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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument on number 04-278, the Town of Castle Rock versus Jessica Gonzales. Mr. Eastman.

ORAL ARGUMENT OF JOHN C. EASTMAN

ON BEHALF OF PETITIONER

MR. EASTMAN: Mr. Chief Justice and may it please the Court:

What happened here is undeniably tragic. A father shot and killed his own daughters. He was under a restraining order, so the issue for this Court is whether the order restraining Mr. Gonzales also gave to Mrs. Gonzales and her children a property interest put against the police giving Mrs. Gonzales an entitlement to the arrest of her estranged husband.

More precisely, the issue is whether the State of Colorado intended to create such a property interest.

JUSTICE O'CONNOR: Tell us how we know exactly how much discretion the State of Colorado wanted to give to the police.

MR. EASTMAN: Well, Justice O'Connor --

JUSTICE O'CONNOR: Without a statute that uses the word shall enforce. Do we know how Colorado

1 has interpreted that?

2 MR. EASTMAN: Well, they have in other
3 cases, as we note in our brief, that the word shall
4 is not always mandatory, particularly here, I think,
5 Justice O'Connor, when we have such a backdrop of law
6 enforcement discretion.

7 JUSTICE O'CONNOR: Well, are there
8 Colorado cases that tell us how we should read those
9 statutes?

10 MR. EASTMAN: Not in particular on this
11 statute. They only -- the Colorado case law on the
12 word shall says that you have to read it in context
13 of the entire statute. And here the word shall is
14 used several different places pointing several
15 different directions in the statute.

16 JUSTICE SCALIA: So do you concede that if
17 shall means shall, that it creates a property
18 interest?

19 MR. EASTMAN: No, Justice Scalia, I do
20 not. There is a long way between giving direction,
21 even mandatory direction, to law enforcement and
22 creating a property interest. I think that was the
23 essence of this Court's holding in Sandin. And it's
24 that distinction that even if you read shall in these
25 statutes as requiring a particular outcome, and we

1 don't --

2 JUSTICE STEVENS: Mr. Eastman, would you
3 comment on the extent of deference that we should
4 give to the court of appeals' interpretation of
5 Colorado while in view of what we said in Bishop
6 against Wood?

7 MR. EASTMAN: Yes, I don't think here,
8 because it's not just an application of Colorado law
9 here. We have identical statutes in 19 or 20
10 different states around the country. And what you
11 do --

12 JUSTICE STEVENS: But the Colorado statute
13 is the one that's controlling in this case and
14 normally, at least according to Bishop against Wood,
15 we defer to the interpretation of the court of
16 appeals as the issue of state law.

17 MR. EASTMAN: Well, what you're asking is
18 that the court of appeals that created -- that read
19 this statute shall, without any Colorado court
20 interpretation, and did so without any greater
21 indication from the Colorado legislature, that it
22 intended more than just to give direction to police.
23 It intended to create a property interest.

24 I understand the question from Bishop
25 versus Wood, but I don't think we can defer to the

1 Tenth Circuit here in creating something that
2 Colorado did not intend to create.

3 JUSTICE STEVENS: Of course, that's the
4 issue, whether Colorado intended to create it.

5 MR. EASTMAN: But I think there is a big
6 difference. I mean --

7 JUSTICE STEVENS: The reading in Bishop
8 against Wood was really counterintuitive also, as the
9 dissenters pointed out, as you would agree, I think.

10 MR. EASTMAN: Yes, and I think when you're
11 looking at a statute such as this, that is invoking
12 the federal court's -- I mean, what we're using is a
13 state law to invoke federal protections. And I think
14 it's that deference to the State that I think is more
15 critical. And I don't think you can allow the
16 federal courts to make that decision when Colorado
17 itself has not been -- has been as ambiguous as it
18 is. I think we need a clearer statement.

19 JUSTICE GINSBURG: Did you suggest to the
20 federal court that it certify the question of the
21 meaning of Colorado law to this Colorado Supreme
22 Court?

23 MR. EASTMAN: No, we did not, because I
24 don't think the statute gets us over the hurdle to
25 make that even necessary. There is nothing in this

1 statute that is intended -- that uses the language of
2 property interest or entitlement. I think if this
3 Court would look to its decision in Gonzaga, for
4 example, in analogous context --

5 JUSTICE SCALIA: Wait, wait. I thought we
6 were just talking here about state law as to whether
7 shall means shall. Do you think that it's a matter
8 of state law whether, if it does mean shall, it
9 creates a property interest for purposes of the
10 Federal Constitution?

11 MR. EASTMAN: No, Justice Scalia, I don't.

12 JUSTICE SCALIA: You don't concede that
13 that's a state question at all?

14 MR. EASTMAN: No. And what we're talking
15 about --

16 JUSTICE STEVENS: Well, isn't that what we
17 squarely held in Bishop?

18 MR. EASTMAN: Well, what we have to look
19 at is whether, first, the State, under Roth, intended
20 to create a property interest rather than just giving
21 mandatory direction to its officers. And I think the
22 critical question there is what the default rule
23 ought to be on a statute that is not clear on that
24 question.

25 And I think Roth tells us that for

1 purposes of federal constitutional law, the default
2 cannot be that we assume the State created a property
3 interest, at least in this kind of nontraditional
4 property interest. And I think it's important to
5 focus on what kind of property interest we're talking
6 about.

7 JUSTICE BREYER: Suppose shall does mean
8 shall. Fine. But you might have a statute that says
9 the fire department shall respond to fires, the
10 police department shall respond to crimes, the Army
11 shall respond to attacks.

12 Even the word shall doesn't necessarily
13 mean that this is the kind of interest that, like
14 property, the Duke of Rutland relied upon Blackacre,
15 that welfare recipients rely upon continuing to
16 receive money.

17 What is it about this that makes it like
18 property, even if shall does mean shall?

19 MR. EASTMAN: Justice Breyer, I agree, and
20 the difference between even mandatory language
21 directing law enforcement to behave in a certain way
22 is a far cry from actually creating a property
23 interest in Mrs. Gonzales herself.

24 This Court in Sandin held that in the
25 prison context, and I think the analogy in this

1 Court's implied right of action cases such as Gonzaga
2 is a good one.

3 In order to take a statute and try and
4 find a property interest, we would want to have it
5 phrased in terms of the beneficiary rather than the
6 person restrained. We would want to see an
7 actionable entitlement created. None of that is
8 here. And I think that --

9 JUSTICE GINSBURG: But if you compare it
10 to -- this is a court order and it's enforceable.
11 There is no question about that, is there? This is a
12 court order that enforcement officials carry out.
13 How does it differ from, say, a money judgment and
14 executing -- levying execution on property? Judgment
15 creditor says, here is my judgment, marshal, sheriff,
16 go out and find some of the defendant's property.

17 MR. EASTMAN: Well, Justice Ginsburg, you
18 know, the analogy we cite in our reply brief and the
19 U.S. Marshal Statute, 42 U.S.C. 1990 that says that
20 there is a right in the beneficiary to have a warrant
21 issued. And if the marshal refuses to do that, that
22 he can be challenged and held to a thousand dollar
23 fine for the benefit of the person whose arrest
24 warrant he was supposed to serve.

