NO. 21-_____

In the Supreme Court of the United States

PAMELA REILLY, PERSONAL REPRESENTATIVE,
ESTATE OF ROSEMARIE REILLY,

Petitioner,

v.

OTTAWA COUNTY, MICHIGAN,
A MUNICIPAL CORPORATION ET. AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an abused woman who faces increased danger from her abuser because State Actors have emboldened and condoned the abuser's violently escalating conduct has pled a substantive due process violation under the Fourteenth Amendment pursuant to *DeShaney v. Winnebago Cty. Dep't of Soc. Sevs?*

2. While *DeShaney* recognized a due process right for state-induced third-party harm, what are the elements for this State-Created Danger Test for all Circuits to follow?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly

Respondents and Defendants-Appellees Below

- Ottawa County, a Municipal Corporation
- Eric Tubergen, in his individual capacity as an Officer of the Ottawa County Sherriff's Department
- Chris Dill, in his individual capacity as a Sergeant of the Ottawa County Sherriff's Department
- Collin Wallace, in his individual capacity as an Officer of the Grand Valley State Police Department
- Dennis Luce, in his individual capacity as a Sergeant of the Ottawa County Sherriff's Department
- Brandon DeHaan, in his individual capacity as a Captain for the Grand Valley State Police Department

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 20-2220

Pamela Reilly, Personal Representative, Estate of Rosemarie Reilly, *Plaintiff-Appellant,* v. Ottawa County, Michigan, a Municipal Corporation; Chris Dill, Sergeant, in his individual capacity; Collin Wallace, Police Officer, in his individual capacity; Dennis Luce, Sergeant, in his individual capacity; Brandon Dehaan, Captain, in his individual capacity; Sean Kelley; Eric Tubergen, Officer, in his individual capacity, *Defendants-Appellees.*

Date of Final Opinion: September 2, 2021

United States District Court Western District of Michigan Southern Division

No. 1:18-cv-1149

Pamela Reilly, Personal Representative of the Estate of Rosemarie Reilly, *Plaintiff,* v. County of Ottawa, et al., *Defendants.*

Date of Final Opinion: November 13, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in September 2, 2021.

OPINIONS BELOW

Both the opinion of the Sixth Circuit and the Western District of Michigan are unpublished. The opinion of the United States for the Sixth Circuit was entered on September 2, 2021 and is attached hereto. App.1a. The opinion of the district court granting dismissal is reproduced at App.30a and the denial of reconsideration is reproduced at App.22a.

JURISDICTION

The United States Sixth Circuit Court of Appeals entered the opinion affirming dismissal on September 2, 2021. This Court's jurisdiction to review this opinion arises under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend XIV, § 1

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case

This is a family's worst nightmare. Rosemarie Reilly, an accomplished, beautiful, and ambitious 21-year-old year old college student was brutally gunned down by her stalker and ex-boyfriend. The Defendant police officers knew that the stalker had beaten her and attempted suicide, violated the Personal Protection Order obtained by Rosemarie to keep him away from her at least eighty-six times, and had a weapon cache (including the one that ended Rosemarie's life). But the Defendants chose to protect the stalker because his father was a police officer. In collusion with his father, they told the stalker that they would not enforce the law by arresting him for violating the Personal Protection Order,[1] arrest him on warrants, or do anything else to protect Rosemarie. They mailed arrest warrants for domestic violence against Rosemarie to him, alerting him that they were issued. Although they were clearly empowered by the violations of the PPO and the arrest warrants to immediately take him into physical custody, they refused to do so, even

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[1] In Michigan, a Personal Protection Order ("PPO") issued by a Judge, like this one, allows for the immediate arrest of a violator based upon allegations that it has been violated. M.C.L § 764.15b. Here, in addition to other aggressive stalking, Rosemarie twice informed Defendant Wallace that Jeremy had violated the PPO, even to the extent that she informed Wallace on October 22 that he had contacted her eight-six times. App.69a-70a. Defendant Wallace knew that Jeremy was stalking her in person on GSVU's campus. Defendants were empowered by Michigan law to immediately arrest him without a warrant. *See* M.C.L § 764.15b.

though they knew exactly where he was. The Defendants repeatedly turned a blind eye to the clear danger and elevating risk that the stalker posed to Rosemarie in collusion with his police officer father, who sought and received leniency for his stalker son. This collusion caused this entirely predictable and easily preventable murder.[2] Indeed, Rosemarie paid for the Defendants' collusion with her life.

