.5, are as follows:

> (3)(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.
>
> (b) A peace officer shall arrest, or if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a 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.

This statute, even when combined with the restraining order issued by the state court, does not create a constitutionally protected property interest.

Constitutionally protected property interests may include not only tangible physical property, but a "legitimate claim of entitlement," to certain circumscribed benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Property interests are not determined by the Constitution; rather, they are determined by reference to state law. *Id.* If a state has legislatively created a certain entitlement, and a person can demonstrate a legitimate claim to that entitlement, only then does the Fourteenth Amendment protect that person from a deprivation of that entitlement absent due process of law. *Id.*

However, there is no property interest in mere procedures.

> The point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life for liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."

Cleveland Board of Education v. Laudermill, 470 U.S. 532, 541 (1985) (citing *Arnett v. Kennedy*, 416 U.S. 134,167 (1974) (Powell, J. concurring in part and concurring in result in part)).

Absent an underlying substantive property interest, the denial of a **procedural** right is not a denial of procedural **due process**. *See Loudermill, supra* at 541; *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (process is not an end in itself. Its purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement); *Clark v. Township of Falls,* 890 F.2d 611, 620, n. 4 (3rd Cir. 1989) *citing Olim, supra,* at 250-51 (a property interest is no more created by the mere fact that a state has established a procedural structure than is a liberty interest); *Fleury v. Clayton,* 847 F.2d 1229, 1231 (7th Cir. 1988) (there is neither a liberty nor a property interest in procedures themselves); *District Council v. City of Philadelphia,* 944 F.Supp. 392, 395 (E.D. Penn. 1995) (the court found no case in which a property interest has been held to exist in a procedure); and *Brandywine Affiliate, NCCEA/DSEA v. Board of Education,* 555 F.Supp. 852, 862 (D. Del. 1983), ("The claim that a state procedural statute can create a liberty or property interest cannot withstand analysis.") In *Brandywine*, the court reasoned that: "To find that a procedure is a constitutionally protected interest would be to find that a state cannot deprive an individual of due process of law without due process of law." *Id.*

In this case, "restraining order" is defined in the subject state statute, § 18-6-803.5(1.5)(d), to mean "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 … that is issued by a court of this state …." Section 18-6-803.5(3), C.R.S. provides for a procedure by which an individual protected by a restraining order can seek law enforcement assistance in its enforcement. This **procedure** is distinct from the substantive right, which is the right to be free from abuse, injury, and harassment embodied in the temporary restraining order itself.

The restraining order issued in favor of Jessica Gonzalez was to protect Ms. Gonzalez and her children against injury, harassment, and threats from her husband. It is that order which cannot be rescinded or modified without due process of law (i.e. notice and an opportunity for hearing). The procedure provided by the state statute - contacting law enforcement officials and requesting that they make a determination of probable cause for an arrest or that they seek a warrant for the arrest of the restrained person - is merely an enforcement mechanism. *See* cases cited by Appellees: *S. Doe v. Milwaukee County*, 903 F.2d 499, 503 (7th Cir. 1990) (Where a state statute required a county department of social services to investigate allegations of child abuse, the procedures did not amount to a "benefit of government protection" within the meaning of the Fourteenth Amendment); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1211 (N.D. Ohio 1994) (Where prior to her

murder a woman had complained to the local police department of domestic violence inflicted by her ex-husband, yet no arrest occurred, the court held that the existence of a statutory duty to investigate the domestic violence claim did not create a constitutionally protected property interest in favor of the persons who would benefit from that statutory duty); and *Semple v. The City of Moundsville*, 963 F. Supp. 1416, 1429-30 (N.D. Va. 1997), *aff'd* 195 F. 3d 708 (4th Cir. 1999) (Where prior to her murder, a woman had called police complaining of abuse and violations of restraining orders by her boyfriend, the court held that the state statutes requiring a law enforcement officer to inform the parties of possible remedies and to immediately arrest an individual who violate the restraining order did not create a procedural due process right).