25 Now, even that doesn't quite go far enough

1 because there is not a private right of action by the
2 beneficiary about a warrant to bring the suit
3 directly. But at least that kind of statute is
4 getting closer to acknowledging a property interest.

5 This is enforceable against Mr. Gonzales,
6 and Ms. Gonzales could go back in and get a contempt
7 proceeding. I know here, after the fact, that's not
8 going to do any good. But the restraining order is
9 issued against Mr. Gonzales. It's not issued to the
10 police. And all we have then is how its violation by
11 Mr. Gonzales will be enforced.

12 JUSTICE GINSBURG: But isn't that true of
13 all injunctive orders, they're not issued to the
14 police. And yet the police -- don't the police have
15 an obligation to enforce that?

16 MR. EASTMAN: To my knowledge, we've never
17 held that the police have an actionable obligation to
18 enforce them. But the State --

19 JUSTICE SOUTER: But wouldn't you concede
20 that in the case of the injunction in which there is
21 a specific order in relation to a specific
22 respondent, that the police have much less discretion
23 than they would have when there is in effect a
24 general statute saying, respond in these kinds of
25 situations?

1 MR. EASTMAN: Justice Souter, they still
2 have a great deal of discretion here. The statute
3 says reasonable means of enforcement.

4 JUSTICE SOUTER: In the case of the
5 statute that we're talking with, but they don't have
6 that kind of discretion, do they, in Justice
7 Ginsburg's example? What I'm getting at is, if
8 you're going to take the example that Justice
9 Ginsburg has given you as equivalent to the example
10 that we have before us, I think you're fighting
11 uphill and I don't think you have to do that.

12 MR. EASTMAN: Well, let me take your
13 invitation, then, and respond back. I mean, if the
14 terms of the restraining order cut out all discretion
15 whatsoever and that they specifically are written in
16 terms that the property interest creates an entitlement
17 in the beneficiary of the restraining order, as
18 against not just the person restrained or the person
19 whose property is going to be attached, but an
20 entitlement to enforcement by the police itself, then
21 I think we would be on the step toward creating a
22 property interest.

23 The Colorado statute here does none of
24 those things. It continues to give the police a
25 great deal of discretion. Reasonable means --

1 JUSTICE GINSBURG: But is discretion --
2 does discretion on the means to use include
3 discretion to do nothing?

4 MR. EASTMAN: Well, it includes a finding
5 of probable cause. It includes a -- seek an arrest
6 or make an arrest or seek a warrant arrest when the
7 arrest is impractical. If the arrest is impractical,
8 such as when --

9 JUSTICE GINSBURG: But were any of those
10 determinations made here?

11 MR. EASTMAN: Well, we don't know. We
12 don't know because this case comes up here on a
13 motion to dismiss. All we have are the allegations.
14 The allegations are that they didn't enforce the
15 restraining order, all right? But we don't know
16 whether it's because they made a determination of no
17 probable cause, whether there was probable cause but
18 because he wasn't in the jurisdiction --

19 JUSTICE GINSBURG: So are you requesting
20 that there are insufficient fact findings here, so it
21 should be returned --

22 MR. EASTMAN: No, Justice Ginsburg,
23 because what we're saying is that there is not a
24 property interest at all and it doesn't matter, even
25 if these allegations are true, there is no underlying

1 property interest that would invoke the procedural
2 protections of the Fourteenth Amendment.

3 JUSTICE BREYER: Mr. Eastman, can I ask
4 you this question? Supposing this case came to us
5 through the Colorado State system instead of through
6 the federal system, and the Colorado Supreme Court
7 had written precisely the same opinion that the Tenth
8 Circuit ruled. Would we have jurisdiction to
9 overturn their holding that there was a property
10 interest here?

11 MR. EASTMAN: Justice Stevens, you're
12 asking whether, for purposes of federal
13 constitutional law, the state court decision that
14 Colorado had created a property interest is
15 dispositive. And I'm not sure it is, but --

16 JUSTICE STEVENS: Then your answer is no,
17 we would not have jurisdiction in that event.

18 MR. EASTMAN: Well, no, I was saying that
19 yes, you would, because what we're talking about is
20 looking to the state legislature on whether they've
21 created a property interest for purposes of federal
22 law.

23 JUSTICE STEVENS: We could say that they
24 had misconstrued Colorado law? I don't think you
25 really mean that.

1 MR. EASTMAN: Okay.

2 JUSTICE STEVENS: But I think you might --

3 JUSTICE SCALIA: Perhaps what you mean is
4 that what is a property interest for purposes of
5 Colorado law, if Colorado chooses to nominate some
6 utterly zany thing of property interest, it doesn't
7 necessarily mean that it's a property interest for
8 purposes of the Federal Constitution.

9 MR. EASTMAN: Justice Scalia, I'm happy to
10 do that.

11 JUSTICE STEVENS: You can do that, but you
12 won't find any cases making that point.

13 MR. EASTMAN: No, you won't, but it makes
14 perfect sense --

15 JUSTICE SCALIA: I don't think you need a
16 case for that, do you?

17 MR. EASTMAN: No, but it makes perfect
18 sense.

19 JUSTICE STEVENS: But you have cases
20 saying the contrary. That's the problem.

21 MR. EASTMAN: What we want to find out is
22 whether the Colorado --

23 JUSTICE SCALIA: Do we have any cases
24 involving a zany property interest having been found
25 by a State? I don't think we have any.

1 MR. EASTMAN: We don't even have any cases
2 involving a property interest to enforcement against
3 somebody else. All we have are cases to the
4 contrary. Linda R.S., for example, this Court held
5 that there is no right to arrest or enforcement
6 against somebody else.

7 And so I think at least in the context of
8 these very non-zany property interest claims, that we
9 need to have a pretty clear statement, not even from
10 the Colorado courts, but from the legislature itself
11 that the legislature intended, as a matter of state
12 policy, to have a property interest created and all
13 of the consequences that would flow from that.

14 JUSTICE GINSBURG: May I stop you? You
15 cited that Linda R.S., whatever, I thought that was a
16 standing case saying it's not going to do you any
17 good to have him locked up in jail if what you want
18 to do is get money from him.

19 MR. EASTMAN: It was, but the case has
20 been relied on by several subsequent decisions
21 including in the Second Circuit in the Attica case,
22 inmates of Attica, for the proposition that there is
23 just simply no right to an enforcement against
24 somebody else, that there is no entitlement.

25 Now, I'm not saying that the Colorado

1 legislature never could create such an entitlement,
2 but given the backdrop of Linda R.S., and also given
3 the backdrop of traditional law enforcement
4 discretion, I think we need a much clearer statement
5 from the Colorado legislature itself, both that it's
6 written in terms of the beneficiary -- getting her an
7 entitlement against the police, rather than in terms
8 of what the person restrained is.

9 JUSTICE O'CONNOR: Mr. Eastman, assuming
10 for the moment there is no due -- procedural due
11 process right here, on the facts of this case, does
12 Colorado law provide any alternative remedy for
13 Mrs. Gonzales?