The Defendant officers have cowered behind unclear and under-defined legal precedent to avoid the repercussions of their collusion and to avoid judgement for their bad choices. The grieving and heartbroken family of Rosemarie Reilly seeks this Court's intervention to avoid a gross miscarriage of justice, and to avoid the same harm to future victims.

This action was brought on behalf of the estate of Rosemarie Reilly, the Petitioner, (herein be referred to as "Plaintiff"). The Respondents (herein referred to "Defendants") were various police officers employed with the Grand Valley State Police Department and officers employed by the Ottawa County Sherriff's Department. Rosemarie Reilly was a student at Grand Valley State University and had previously been in a relationship with Jeremy Kelley. Sometime around September of 2016, Rosemarie and Jeremy's relationship ended. After the break-up, although Rosemarie and Jeremy continued to live together, Jeremy became unhinged; to the extent he was admitted to the Holland Hospital on October 5 for attempted suicide. When

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[2] Not only are one in two female murder victims killed by their intimate partners, but the risk of a murder committed by a domestic abuser increases by 400% when the abuser has access to firearms. *See* Campbell, *infra* n. 4; Ertl, *infra* n. 6.

Jeremy had threatened suicide and Rosemarie could not reach him, she called his father, Sean Kelley, who was a Bloomfield Township Police Officer. After Sean Kelley became involved in trying to find his son, and while attempting to locate Jeremy, he communicated with Grand Valley State Police Officers, including GVSU Officer Collin Wallace. This is important as it evidences a pre-existing relationship between Sean Kelley and GVSU.

Jeremy was released from the hospital on October 5, 2016, and began harassing Rosemarie, causing her to stay at a friend's apartment and her aunt and uncle's house. On October 8, Rosemarie's mother observed Rosemarie with a nose injury, and ultimately took her to the hospital for treatment. Rosemarie's parents then found out that her nose had been broken by Jeremy when he angrily punched her multiple times in the face, arms, and legs. Jeremy then called Rosemarie from October 8 to October 11 approximately forty-three times despite her unwillingness to speak to or see him.

After another failed suicide attempt, which Ottawa County officers were on notice of, the unhinged Jeremy continued to stalk Rosemarie. This behavior escalated on or about October 12, when Jeremy came to Grand Valley State University's campus and jumped in front of Rosemarie's car before pounding on the window and violently head-butting her vehicle.

Due to this car incident, on or about October 12, Rosemarie contacted GVSU's Police Department and reported Jeremy for stalking, domestic violence/abuse, and for putting a gun to her head and threatening to kill her. Evidently, because GVSU officer Defendant Wallace had had prior involvement with Jeremy, Rosemarie made this stalking/domestic violence com-

plaint specifically to him. Wallace then contacted the Ottawa County Sheriff's Department, who dispatched Defendant Dill to the GVSU campus to give Rosemarie paperwork required for filing a Personal Protection Order ("PPO"). During this October 12 encounter, Defendant Wallace completed a "no trespassing" form for Jeremy along with creating an incident report based on stalking arising from the circumstances Rosemarie told him about.

The first police contact involving Rosemarie's complaint with Jeremy occurred on October 13, 2016, when Ottawa County officer Defendant Eric Tubergen visited Jeremy at home to speak to him about Rosemarie's desire to file a PPO and he told Jeremy to leave Rosemarie alone. Despite meeting Jeremy at his home, Defendant Tubergen called Rosemarie's mother, Pam, shortly after telling her three things: (1) there was nothing he could do to prevent Jeremy from calling Rosemarie; (2) he had seen Jeremy's guns in his home but Jeremy was legally allowed to own those guns; and (3) he was "well aware" that Jeremy's father was a police officer. Rosemarie's mother again told Defendant Tubergen that Jeremy had threatened to kill Rosemarie, to wit Defendant Tubergen simply told her to file the PPO.