Because the decision to arrest is discretionary, no constitutionally protected property interest exists. No entitlement to a benefit can exist if the state actor has discretion in determining probable cause to arrest or seek an arrest warrant. See *Olim v. Wakinekona, supra,* 461 U.S. at 249-50; *Doyle v. Oklahoma Bar Association*, 998 F.2d 1559, 1569-70 (10th Cir. 1993) (An abstract desire or unilateral hope does not establish a protected interest. A state creates a protected interest not only by establishing substantive predicates to govern official

decisionmaking but by mandating the outcome to be reached upon a finding that the relevant criteria have been met.)

B. THE PANEL'S DECISION ADVERSELY IMPACTS MUNICIPALITIES AND COUNTIES WITHIN THE STATE OF COLORADO.

The Panel's decision to find a constitutionally protected property interest in enforcement of § 18-6-803.5(3). C.R.S. subjects municipalities and counties throughout Colorado to significant potential liability for procedural irregularities, inadvertent errors, and judgment calls that may occur when confronted with complaints of restraining order violations. The threat of such litigation will have a chilling effect on the ability of local government and law enforcement to fulfill their duties.

Local governments engage in a wide variety of tasks related to the regulation and administration of their communities. They are empowered by the Colorado Constitution, state statutes, and municipal charters and ordinances to act in a variety of areas, including enforcement of state criminal statutes. Many such statutes contain words such as "shall" and "must." *See* Colorado statutes cited by Defendants-Appellees in their Brief Re: Rehearing En Banc: §§ 32-1-1002(3)(b),

16-13-905, 19-3-316, 19-3-307, 19-3-304, C.R.S. Other statutes also contain mandatory language. [1]

The word "shall" appears throughout the statute at issue: "The arrested person *shall* be removed from the scene of the arrest and *shall* be taken to the peace officer's station for booking ... The prosecuting attorney *shall* present any available arrest affidavits ...." § 18-6-803.5(3)(d), C.R.S. "The arresting agency arresting the restrained person *shall* forward to the issuing court ...The agency *shall* give a copy of the agency's report ... to the protected party." § 18-6-803.5(3)(e), C.R.S. "If a restrained person is on bond ... and is subsequently

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[1] *See e.g.* § 18-1-901(IV.5)(D), C.R.S. (Vol. 6, 2002) ("When performing surveillance duties, the assignment of the peace officer, level IIIa, *shall* be confined to such surveillance duties...."); § 18-6-803.7(2)(b), C.R.S. (Vol. 6, 2002) ("Restraining orders and subsequent orders *shall* be entered into the registry by the clerk of the court ...."; § 16-11-102(4), C.R.S. (Vol. 6, 2002) ("a victim impact statement *shall* be made in every case."); § 18-7-201.5(2), C.R.S. (Vol. 6, 2002) (the test *shall* be reported to the person tested and the district attorney who *shall* keep the results of the test confidential); § 19-1-304(5.5), C.R.S. (Vol. 6, 2002) ("the prosecuting attorney ... *shall* make good faith reasonable efforts to notify the principal of the school in which the juvenile is enrolled and *shall* provide such principle with the rest of the records information ...[or] *shall* contact the superintendent of the juvenile's school district."); § 26-13-105(2), C.R.S. (Vol. 8, 2002) (regarding enforcement of child support: "any district attorney or county attorney as contractual agent for a county department *shall* collect a fee ...."); § 19-2-926(5)(a), C.R.S. (Vol. 6, 2002) ("When the juvenile probation officer learns the juvenile ... has changed his or her residence ... such officer *shall* immediately notify the court."); § 19-3-316(2)(a), C.R.S. (Vol. 6, 2002) ("The chief judge in each judicial district *shall* be responsible for making available ... a judge to issue by telephone emergency protection orders ....")

arrested for violating or attempting to violate a restraining order, the arresting agency *shall* notify the prosecuting attorney who *shall* file a motion with the court which issued the prior bond for the revocation of the bond and the issuance of a warrant ...." § 18-6-803.5(4), C.R.S. [emphasis added]. Under the rationale of the Panel's decision, each of these procedural acts, if not performed, could subject the local government or individual employee to civil damages under 42 U.S.C. § 1983 and attorney fees under § 1988.