14 MR. EASTMAN: Yes, Justice O'Connor, it
15 does.

16 JUSTICE O'CONNOR: And what would that be?

17 MR. EASTMAN: There are several remedies.
18 In the first instance, any violation of a restraining
19 order, she can petition the court for a contempt
20 order, even against the police. If their conduct was
21 willful and wanton, they can be held --

22 JUSTICE O'CONNOR: So she could presumably
23 ask for some relief under that notion, against the
24 police and possibly the town?

25 MR. EASTMAN: Against the police and --

1 not the town. The town has absolute immunity but
2 against the police under the tort statute, the police
3 are not immune if their conduct is willful and
4 wanton.

5 And I think this Court in DeShaney
6 addressed that very question when it looked like if
7 the State wanted to create an interest here, that it
8 could do so by modifying the --

9 CHIEF JUSTICE REHNQUIST: You say the
10 tort statute means something like the Federal Tort
11 Claims Act. Does Colorado have something like that?

12 MR. EASTMAN: It does. And there is a
13 Colorado Governmental Immunity Act that gives
14 immunity to police except when their conduct is
15 willful and wanton. And so that tort remedy does
16 exist and if the Colorado legislature wanted to lower
17 the threshold on that and make it negligent omissions
18 or what have you, whatever the allegations are, they
19 could do so.

20 The fact that they haven't done so I think
21 is a pretty strong indication that they did not
22 intend to create a property interest here.

23 If there is a property interest -- let me
24 just say one minute about the procedures that were
25 given, and then I'll reserve the remainder of my

1 time. At most we would have here, if there is a
2 property interest, is the opportunity for
3 Mrs. Gonzales to tell the police that she believed
4 the restraining order was violated and that they
5 responded to her however they did.

6 She received whatever process might be due
7 assuming we have a property interest here. If there
8 are no more questions, I'll reserve the remainder of
9 my time.

10 CHIEF JUSTICE REHNQUIST: Very well,
11 Mr. Eastman. Mr. Elwood, we'll hear from you.

12 ORAL ARGUMENT OF JOHN P. ELWOOD

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING PETITIONER

15 MR. ELWOOD: Mr. Chief Justice and may it
16 please the Court:

17 For two reasons the holders of restraining
18 orders lack a property right to police enforcement of
19 those orders. First, Respondent's claim has to be
20 evaluated in light of the fundamental background
21 principles that private citizens lack a judicially
22 cognizable interest in arrest and in prosecution of
23 third parties. And that executive decisions not to
24 enforce criminal statutes are presumptively beyond
25 the scope of judicial review.

1 Nothing in the Colorado statute reflects
2 an intent to depart from those background
3 presumptions and to create an individual right to
4 enforcement. Unlike statutes where this Court has
5 recognized a protected property interest, the
6 provisions at issue here do not regulate the
7 Plaintiff or Respondent, but rather regulate a third
8 party. And the provisions do not mention the
9 restraining order holder, much less state that she
10 has an entitlement to review.

11 In addition, the provisions do not afford
12 the holder of restraining orders procedural
13 protections or judicial review of the sort that this
14 Court --

15 JUSTICE GINSBURG: What good is -- what
16 does the restraining order do, then, other than give
17 her a right to sue the person who is restrained for
18 contempt?

19 MR. ELWOOD: I think it does two main
20 things. First of all, it gives her rights against
21 her husband which are enforceable through contempt
22 and are enforceable by asking the police to enforce
23 them.

24 And second, which has the benefit -- it
25 has the effect basically of creating a new arrest

1 statute that lowers the threshold of what conduct is
2 criminal from something that would be a freestanding
3 crime to basically just violating one of the terms of
4 the order. And that is the interest that the
5 restraining order gives her.

6 JUSTICE GINSBURG: But only to ask the
7 police and the police are not obliged to respond.

8 MR. ELWOOD: That is correct. She has the
9 ability to ask the police to enforce the order, but
10 the police have discretion, under our reading of the
11 statute, not to enforce the --

12 JUSTICE STEVENS: Do the police have any
13 duty at all, in your view?

14 MR. ELWOOD: The police -- I don't believe
15 that the police have any sort of actionable duty. I
16 think that what the statute creates is basically it's
17 a direction from the legislature that this is what
18 they want them to do.

19 JUSTICE STEVENS: Could the police just
20 issue an order saying ignore all orders of this kind?

21 MR. ELWOOD: I think that if they were to
22 do that, I do not think that there would be sort of
23 any individual right to challenge that. I think that
24 they would be adopting a policy decision that would be
25 probably different than the one the Colorado

1 legislature has --

2 CHIEF JUSTICE REHNQUIST: That's the sort
3 of aggressive sort of thing that the Colorado courts
4 could conclusively decide.

5 MR. ELWOOD: That's something the Colorado
6 courts decide, and it's something that would be --
7 that could be addressed through the political process
8 as well.

9 JUSTICE KENNEDY: Are there any extreme
10 cases we could imagine where the police have a duty
11 to protect the citizen? The policeman sees four
12 people beating up on the victim, no race involved,
13 and he just enjoys watching the fight. Does he have
14 a duty under the Constitution to intervene?

15 MR. ELWOOD: I think any duty that there
16 would be would be a substantive duty. And this Court
17 indicated in DeShaney that it would require basically
18 state creation of the harm or state increasing the
19 vulnerability of the person. So for example --

20 JUSTICE KENNEDY: Did DeShaney stand for
21 the proposition there could never be an affirmative
22 duty to intervene, under what you're talking about
23 the Constitution here?

24 MR. ELWOOD: I think it would be, in a
25 case, for example, where a prisoner was handcuffed in

1 his cell with a cell mate who the authorities knew to
2 be basically interested in harming him. Because they
3 had affirmatively restrained him, I think that that
4 would be a case where the State had created the
5 danger or increased the vulnerability.

6 So I think there is something left to the
7 requirement of police protection substantively under
8 DeShaney.

9 JUSTICE KENNEDY: But there has to be some
10 State -- the State has to have created the risk
11 somehow?

12 MR. ELWOOD: Under DeShaney, the State has
13 to have created the risk or increased the
14 vulnerability of the person.

15 Now, in addition to the fact that the
16 Colorado statute does not speak to the Plaintiff, it
17 essentially speaks to the restrained party. And
18 under -- as Mr. Eastman mentioned, under Gonzaga and
19 this Court's 1983 cases, that when a statute speaks
20 in terms of the regulated party instead of the
21 protected party, there is no implication of an intent
22 to create a federal right.

23 And I think that that principle would
24 apply even more clearly in the context of the state
25 rights, because there there is a question of imposing

1 federal liability which shouldn't really be done in
2 the absence of an indication that the State really
3 meant to do that.

4 Another reason is -- not to assume that
5 there is a property right here, is that the State
6 statute does not create any sort of procedural
7 remedies or judicial remedies which this Court has in
8 the past taken as an indication that the State really
9 did mean to create a protected right.