Following this conversation with Pam Reilly and in response to Officer Tubergen's direction, Rosemarie reported on October 13 that Jeremy held a gun to her head and threatened to kill her to Defendant Chris Dill. That same day, Defendant Dill informed Jeremy over the telephone that he was not going to take Jeremy to jail. In the same telephone conversation with Jeremy, Jeremy informed Defendant Dill that he

was upset Rosemarie had called the police and he believed she had obtained a PPO at that time.

On October 13, 2019, Defendant Brandon DeHaan, a Captain for Grand Valley PD, reviewed both Defendant Wallace's and Dill's reports pertaining to these matters. On October 13, Rosemarie's mother informed DeHaan about Jeremy's stalking behavior, that Jeremy had several guns and was very unpredictable, and that she was concerned about Jeremy's father, Sean Kelley, meddling with the situation. DeHaan informed Pam that he would follow up on the incident. Defendant DeHaan subsequently spoke to Jeremy on the telephone, where he informed Jeremy he was inquiring into a report made about him by Rosemarie. In this same conversation with Jeremy, Defendant DeHaan told Jeremy that because of his earlier actions he was trespassed from GVSU property, was not allowed on to enter any GVSU property, and not to contact any of the Reilly family members by phone, e-mail or any other electronic means.

Three days later, on October 16, Rosemarie's mother called the Ottawa County Sheriff's office and spoke to Defendant Dennis Luce. Pam desired to assist Rosemarie to collect Rosemarie's belongings from Jeremy's trailer (their home) and expressed her concern to Defendant Luce about doing so in light of Jeremy's guns and prior comments to Rosemarie. When Luce communicated with Pam Reilly, he had previously spoken to Jeremy's father, Sean Kelley, and expressed to Kelley that there was no cause to remove Jeremy's guns. This was not the first time Sean Kelley had spoken to Ottawa County Sherriff's officers on behalf of Jeremy pertaining to these incidents. When Pam and Rosemarie arrived at Jeremy's trailer on

October 16, Jeremy cordially stood outside with the Ottawa County Sherriff's officer waiting.

On October 17, Rosemarie paid for and retrieved a signed PPO from the Kent County Courthouse. After Jeremy violated this PPO three times on October 18 by calling Rosemarie, Rosemarie contacted Defendant Wallace and reported these calls and that Jeremy had stalked her on GVSU's campus. Rosemarie's mother also called GVSU Police to report Jeremy's violations of the PPO. But nothing was done, evidently because the Defendants remained pat in what they had told Sean Kelley: that Jeremy would not be arrested.

On October 20, 2016, Sean Kelley told Rosemarie's father in a telephone call that Rosemarie was a liar and that she needed to stop calling the police on Jeremy. This was after Jeremy—while violating the PPO—told Rosemarie that his dad had spoken to the local police and "nothing was going to happen" to him for violating the PPO. Rosemarie emailed Defendant Wallace on or around October 22, explaining that since they had last spoken when she told Jeremy she had obtained the PPO, Jeremy tried to contact her eighty-six times through her phone, left her multiple voicemails, and emailed her University email address.

On October 28, 2016, OCSD Officers who had been working on this matter prepared an arrest warrant for Jeremy arising out of domestic violence, which they mailed to his residence. Similarly, Defendant Wallace, along with other GVSU officers involved in the matter, prepared and mailed another arrest warrant to Jeremy's residence for charges arising out of Jeremy' stalking on November 2, 2016.

On November 5, 2016, Jeremy spoke on the telephone with Rosemarie's father, and expressed his knowledge and dissatisfaction with warrants being out for his arrest arising out of these incidents with Rosemarie. Along with mailing Jeremy the arrest warrants, both Jeremy's father and/or the Defendant officers informed Jeremy of these existing warrants. The officers did not arrest Jeremy—despite both Ottawa County and Grand Valley State Police having arrest warrants for the known-violent Jeremy Kelley—because they listened and acquiesced to Sean Kelley's pleas for leniency for Jeremy. These were the same individuals that had encouraged Rosemarie to file the PPO. Instead, the officers elected to protect the known-violent abuser based on their numerous improper communications with both Jeremy and his father.