Until the Panel's decision, no procedural process established by such statutes has been elevated to a right protected by the U.S. Constitution. However, the effect of the Panel's decision is that every such statutory mandate carries with it the risk of constitutional liability.

The implications of the Panel's decision are significant for local law enforcement officials. State and local statutes contain many examples of procedural obligations on law enforcement to respond to complaints of criminal conduct. But the problem extends beyond criminal statutes; the word "shall" is found in numerous places, describing both criminal and civil responsibilities of local governments. As a result of the Panel's decision, any irregularities in following these procedures create the threat of civil rights damages claims and awards of attorney fees. If every "shall" in a statute is a source of potential

liability, municipalities and counties will be severely constrained in their ability to carry out these duties.

The ruling by the Panel may also subject municipalities and counties to such civil rights claims every time a law enforcement officer exercises discretion, or makes an inadvertent error, in deciding whether a restraining order has been violated. As a result, municipalities and counties could now be burdened with the threat of constitutional violations if a complaining party is dissatisfied with the effort expended or the decision made by the police officer, or even for mistakes in such decisions. Inevitably, complaints of an inadequate response by law enforcement officials will occur, and inadvertent mistakes will occur.

For myriad reasons, local law enforcement may not be able to make an arrest or seek an arrest warrant where a restraining order has been violated. First, a police officer may determine no probable cause exists. Second, the opportunity to obtain an arrest warrant may be curtailed due to the lack of availability of law enforcement officials or judicial officials, or police officers may have more urgent law enforcement priorities. Third, there may be a lack of cooperation by the complaining party or witnesses. Fourth, local governments are already struggling to make up budgetary shortfalls and may not have enough police personnel. Local law enforcement officials are already struggling to provide sufficient police

protection because of the military commitment of many officers and the obligation to protect their communities from security threats.

If every complaint of a restraining order violation requires an arrest or issuance of a warrant, the expense to local communities may well be significant. Local communities will need substantially increased law enforcement budgets to add more police officers to accommodate restraining order complaints. Alternatively, if they are unable to meet the demands of complaining parties and because of concern for their exposure to such liability, municipalities and counties may very well refuse to take any complaints of restraining order violations. The Panel decision may result in a curtailment of activity in responding to complaints of restraining order violations. Local governments are likely to reduce opportunities for citizens to bring such complaints, rather than expose themselves to the potential for civil rights damages claims, and attorney fees, due to second-guessing of decisions or inadvertent errors.

Furthermore, if a police officer makes an arrest in response to a complaint on a restraining order that later turns out to be incorrect, the officer and his or her employer are already subject to suit for wrongful arrest, and a concomitant constitutional claim. With the Panel's decision, the officer is now in a "catch-22", whether to face a claim of wrongful arrest or a constitutional due process claim.

The above examples highlight the practical implications of the Panel's decision. The decision of the Panel exposes municipalities and counties and their law enforcement officials to civil rights liability for discretionary decisions and inadvertent errors of public officials in failing to enforce § 18-6-803.5, C.R.S. Further, the decision is inconsistent with the deference properly shown to the on-the-scene discretion of officers. For all of these reasons, the Panel's decision must be reversed.

CONCLUSION

Law enforcement officials of Colorado's cities, towns, and counties have responsibility for enforcement of state statutes and local ordinances, including the enforcement of criminal laws, zoning codes, liquor codes, and traffic codes. In this case, the ruling by the Panel significantly and negatively impacts the most basic operations of the law enforcement community in Colorado's municipalities and counties.

Based upon the authority and arguments set forth above, Amici Curiae respectfully request that this Court affirm the decision of the trial court and reverse the Panel's conclusion that § 18-6-803.5(3). C.R.S. creates a constitutionally protected property interest in the enforcement of the restraining order to which constitutional procedural due process applies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 31st day of March 2003 a true and complete copy of the foregoing BRIEF RE: REHEARING EN BANC SUBMITTED BY AMICI CURIAE THE COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND THE COLORADO ASSOCIATION OF CHIEFS OF POLICE was placed in the U.S. mail, first-class postage prepaid, addressed to the following:

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