10 JUSTICE SCALIA: What's your response to
11 the fact that the Tenth Circuit found otherwise and
12 that we usually defer?

13 MR. ELWOOD: I think our response would be
14 that it's not simply -- well, first of all, I don't
15 want to make too much of the fact that it's obviously
16 a very close question of state law because the Tenth
17 Circuit was divided by a single vote.

18 But even aside from that, you basically
19 have to adopt not simply a question of what the state
20 law says, but what the federal courts are going to do
21 with it. And we are of the opinion that given what a
22 tremendous departure it would be, what a procedural
23 innovation it would be to give complaining witnesses
24 essentially a right in the process, that in the
25 absence of a very clear statement, the federal court

1 should not imply a right or imply -- should not
2 infer, rather, that the state legislature intended to
3 create a right.

4 So essentially, what we're asking for is a
5 clear statement rule. And in the absence of a clear
6 statement, we should presume that the --

7 JUSTICE STEVENS: Do you agree that if
8 this case stands with the state system, we would have
9 to accept their holding on the property right issue?

10 MR. ELWOOD: Obviously, I think there
11 would be a much closer question at a minimum. There
12 may be something to the fact that we should -- this
13 is the sort of thing we would want a statement from
14 the Colorado legislature.

15 JUSTICE STEVENS: No, let's -- I'm
16 assuming the Supreme Court has said, this is what the
17 statute means and so forth and so on, wouldn't that
18 be binding on this?

19 MR. ELWOOD: I think it would be binding.
20 I mean, it would still be the federal question of
21 whether that applied federal law correctly. But
22 given that it's basically a question of what is a
23 state property right, yes.

24 JUSTICE STEVENS: Or whether the question
25 of property right -- the property right issue is not

1 a question of federal law, it is a question of state
2 law.

3 MR. ELWOOD: That is correct. That is
4 correct. There is something of a federal overlay to
5 sort of correct it at the margin --

6 JUSTICE BREYER: Yes. What did they hold
7 in the Tenth Circuit? I mean, shall could be
8 mandatory. You can have a mandatory duty, but that
9 doesn't mean that the victim has a legal right to
10 enforce that duty.

11 MR. ELWOOD: That's absolutely correct,
12 Justice Breyer.

13 JUSTICE BREYER: So what did they hold in
14 the Tenth Circuit in respect to that?

15 MR. ELWOOD: Basically they said that
16 because it is -- because the statute was mandatory,
17 they basically leapt from that to an inference that
18 because it was mandatory, it was a duty that she
19 could enforce. But there is no tradition in that --

20 JUSTICE BREYER: They should reask the
21 certified question?

22 MR. ELWOOD: I don't think that they need
23 to because that is something that, again, it would be
24 a useful thing given that there are 50 legislatures
25 out there and there are probably at least 20 and

1 perhaps 31 similar statutes that rather than certify
2 the question and then have to certify on a
3 State-by-State basis, just to adopt a background rule
4 that this Court applies.

5 JUSTICE BREYER: But a background rule is
6 awfully tough. I mean, you could have lots of shalls
7 in all kinds of statutes. If they said shall, the
8 sanitation department shall inspect your home for
9 tuberculosis, maybe that does give a right. If they
10 say to the fire department, you shall put out fires,
11 I wouldn't think they meant that every possible
12 homeowner had a right to a lawyer and a full judicial
13 hearing before they go and respond to an alarm.

14 You know, I mean, it depends on the area.
15 I don't know how to create a background rule.

16 MR. ELWOOD: Well, I think the rule that
17 the Court could create is that in a criminal context,
18 which is all that is at stake here, there is a
19 background presumption that individuals lack a
20 judicially cognizable right to arrest or prosecution.

21 For example, an arrest warrant, although
22 there is some question about whether or not that
23 really is mandatory. It's certainly couched in
24 mandatory terms. It's directed to the marshal. To
25 the marshal, you are hereby commanded to arrest Jane

1 Doe or whoever.

2 But there is a very established body of
3 law that even the people who basically agitate for
4 the arrest warrant don't have a grounds to complain
5 if the arrest warrant isn't executed.

6 At the federal level, there is Leek versus
7 Timmerman, where the court held there is no
8 protective interest or there is no cognizable
9 interest in the arrest of another party. And at the
10 state level, there is a lot of case law indicating
11 that officers are not liable to private citizens for
12 failure to execute arrest warrants.

13 JUSTICE STEVENS: But is it not true that
14 the Colorado legislature could create such a right if
15 it did it with sufficient specificity?

16 MR. ELWOOD: I think that that is correct.
17 This Court has not placed really many limits on what
18 kind of rights could be created under Roth. There is
19 some indication in cases like Sandin that there might
20 be limits at the margins or rather at least limits
21 presumptively --

22 JUSTICE SCALIA: The Constitution does say
23 property right. I mean, it has to be a property
24 right, doesn't it? Is that meaningless? Is
25 everything in the world either life, liberty or

1 property? Does that describe everything in the
2 world?

3 MR. ELWOOD: Justice Scalia, all I'm
4 saying is that the Roth cases haven't really
5 indicated that there might be limits on that. I
6 think that there are reasons --

7 JUSTICE SCALIA: Well, because there has
8 been no case that really did not involve something
9 that could reasonably be called property.

10 MR. ELWOOD: Correct. And I think that
11 this is a case where courts might want to exercise
12 some caution because there is a reason why they don't
13 involve private citizens in the prosecution. And
14 that is because our system is built around the idea
15 that to -- basically, we want to interpose brakes
16 between the complaining witness and the courts and
17 power of the State, as the Court indicated in Young
18 versus United States ex rel. Vuitton. The prosecutor
19 there, because it was a prosecutor, basically serves
20 as a circuit breaker to prevent people from
21 going straight to the --

22 JUSTICE SCALIA: That's the State's
23 problem. I mean, if the State doesn't want that,
24 sure, the State can take that away. But if the State
25 does, do I still have to call it property just

1 because the State does?

2 MR. ELWOOD: I think that you would
3 require a much clearer statement before accepting
4 that kind of procedural innovation. I see my time
5 has expired.

6 CHIEF JUSTICE REHNQUIST: Yes, it has.
7 Thank you, Mr. Elwood.

8 Mr. Reichel, we'll hear from you.

9 ORAL ARGUMENT OF BRIAN J. REICHEL

10 ON BEHALF OF RESPONDENTS

11 MR. REICHEL: Mr. Chief Justice and may it
12 please the Court:

13 A public high school student threatened
14 with suspension receives more process under this
15 Court's holding in Goss versus Lopez than Castle Rock
16 is willing to provide to a holder of a court-issued
17 protective order.

18 Instead of providing Ms. Gonzales with any
19 opportunity to be heard in any meaningful manner,
20 Castle Rock repeatedly ignored Ms. Gonzales's pleas
21 to have her children returned to her and the
22 restraining order enforced.

23 CHIEF JUSTICE REHNQUIST: What process do
24 you think your client was entitled to?

25 MR. REICHEL: We believe that what my

1 client seeks is much less than what police officers
2 do every day. We would ask this Court to hold that
3 Ms. Gonzales was entitled to an objective, reasoned
4 and good faith consideration of her complaint of a
5 restraining order violation, and a good faith
6 assessment of probable cause.