Tragically, on November 6 Jeremy found Rosemarie at her friend's house, dragged her out of the house, and shot and killed her with one of the weapons from his trailer and then killed himself. The Defendants' regular communications with Jeremy and his father, especially but not limited to after he continually violated the signed PPO, emboldened his belief that "nothing was going to happen" him, which in turn led to Rosemarie's death. Likewise, the Defendant officers chose to protect Jeremy and acquiesced to Sean Kelley's pressure and plea for leniency to not arrest Jeremy on four separate occasions when Jeremy violated the PPO.

B. District Court Proceedings

This matter was decided on the pleadings pursuant to Fed. R. Civ. P. 12(b)(6). Thus, Plaintiff's First Amended Complaint, which was filed on November 2, 2018, dictates this appeal and is attached at App.59a. The

trial court did not conduct oral argument so there is no transcript. Plaintiff asserted substantive due process violations pursuant to the Fourteenth Amendment and what has been deemed the "state-created danger doctrine", along with various state claims that are not subject to this petition. The Defendants, both Ottawa County and Grand Valley State officers, filed motion(s) to dismiss on November 2, 2018. The crux of their argument turned on this case purportedly being a "failure to act" case. They relied on this Court's decision in *DeShaney* and later Sixth Circuit precedent applying a four-prong state-created-danger test to argue that Plaintiff did not plead "affirmative acts" committed by the Defendants that increased the danger Rosemarie Reilly faced from Jeremy Kelley.

The trial court issued an Opinion and Order dismissing Plaintiff's complaint in whole on September 21, 2020. App.30a. Regarding the dismissal of Plaintiff's state-created-danger theory, the trial court held that many of the relevant facts as pled were omissions and not affirmative acts. Specific to this petition, the trial court held that "Defendants' conversations with Jeremy, notifying him of the decedent's report and/or telling him he was not going to be arrested, are also insufficient to state a *DeShaney* claim." App.44a-45a. The trial court concluded that Plaintiff's complaint failed to plead a state created danger claim because the Defendants "affirmative acts . . . did not plausibly increase the preexisting danger to the decedent." App.45a.

C. Appellate Court Proceedings

Plaintiff timely filed an appeal with the Sixth Circuit Court of Appeals. While Plaintiff's appeal dealt with both a due process and *Monell* claim and pendent state claims, only the substantive due process claim

applies to this petition. After conducting oral argument, the Sixth Circuit issued an unpublished opinion affirming the district court's 12(b)(6) dismissal on September 2, 2021. App.1a. The Sixth Circuit began its analysis relying on *DeShaney* and how this decision formed the basis for the Sixth Circuit's distinct state-created danger doctrine. App.9a-11a. The Sixth Circuit conceded the following facts as pled: (1) the Defendant officers "provided reassurances to Jeremy that he would not be arrested despite two existing warrants"; (2) the Defendant officers "'acquiesced' to a request for leniency made by Jeremy's father"; and (3) "both the OCSD and GVSU officers mailed, rather than personally served, arrest warrants to Jeremy." App.13a. Noting that *DeShaney* "tacitly created a state-created danger component of the Fourteenth Amendment's Due Process Clause," the Court held that these allegations "fall short of stating a colorable state-created danger claim." App.14a.

Importantly, the Court cited Sixth Circuit precedent for the holding that a plaintiff must show that she was "safer before the state action than [s]he was after it." App.14a. As it pertains to Plaintiff's theory that the Defendants' collusion with Jeremy and Sean Kelley emboldened Jeremy, the Court held that "[t]hese assertions fall far short of alleging that the officers actually encouraged Jeremy to harm her by implying that he would be immune from prosecution should he do so." App.15a. In sum, the Court held that "[t]he facts as pleaded in the amended complaint simply fail to show, as they must, that defendants took any affirmative action that exposed Rosemarie to any danger to which she was not already exposed." App.15a.