7 CHIEF JUSTICE REHNQUIST: Could that
8 simply be made by the person on the desk?

9 MR. REICHEL: It can, Your Honor, but it
10 needs to be a probable cause determination that is
11 actually communicated to the holder of the
12 restraining order, whether it be a favorable or
13 adverse determination, there needs to be some notice
14 provided to the holder of a restraining order of what
15 the police officers intend to do.

16 JUSTICE BREYER: Well, does --

17 JUSTICE SOUTER: That -- no, please.

18 JUSTICE BREYER: The basic problem that I
19 have is you just put your finger on. I mean, on your
20 view of the facts here, which I will accept, it's
21 outrageous what happened and a terrible tragedy, but
22 it wasn't that they didn't hear her. They heard her.
23 That's the problem. They heard her and they didn't
24 do anything.

25 So if you proceed under state law, you

1 will, if you're right, get a holding that the police
2 behaved very badly, that would help your client, and
3 it would help future people in the same position.

4 If you proceed under federal law, the most
5 you get is somebody at the desk saying, well, we
6 think other things are more important. And at that
7 point, your client may or may not be helped and other
8 people won't be helped. So don't you have a misfit
9 between the remedy that you're trying to get and the
10 harm that was done?

11 MR. REICHEL: No, Your Honor, I don't
12 believe so. We're asking for a specific process
13 here. And Ms. Gonzales wants the right to prove a
14 pattern and practice on the part of Castle Rock of
15 not responding properly to complaints and pleas of
16 this type.

17 JUSTICE SOUTER: But that's not the kind
18 that you've brought, as I understand it. As I
19 understand it, you've brought a claim simply that she
20 was hurt and was not given process. That's all you
21 have to prove. If you can prove a pattern, sure,
22 it's easy to prove an individual case. But your only
23 claim is damage as a result of a denial of some
24 procedural right in this case, isn't that correct?

25 MR. REICHEL: As the case stands now, it

1 is a Monell claim, Your Honor. It is a pattern and
2 practice claim.

3 JUSTICE SOUTER: But it's not a class
4 action, is it? It's not a claim under some
5 statute -- civil rights statute. It's a claim for
6 the benefit of this client and if this client wins,
7 this client presumably will get a money judgment,
8 isn't that the case?

9 MR. REICHEL: Yes, you are correct, Your
10 Honor.

11 JUSTICE SOUTER: Okay. Okay.

12 MR. REICHEL: You are correct. But the
13 ignoring here, the allegations are in the complaint,
14 Your Honors, is that Castle Rock has this custom and
15 policy, this pattern and practice of just ignoring
16 these types of complaints. And the ignoring, as the
17 law enforcement amicus brief filed on our behalf
18 points out, the ignoring is a classic example of how
19 police have traditionally responded to these types of
20 complaints.

21 JUSTICE SOUTER: I'll grant you that, but
22 as I understand it, what stands between or what would
23 stand between your ignoring complaint and success
24 would simply be the police's statement of a reason
25 because, as I take it, I take it that you don't deny

1 she was heard, they answered the phone, they talked
2 to her. She got a result.

3 After she had talked with them on the
4 phone, she knew that they weren't going to do
5 anything or that they weren't going to do anything
6 satisfactory. So as I understand it, on your theory,
7 the only thing she didn't get that she would be
8 entitled to would be a statement by them as to why
9 they were not going to do something for her. Is that
10 what it boils down to?

11 MR. REICHEL: No. What it boils down to,
12 Your Honor, is we're looking for a probable cause
13 determination to be made in good faith.

14 JUSTICE SOUTER: And if they had said, we
15 don't think there is probable cause, that would be
16 the end of your case.

17 MR. REICHEL: As long as there was a good
18 faith determination. If there was a mistaken belief
19 that there was a lack of probable cause, then there
20 is no violation of due process. The process has been
21 provided.

22 JUSTICE BREYER: Suppose they just say,
23 look, in our experience, children come home in two or
24 three hours and, moreover, we have other things to do
25 that are more important. Is that a sufficient

1 answer? Both things, by the way, most people who
2 look into this would say are completely wrong. But I
3 mean, the police would say just what I said. Is that
4 sufficient?

5 MR. REICHEL: No, Your Honor, that is not
6 a thoughtful, objective --

7 JUSTICE BREYER: So what you really want
8 is what they should do, is they should respond?

9 MR. REICHEL: They should respond by
10 making an objective probable cause determination --

11 JUSTICE BREYER: In this case, you would
12 say they should respond?

13 MR. REICHEL: They should have made the
14 probable cause determination.

15 JUSTICE KENNEDY: But then your complaint
16 is the result, not the procedure.

17 MR. REICHEL: No, Your Honor --

18 JUSTICE KENNEDY: Yes, it's true that the
19 procedural cases are designed so that the right result
20 can be reached most of the time. I understand that.
21 But all we ask is whether or not the procedure was
22 adequate.

23 MR. REICHEL: There was no procedure here,
24 Your Honor, and that's the point of our lawsuit is
25 that the fact that Castle Rock has an official custom

1 and policy of ignoring, of not applying any procedure
2 to these types of claims is the crux of our complaint
3 in this case.

4 JUSTICE SCALIA: Why was your procedure,
5 assuming your entitled to a procedure, why did it
6 have to come from Castle Rock? Why wasn't your
7 proper recourse to the court that issued the
8 restraining order? Did you try to do that, to go to
9 the judge that issued the restraining order and say,
10 the police are not enforcing the restraining order
11 that you issued, I would like directive from the
12 court that they enforce it?

13 MR. REICHEL: At the point at which she
14 realized the police weren't really going to do
15 anything, she found out her children were dead. That
16 would have been at that point in time a meaningless
17 process.

18 JUSTICE SCALIA: Well, just as she could
19 have complained to the police earlier, she could have
20 gone to the court earlier when she saw that the
21 police weren't doing anything.

22 MR. REICHEL: The police told her to
23 continue to wait. They strung her along, Your Honor.
24 That's -- the crux of the problem here is that she
25 relied upon the police to enforce her restraining

1 order. They told her to hold on --

2 JUSTICE SCALIA: That may be a tort, but
3 it's not necessarily a denial of process if the
4 proper place to seek that process was from the court
5 that issued the restraining order.

6 MR. REICHEL: But the restraining order
7 has no meaning, Your Honor, unless the police are
8 willing to enforce it.

9 JUSTICE SCALIA: That's right, and the
10 court can make sure that they enforce it upon
11 complaint.

12 MR. REICHEL: In this case, it's our
13 position that the legislature has done so as well.

14 JUSTICE SOUTER: Let me ask you a question
15 that is suggested by Justice Scalia's question. And
16 it goes basically simply to the practical problems
17 that your position seems to entail.

18 You answered him by saying that the point
19 at which she realized they were denying her whatever
20 she was entitled to was the point at which the
21 children were dead. How would a reviewing court know
22 when this particular right had been denied?

23 I take it from your answer to Justice
24 Scalia that there had not been a denial of the right
25 and hence a violation of procedural due process after

1 the first telephone conversation. I take it from
2 your answer that there wasn't one after the second
3 conversation. And I take it the only -- that there
4 was no ripening, as it were, of the facts into a
5 denial of what she was entitled to until the 3:00
6 a.m. call, is that correct?

7 MR. REICHEL: No, Your Honor, and I
8 apologize if I misstated -- and it gave you that
9 impression.

10 JUSTICE SOUTER: Well, my general question,
11 then, is how does a reviewing court determine when or
12 the point at which there has been a denial?

13 MR. REICHEL: The initial contact with the
14 police department we're saying has to involve
15 appropriate processes --

16 JUSTICE SOUTER: So following the first
17 phone call, they would have to have made an express
18 probable cause determination?

19 MR. REICHEL: They would have had to have
20 made a probable cause determination in good faith and
21 conveyed and communicated --

22 JUSTICE SOUTER: And communicate that to
23 her.

24 MR. REICHEL: Communicated that to her,
25 which they never did. Instead they just kept telling

1 her, you can call back later, call back later. They
2 never made the probable cause determination and
3 conveyed it to her.

4 CHIEF JUSTICE REHNQUIST: Did they simply
5 have to take her word as to the facts on the probable
6 cause issue?

7 MR. REICHEL: No, not at all, Your Honor,
8 and I believe that the whole intent of Goss versus
9 Lopez was to allow a high school student to
10 understand the interpretation of the principal's view
11 of the facts, and allow the student the opportunity
12 to clarify or to fill in any missing points in terms
13 of the understanding being --

14 JUSTICE BREYER: That's true, but Goss
15 versus Lopez, to my knowledge -- you may know more
16 about it. But to my knowledge, there are not a lot
17 of federal cases which second guess the principal or
18 the teacher, once the teacher or the principal gives
19 a plausible reason for suspending the student.

20 And of course my fear is that that is
21 precisely what would occur here. There would be
22 procedure, there would be a reason. The reason is
23 we're too busy. All right? And courts won't second
24 guess that.

25 But if you take the other route, you get

1 what you need, which is an instruction to the police
2 department that when a child is missing, you don't
3 wait. But I don't see how you can get that
4 instruction on this procedural route.

5 MR. REICHEL: Your Honor, we're not asking
6 for the Court to instruct the police department they
7 have to drop everything --

8 JUSTICE BREYER: Exactly. And that seems
9 to me to be the problem, because you have a case
10 where the problem was the delay and that's apparently
11 a common problem. And I don't see how this route
12 that you take gets at that problem.

13 MR. REICHEL: Your Honor, if I could
14 respond, the delay issue is not the crux of the
15 problem. The crux of the problem is that the police
16 officers here never told Ms. Gonzales that they
17 believed that there was or was not probable cause.

18 JUSTICE SOUTER: What good could that have
19 done anyone?

20 MR. REICHEL: It would have allowed her
21 the opportunity --

22 JUSTICE SOUTER: She knew, as it was, that
23 they weren't going to do anything. What good would
24 it have done her to know that, oh, it's nice to know
25 that they've gone through a probable cause

1 determination in coming to the conclusion that
2 they're not going to do anything. I mean, what is
3 the social value of that?

4 MR. REICHEL: Your Honor, I don't believe
5 the record is such that we've alleged that
6 Ms. Gonzales knew that they weren't going to do
7 anything. In fact, it's just the opposite, that she
8 relied upon --

9 JUSTICE SOUTER: They said call back in
10 two hours and whatnot.

11 MR. REICHEL: And she continued to do
12 that, to follow their instructions.

13 JUSTICE SOUTER: And each time at the end
14 of the call, she knew that they weren't going to do
15 -- they weren't going to go out and look and they
16 weren't going to enforce the order at that point,
17 didn't she?

18 MR. REICHEL: I'm not sure that's correct.

19 JUSTICE SOUTER: I mean, I can understand
20 you're making an argument -- you have made it, but I
21 can understand you're making an argument that the
22 point of procedure is to force people, in this case
23 the police, to face facts. If they really know that
24 she has made out probable cause that something is
25 wrong here, if they are forced to face that as a

1 result of procedure, they will then do something
2 about it. It's not as easy to be irresponsible in
3 that case.

4 But the trouble with that argument, it
5 seems to me, although it's sound as far as it goes,
6 is that it's an argument that would apply with
7 respect to every statute in which there is mandatory
8 language to the police to enforce it.

9 And that seems to me to suggest a
10 completely nonadministerable system and one which is
11 totally at odds with the normal accord of police
12 discretion.

13 MR. REICHEL: Your Honor --

14 JUSTICE SOUTER: I mean, how do you get
15 around that dilemma?

16 MR. REICHEL: We believe that the process
17 test that we're articulating here is unique to
18 domestic violence mandatory arrest statutes across
19 the country. The reason being is that these statutes
20 were enacted precisely because of this problem, the
21 problem of --

22 JUSTICE SOUTER: Then why weren't they
23 enacted with an express provision saying, and by the
24 way, the police have got to go, either through the
25 following procedure or, by the way, this statute

1 creates a right on the part of the protected party.

2 In other words, if the response to what I
3 understand the problem to have been, if the response
4 was the response that you think the legislature made,
5 why didn't the legislature say something that would
6 take these statutes out of the run of the mill
7 criminal law statutes in which the police, subject to
8 mandatory language, have an apparent obligation to do
9 something to enforce?

10 MR. REICHEL: I would respectfully submit,
11 Your Honor, that they have, especially in Colorado.
12 This statute is much more detailed than a run of the
13 mill criminal or civil statute.

14 JUSTICE SOUTER: But it doesn't say that
15 people like your client have a personal right to
16 enforcement with a damage remedy.

17 MR. REICHEL: It doesn't, Your Honor, but
18 the fact that there is a court order here in place
19 individualizes the entitlement. It makes it
20 personal.

21 Ms. Gonzales went into court and aired her
22 dirty laundry under the assumption, mistakenly here,
23 that she was going to be provided protection from the
24 State. That if she went in and explained the
25 situation to the courts, the courts would issue her

1 an order that meant something. And it could only
2 mean something if police officers are willing to
3 enforce it. The legislature in turn has said, if a
4 person has this kind of order, you shall use every
5 reasonable means to enforce it.

6 Now, in order to enforce it, the police
7 officers are going to have to, as they respond to
8 every criminal complaint, make an initial probable
9 cause determination. That's part of every day law
10 enforcement.

11 JUSTICE SCALIA: Mr. Reichel, how would
12 you describe, briefly, the property that your client
13 has been deprived of? What is the property?

14 MR. REICHEL: The property is an
15 entitlement to enforcement of her order. That's the
16 property, Your Honor. That's how it was --

17 JUSTICE SCALIA: The entitlement to
18 enforcement of an order is property? Do you know any
19 case that is -- what's the closest case that you
20 would say has held something to be property that is
21 an entitlement to have an order enforced as opposed
22 to an entitlement to a job, an entitlement to money,
23 an entitlement to what I would consider property?