REASONS FOR GRANTING THE PETITION

In 1989, this Court decided *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). *DeShaney* held that in certain limited circumstances, the United States Constitution imposes on the state affirmative duties of care and protection. 489 U.S. at 198. In *DeShaney*, a county agency was sued for violating a child's due process rights by failing to protect the child from his father's abuse. *Id.* at 193. The Court held that the agency was not liable because it did not create the danger that the child faced nor do anything to render the child more vulnerable to the danger. Justice Rehnquist went on to comment that "[the state] played no part in [the danger's] creation, nor did it do anything to render [the plaintiff] any more vulnerable to them. *Id.* at 201.

The above *dicta* mutated into what almost every circuit now recognizes as the "state-created danger" doctrine. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996); *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995); *Uhlrig v. Harder*, 64 F.3d 567, 572 n.7 (10th Cir. 1995). As will be discussed below, while the Circuits vary both in elements and application of this court-created test, this Court has not squarely addressed the issue since *DeShaney*. There are no elements or factors given by this Court in aiding the Federal Courts in determining whether state affirmative conduct rises to a level of a substantive due process violation. Rather, each Circuit has constructed, or not constructed, their own test, creating

a division and split in the Circuits, rendering this issue ripe for consideration by this Honorable Court. Further, this Court has not considered an "emboldened" due process claim where the plaintiff faced increase danger from a violent individual because police officers provided emboldening reassurances arising from collusion based on the individual's status that he will not be arrested despite ample probable cause to do so. While telling someone they will not be arrested falls on the low side of the egregious due process spectrum, when the purpose of this reassuring communication arises from collusion between the violent individual's father and the police because he, too, is a police officer, such improper acts rise to a level of a *DeShaney* due process violation. The Court should grant the Petition to reaffirm the existence of the state-created danger doctrine and its applicability to cases such as the one at bar where state actors colluded with a police officer to protect his own, which resulted in a violent, dangerous abuser believing he could act with impunity and escalating violence.

While the facts establishing collusion between the police and violent domestic abuser warrant consideration of this Petition, these facts are just a microcosm of a domestic violence epidemic in this Country. Though the due process clause of the United States Constitution is not the only vehicle to solve this epidemic, when governmental collusion and oppression increases the likelihood of domestic violence escalating into death, only the judiciary and Fourteenth Amendment can provide recourse. At the time of these events in 2016, Rosemarie was a 21-year-old college student. From 2016 to 2018, the number of intimate partner violence victimizations in the United States increased

by 42.7%.[3] An abuser's access to a firearm increases the risk of intimate partner femicide by 400%.[4] This sort of intimate partner crime is most common against women between the ages of 18-24.[5] Likewise, one in two female murder victims are killed by intimate partners, and 96% of murder-suicide victims are female.[6]

With these appalling statistics in mind, police collusion emboldening a violent, gun-possessing, domestic abuser flies in the face of liberty. It amounts to the worst kind of collusion and deprivation of Plaintiff's right to her life. Evidenced by these statistics, Rosemarie Reilly faced an uphill battle to survival just by her circumstances, which was multiplied by the Defendants' decisions to collude with the stalker's father. She chose to end an abusive relationship with a gun-wielding son of a police officer. She did everything right: obtaining a Personal Protection Order, pressing charges, and cooperating with the Defendants. Instead

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[3] Morgan, R.E., & Oudekerk, B.A., *Criminal victimization, 2018*. BUREAU OF JUSTICE STATISTICS (2019). Retrieved from https://bjs.ojp.gov/content/pub/pdf/cv18.pdf

[4] Campbell, J.C., et. al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, AMERICAN JOURNAL OF PUBLIC HEALTH, 93(7), 1089-1097 (2003); Morgan, *supra* n. 1.

[5] Morgan, *supra* n. 11.

[6] Ertl, A., et. al., *Surveillance for Violent Deaths—National Violent Death Reporting System, 32 States, 2016*. CENTERS FOR DISEASE CONTROL AND PREVENTION (2019). Retrieved from https://www.cdc.gov/mmwr/volumes/68/ss/ss6809a1.htm; *see also American Roulette: Murder-Suicide in the United States*, Violence Policy Center, Sixth Edition (June 2018). Retrieved from https://vpc.org/studies/amroul2018.pdf.

of leaving those odds at the status quo, the Defendant police officers here multiplied the chances that she would be a victim by their collusion with Jeremy Kelley's father. In the face of statistics showing that an abuser's access to firearms increases the risk of femicide five-fold, these Defendants emboldened Jeremy Kelley by telling him "we're not going to take your guns" and "we're not going to arrest you." They did this because they elected to protect their own and acquiesce to Sean Kelley's pleas for leniency.

This is just another reason why this Court should grant the Petition in order to reaffirm the existence of the state-created danger doctrine and its applicability where the State colluded with a police officer (Sean Kelley) to protect his own, which resulted in a known violent, abusive individual's belief of impunity. These police reassurances emboldened Jeremy to keep harassing Rosemarie, and as a result, her due process rights were violated. This Court's decision will not bring back Rosemarie, but it will allow justice against the colluding Defendants, and will make the United States safer for women against stalkers who would take their lives.

I. THE SIXTH CIRCUIT'S "STATE-CREATED DANGER" TEST UNDERMINES *DESHANEY'S* SUBSTANTIVE DUE PROCESS PRINCIPLES

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The due process clause has been interpreted as eliciting two distinct subparts: substantive due process and procedural due process. In the substantive context, "the Clause is phrased as a limitation on the State's power to act" and prevents "government from

'abusing [its] power, or employing it as an instrument of oppression." *DeShaney*, 489 U.S. at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). While the majority in *DeShaney* held that the facts established failures and omissions more than acts sufficient to warrant a due process deprivation, Justice Brennan, with Justice Marshall and Blackmun, dissented. This dissent illuminates the distinction between disabling oppression and omissions:

> My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.

DeShaney, 489 U.S. at 212.

The due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests", which includes "bodily integrity." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). As Justice Cardozo held, a substantive due process claim seeks whether the alleged conduct violates values "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). "Substantive due process . . . serves the goal of preventing governmental power from being used for purposes of oppression, regardless of the fairness

of the procedures used." *Pittman v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 640 F.3d 716, 728 (6th Cir. 2011) (quoting *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996)).

With these fundamental principles in mind, the Sixth Circuit's finding that Defendants' conduct did violate Rosemarie's substantive due process rights lacks legal support. Indeed, the Sixth Circuit applied its three-prong test requiring "(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff." *Estate of Romain v. City of Gross Pointe Farms*, 935 F.3d 485, 491-92 (6th Cir. 2019). The Court deemed the first element sufficient to warrant dismissal, and this is where the Sixth Circuit test conflicts with *DeShaney*.

DeShaney applied broad principles to a fact-intensive situation. While this Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," this holding arose because the conduct alleged were failures to act. Such failures are akin to negligence, which this Court has long held insufficient to warrant a substantive due process violation. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

Here, the facts establish that the Defendants undertook far more overt acts than merely failing to

arrest Jeremy Kelley or failing to enforce a PPO. The Defendants' conduct went a step further than the conduct referred to the dissent in *DeShaney*—the state shrugging its shoulders and turning away from harm it promised to prevent. By colluding with Sean Kelley, the Defendants abused their power as police officers to protect their own. Such unlawful conduct and violative of every duty the police have to citizens such as Rosemarie Reilly epitomizes "oppression". While the due process clause does not authorize protection from third-party violence, the State cannot interfere with a person's ability to protect oneself. Whether termed collusion or interference, protecting a violent abuser because his father is a police officer and sought lenience offends every sense of liberty. Selecting who to arrest and who to enable the criminal conduct of because of their familial relationship represents the worst kind of abuse of power resulting in oppression.