24 MR. REICHEL: There is no opinion of this
25 Court that talks about orders per se. There is,

1 however, what I would classify as a more quirky
2 property interest, and that was the Logan versus
3 Simmerman Brush case. That case dealt with the
4 situation where there was a statute that provided a
5 cutoff for when somebody could sue for unemployment
6 benefits or discriminatory allegations in the State
7 of Illinois.

8 And the court there held that while there
9 is really a right in this process, to go through this
10 process and by cutting it off without any opportunity
11 for notice or a hearing, the State of Illinois --

12 JUSTICE SCALIA: Yes, but it's, at the end
13 of the day, they were unemployment benefits, right?
14 I mean --

15 MR. REICHEL: That's true.

16 JUSTICE STEVENS: Wouldn't the better
17 analogy be to assume she made a contract with a
18 private detective agency to protect her from these
19 events. And if something arises, to go get the
20 police and act on it? That would be a property right
21 if she had a private contract with a private
22 detective agency to do exactly what the police were
23 supposed to do here.

24 MR. REICHEL: Well, Your Honor, that's
25 true, although when she went into court, I think she

1 believed that she had a contract with the State of
2 Colorado, at least a promise by the State of Colorado
3 that she would obtain some protection.

4 JUSTICE STEVENS: But it seems to me a
5 contract for protection would be a familiar kind of
6 property, is what I'm suggesting.

7 MR. REICHEL: Exactly. Exactly. And here
8 the order --

9 JUSTICE SCALIA: But there is no contract
10 here, is there?

11 MR. REICHEL: There is no contract but
12 there is an order. There is a court issued order
13 based upon her allegations and based upon her
14 submissions to the court.

15 Your Honors, again, Ms. Gonzales took the
16 risk here of seeking an order of protection and
17 airing her dirty laundry in public, and she did so
18 with the reasonable expectation that the order meant
19 something, that law enforcement would enforce it.

20 JUSTICE GINSBURG: Could you be precise
21 about what is the due process? You're saying it's
22 not a hearing that you're seeking. Not just that she
23 could be listened to and no action taken. But what
24 precisely is the process to which she is due?

25 MR. REICHEL: We believe that there has to

1 be an objective, thoughtful, reasoned evaluation of
2 her complaint of a violation. And that involves
3 necessarily an evaluation in good faith of probable
4 cause, a determination of whether probable cause
5 exists, and an articulation of that determination --

6 CHIEF JUSTICE REHNQUIST: But you said a
7 moment ago, this could be done by the sergeant on
8 duty at the desk who probably had three other calls
9 waiting. Do you still think that could be done?

10 MR. REICHEL: Certainly, Your Honor. I
11 believe if you take a look at some of the model
12 policies already in place by police departments
13 around the country that are attached to the amicus
14 brief of the law enforcement agencies that filed on
15 our behalf, you'll see some policies whereby the
16 person at the desk taking the information is required
17 to have certain types of questions and provide
18 certain types of responses to those questions.

19 JUSTICE GINSBURG: But on any timetable?

20 MR. REICHEL: Yeah, we're not asking for
21 the police department to drop everything. We're just
22 asking that they --

23 JUSTICE STEVENS: If I understand your
24 position correctly, I know what the allegations are
25 here, but if the evidence should show later on that

1 in response to one of these telephone calls, the desk
2 sergeant said, send a squad car out and see if you
3 can locate the kids, you would lose?

4 MR. REICHEL: No, Your Honor, that's not
5 what I'm saying.

6 JUSTICE STEVENS: Because that would have
7 been a good faith response by somebody to try and
8 find out whether there was probable cause.

9 MR. REICHEL: There has to be an
10 articulation of the determination of probable cause
11 to the holder of the restraining order to allow her
12 to, for example, clarify facts, to perhaps talk to a
13 superior or perhaps, in this case, go somewhere else
14 for help, go to the court.

15 JUSTICE GINSBURG: But where do you get
16 that? I know that the Tenth Circuit tried to stick
17 to the language of the statute. But where do you get
18 the requirement, A, that police inform her and, B,
19 that it give reasons for nonenforcement? Those were
20 not within what the Tenth Circuit said.

21 MR. REICHEL: I believe it was wrapped
22 within the concept of a probable cause determination.
23 And they did specifically state that if there was an
24 adverse determination, that notice of that
25 determination has to be conveyed to her. That was, I

1 believe, the fourth prong of our analysis.

2 JUSTICE GINSBURG: So the notice -- yeah,
3 did it say with a statement of reasons?

4 MR. REICHEL: With a statement of reasons,
5 it did, Your Honor.

6 JUSTICE GINSBURG: Where does that come
7 from?

8 MR. REICHEL: Well, the statement of
9 reasons, Your Honor, allows again for there to be
10 communication on both sides. So that if the
11 statement of reasons turned out to be based upon
12 false information --

13 JUSTICE GINSBURG: I know that it would be
14 a fair process that you're describing.

15 MR. REICHEL: A meaningful process.

16 JUSTICE GINSBURG: But is it an essential
17 one, that is, that nothing spells out -- in most of
18 the cases that involve property and a procedural due
19 process right, it's a hearing that the person is
20 seeking. Are they entitled to benefit or are they
21 not? But here, this is not what you want. You want
22 the police to enforce. And if they don't enforce, to
23 give you a reason.

24 MR. REICHEL: Well, I believe that the
25 enforcement of the order flows from the probable

1 cause determination. The obligation to enforce is
2 triggered by a finding of probable cause of a
3 violation.

4 So the process we're looking for involves
5 the probable cause determination. It's our position
6 that by simply ignoring that process, you're
7 depriving somebody potentially of their property
8 right in enforcement of the order.

9 JUSTICE GINSBURG: But if the police --
10 let's say, focusing on this case, suppose they had
11 looked at this order and said, wow, it gives him
12 weekends with the girls, it gives him summertime with
13 the girls and, subject to his ex-wife's agreement,
14 dinner time with the girls, this can't be all that
15 urgent because if he would harm the girls then why is
16 the judge allowing him so much sole time with them?

17 So wouldn't -- looking at this particular
18 order, wouldn't there be reasons why the police would
19 say, the judge is allowing the father to spend time
20 with the girls, this can't be that urgent?

21 MR. REICHEL: There could have been, Your
22 Honor, but again, those reasons were never
23 articulated to my client and any reasons the police
24 officers may have had are not in the record.

25 JUSTICE O'CONNOR: But this is such a new

1 sort of a requirement you're seeking us to develop
2 here. I just don't know of any past case that would
3 suggest such a requirement when it comes to law
4 enforcement requests by citizens of police. It would
5 be a major step, wouldn't it?

6 MR. REICHEL: It would be a different kind
7 of case, Your Honor.

8 JUSTICE O'CONNOR: Yes. Are there any
9 indications that any of the police in this instance
10 will face disciplinary action for their response
11 here?

12 MR. REICHEL: I really have no idea, Your
13 Honor. I really have no idea.

14 JUSTICE BREYER: Could you still bring a
15 state tort suit?

16 MR. REICHEL: No, Your Honor. I believe
17 that as was conceded in Petitioner's reply brief,
18 they're really under our governmental immunity laws.
19 They're probably the strictest in the country. There
20 really is no viable tort --

21 JUSTICE BREYER: Why? Because it is
22 willful and wanton, and you've made out a claim they
23 didn't even give an answer, they didn't do anything,
24 they have a practice of doing nothing.

25 MR. REICHEL: I believe that centers more

1 around the causation and foreseeability issues that
2 are triggered by that type of a claim.

3 JUSTICE KENNEDY: Well, if the State cares
4 so little about enforcing what its officers do under
5 its own laws, isn't that some indication that it did
6 not intend to create the property interest that
7 you're arguing for?

8 MR. REICHEL: No, Your Honor, I don't
9 believe that at all. And in fact, again, going back
10 to some of the Court's prior cases and the Roth
11 series of case law, if you look, for example, at
12 Logan versus Simmerman Brush, there was a good deal
13 of discussion about whether there was a tort law
14 remedy and, in fact, there was in that case.

15 CHIEF JUSTICE REHNQUIST: Do you have any
16 other cases besides Logan?

17 MR. REICHEL: On that issue?

18 CHIEF JUSTICE REHNQUIST: Yes.

19 MR. REICHEL: Not with that elaborate of a
20 discussion on the issue, although I would submit that
21 the existence of a post-deprivation remedy, so to
22 speak here, is irrelevant under, again, Logan, simply
23 because we're left now with the Monell claim. We're
24 left with the allegations of state action, a custom
25 and policy of a state entity here.

1 And the existence of a post-deprivation
2 state law tort remedy is irrelevant to the analysis
3 of whether there is a due process violation.

4 JUSTICE GINSBURG: If there had been a
5 question certified to the Colorado Supreme Court, and
6 the Colorado Supreme Court said we weren't intending
7 to create any entitlement here, evidence that we
8 don't even have a tort action that's willful or
9 wanton conduct, no liability at all in the
10 municipality. So suppose the State Supreme Court has
11 said, we didn't mean to create any entitlement, then
12 where would you be?

13 MR. REICHEL: We probably wouldn't be
14 here, Your Honor. That question simply never got
15 certified to the Tenth Circuit. And I believe you do
16 have to give deference to the Tenth Circuit's
17 analysis of Colorado law on that issue.

18 Your Honors, at issue here is a specific
19 order of protection, a legislative mandate requiring
20 enforcement of a protective order and a pattern and
21 practice of the Castle Rock police department of
22 ignoring and failing to enforce court issued
23 protective orders.

24 This case does not turn on decisions made
25 by police officers based solely on the facts of this

1 case. This case involves allegations of a pattern
2 and practice, an official policy and custom on the
3 part of Castle Rock of not taking complaints of
4 restraining order violations seriously.

5 This pattern and practice that's -- in and
6 of itself proves there was no process. Ms. Gonzales
7 merely seeks the opportunity to prove at a trial on
8 the merits that no matter what she said to the Castle
9 Rock police officers, they were not going to do
10 anything about her --

11 JUSTICE STEVENS: May I ask you whether
12 you would favor or disfavor our certifying the
13 question whether there is a property right here to
14 the Colorado Supreme Court?

15 MR. REICHEL: At this point in time, I
16 suppose I would disfavor it, because I believe that
17 Bishop versus Wood is controlling. Your Honors, we
18 respectfully request that this Honorable Court affirm
19 the Tenth Circuit's ruling in this matter. Thank you
20 very much.

21 CHIEF JUSTICE REHNQUIST: Thank you,
22 Mr. Reichel. Mr. Eastman, you have four minutes
23 remaining.

24 REBUTTAL ARGUMENT OF JOHN C. EASTMAN

25 ON BEHALF OF PETITIONER

1 MR. EASTMAN: Thank you, Mr. Chief
2 Justice. I want to go back to Justice Scalia's point
3 about the property interest. This is such a unique
4 claim of a property interest. I think it would be
5 appropriate to find that even if you were to accept
6 Justice Stevens' contention of a contract, an ADT
7 type of guarantee of protective services, that looks
8 a lot more like the type of entitlements under Roth
9 that this Court has recognized.

10 I think it may well be the case that you
11 never reach a property interest in the enforcement
12 against somebody else, that that's a different thing
13 in kind from this traditional contract protective
14 services.

15 So if there was a statute that said, when
16 somebody has a protective order that implicates --
17 particularly when there is a finding of dangerousness
18 that's been made by a court that has nothing to do
19 with the restraining order that was issued here, and
20 that the police are obligated to provide 24-hour,
21 seven days a week police -- squad car out in front of
22 her house until she goes to testify at a hearing, for
23 example, that would be I think a property interest.

24 But it would meet the criteria that this
25 Court set out in Gonzaga, that it's defined in terms

1 of rights to her, not just benefits that might flow
2 from a criminal law more generally.

3 It's phrased in terms of the person
4 benefited and it has an unmistakable focus. That's
5 the phrase from Gonzaga. And that there is an intent
6 to create a private remedy as well, not just the
7 private right. I think those kind of things would
8 give rise to a Roth type property interest that would
9 lead to the invocation of procedural due process
10 requirements.

11 JUSTICE BREYER: What about the willful
12 and wanton -- suppose the facts were just as they
13 say, long-standing practice, not responding, doing
14 nothing, doing nothing here despite evidence of
15 serious danger, and being told you shouldn't do
16 anything, don't pay any attention he'll come home,
17 would that show willful and wanton?

18 MR. EASTMAN: I believe under Colorado
19 law, that would show willful and wanton and their
20 tort claim would be available against the police.
21 But it's precisely because of that tort claim is
22 available and only on those limited circumstances
23 that I think you cannot read the Colorado legislature
24 as having created a property interest here, because
25 the remedies that would be available would not be so

1 limited.

2 We would not be limited to willful and
3 wanton conduct. We would have all sorts of remedies
4 beyond what the State of Colorado specifically said.
5 And you would go a long way toward making
6 constitutional provisions the font of Colorado tort
7 law, and completely supplant --

8 JUSTICE STEVENS: May I ask you the same
9 question I asked your opponent? Would you favor or
10 disfavor our certifying the property law issue to the
11 Colorado Supreme Court?

12 MR. EASTMAN: Disfavor. I think there is
13 just nothing in this statute that would even make it
14 reasonable for the Colorado Supreme Court to hold
15 that there is a property interest here.

16 And to go back to your earlier point about
17 Bishop, it's not a determinative rule. You give
18 deference to the Tenth Circuit. But when the Tenth
19 Circuit's decision is not based on any even
20 developments in Colorado law, and based on a Colorado
21 statute and takes the step that this statute simply
22 doesn't comply with, I don't think you need to give
23 the kind of absolute deference here that you might
24 have given other cases. If there are no more
25 questions, I'll -- thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you,
2 Mr. Eastman. The case is submitted.

3 (Whereupon, at 10:59 a.m., the case in the
4 above-entitled matter was submitted.)

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