On appeal, the Defendants cited to *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748 (2005) for the argument that a failure to enforce a PPO does not give rise to a substantive due process right. But this case is distinguishable given the question answered by this Court turned on whether a PPO and state law creates a property right sufficient for a procedural due process deprivation. All *Town of Castle Rock* stands for is that a claim alleging the state failed to protect a woman from a violent third party does not rise to the level of due process when framed as a duty to enforce the PPO. Again, such acts would be akin to negligence per se, and just as the Fourteenth Amendment cannot be treated as a "font of tort law," failing to act without more does not rise to a due process deprivation.

No case that this Court has considered turns on whether overt collusion between the state and a third-party resulting in increased danger to an innocent party rises to a level of an abuse of power and an instrument of oppression. But that is exactly what occurred here. The Sixth Circuit got blinded by the allegations of omissions and failures and lost sight of how the collusion between the Defendants and Sean Kelley seriously undermined Rosemarie Reilly's bodily integrity. Abusing police power to protect thy own and provide favoritism to a fellow police officer's violent son does not just violate the concept of ordered liberty, it obliterates it. A police badge is not a secret handshake to a select group of people who reap the rewards of the badge. And in this case, the badge became an instrument of oppression that impeded Rosemarie Reilly's personal safety and integrity and left her extraordinarily vulnerable to a known, violent individual. Accordingly, the Sixth Circuit erred when it held that these facts did not satisfy either *DeShaney* or the general tenets of the substantive due process clause.

II. THERE IS A CIRCUIT SPLIT REGARDING AN "EMBOLDEN" DUE PROCESS THEORY OF LIABILITY

The Sixth Circuit recognized that Plaintiff's complaint included allegations that the officers "'emboldened Jeremy [Kelley] by leading him to believe that 'nothing was going to happen' to him . . . " App.15a. As pled, the Defendant officers communicated with Jeremy Kelley and informed him he would not be arrested, and this communication arose from Sean Kelley's pleas for leniency. Both the lower court and the Sixth Circuit conceded these facts must be construed in Plaintiff's favor. Indeed, the Defendants' regular communications

with Jeremy and his father, especially but not limited to after he continually violated the signed PPO, emboldened his belief that "nothing was going to happen" him, which in turn led to Rosemarie's death. App.73a. Likewise, the Defendant officers chose to protect Jeremy and acquiesced to Sean Kelley's pressure and plea for leniency to not arrest Jeremy on four (4) separate occasions when Jeremy violated the PPO. App.73a.

As stated above, a significant circuit split exists in applying the state-created danger doctrine. Legal scholars analyzing the doctrine, as far back as 2007, noted that "given the large volume of litigation in this area and the splits among the circuits" it seemed inevitable that the Supreme Court would have stepped in. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 26 (2007). Professor Chemerinsky indicated that "it is striking here that circuits really do have quite different tests." *Id*.

And while a split of authority exists regarding the precise elements under each circuit's respective state-created danger test, Plaintiff's "emboldened" theory represents a further split. The Sixth Circuit here did not refuse to acknowledge an emboldened theory but instead held that despite the facts pled indicating collusion between Defendants and Sean Kelley, "these assertions fall far short of alleging that the officers actually encourage Jeremy to harm her by implying that he would be immune from prosecution should he do so." App.15a. While the Sixth Circuit refused to recognize an "emboldened" theory, Plaintiff's claim would have survived in various other Circuits but likewise would have been dismissed in other circuits.

First, *Okin v. Village of Cornwall-On-Hudson Police Dept.*, 577 F.3d 415 (2d Cir. 2009) is exactly on point. In *Okin*, the female plaintiff was a victim of repeated physical abuse despite attempting to remedy her abuse by going to the police. *Id.* The plaintiff's state-created-danger claim arouse out of (1) the defendant officers endangering her by emboldening the perpetrator; (2) the defendant officers acting in concert with the abuser because he "had significant personal relationships with ranking members" of the police department; and (3) "defendants' dismissive and inappropriate behavior which was witnessed by [the abuser] affirmatively increased the danger she faced." *Id.* at 425-26. The Second Circuit held that the plaintiff had proffered the following evidence sufficient to defeat summary judgment:

> A reasonable factfinder, as Okin argues, could infer that defendants' actions, such as discussing football with Sears during their response to Okin's complaint that he had beaten and tried to choke her, "plainly transmitted the message that what he did was permissible and would not cause him problems with authorities." Moreover, the evidence suggests that the defendants repeatedly communicated to Sears that his violence would go unpunished, as when Sears told Williams that he could not "help it sometimes when he smacks Michele Okin around" and Williams made no arrest, and also, on the numerous occasions that defendants responded to Okin's complaints without filing a domestic incident report, interviewing Sears, or making an arrest. A reasonable view of the evidence sup-

> ports the inference that defendants' actions rise to the level of affirmative conduct that created or increased the risk of violence to the victim.

Okin. at 430.

In responding to various complaints, the officers' conduct was "viewed as ratcheting up the threat of danger to Okin." *Okin* at 430. Further, because the abuser was aware of the officers' dismissive attitude to her complaints, the victim was more vulnerable than before and the abuser's "awareness nullifies the deterrent capacity of police response." *Id*. In other words, the "implied message of the officers' conduct may have galvanized Sears to persist in violent encounters." *Id*.

Much like the Second Circuit, Plaintiff's claims would have survived a motion to dismiss in the Fourth Circuit, which held in the favor of an abused women against the defendant police officers based on the woman's previous complaints of domestic abuse and her eventual murder by her abuser. *See Robinson v. Lioi*, 536 Fed. Appx. 340 (4th Cir. 2013). The defendant officer, Lioi, argued on appeal that the plaintiff's claims amounted to the failure to properly execute an arrest warrant. *Id*. at 345. The Fourth Circuit deemed the following affirmative acts sufficient: "Lioi is alleged to have conspired with [the abuser] to evade capture and remain free despite the finding of probable cause," and "actively interfered with the execution of the warrant by not only failing to turn the warrant over to the proper unit . . . responsible for its execution, but also by warning [the abuser] and giving him advice about how to avoid service of the warrant." *Id*. at 344.

Notably, the defendant in *Robinson* attempted to analyze the facts with this Court's decision in *Castle Rock*. But the Fourth Circuit distinguished *Castle Rock* because "Lioi's alleged conduct in this case was not confined to a failure to execute the arrest warrant. Lioi affirmatively acted to interfere with execution of the warrant by conspiring with Cleaven Williams to evade capture and remain at large. Whereas *Castle Rock* is, fundamentally, a case about inaction, Plaintiffs in the instant case have alleged affirmative misconduct on Lioi's part such that his actions 'directly caus[ed] harm to the injured party.'" *Id.* at 345. After the benefit of discovery, the Fourth Circuit then deemed the proven facts as insufficient to state a *DeShaney* claim because "discovery did not strengthen her earlier allegations that BCPD officers actively conspired to help Williams avoid arrest by interfering with the execution of his arrest warrant." *Graves v. Lioi*, 930 F.3d 307 (4th Cir. 2019). While *Robinson* supports Plaintiff's ability to defeat a motion to dismiss, it also indicates the importance between viewing this type of case on the pleadings or after the benefit of discovery.

Plaintiff's claims would also have survived in the Ninth Circuit pursuant to *Kennedy v. Ridgefield,* 439 F.3d 1055 (9th Cir. 2006) and *Martinez v. City of Clovis*, 943 F.3d 1260 (9th Cir. 2019). In *Kennedy*, the plaintiff offered evidence that a police officer placed her in a position of danger by notifying a neighbor that she had reported that the neighbor molested her nine-year-old daughter. 439 F.3d at 1057–58. The officer assured the plaintiff that he would notify her prior to contacting the neighbor's family about her allegations. *Id.* at 1058. Instead, the police officer informed the neighbor of the plaintiff's allegations without first notifying her.

Id. The following morning, the neighbor shot the plaintiff and her husband while they slept. *Id*. The *Kennedy* Court relied on *DeShaney* to hold that the plaintiff established a state-created danger because the state actor exposed the plaintiff to a danger which she otherwise would not have faced. *Id*. at 1062–63.

In *Martinez*, the domestic abuser also worked for the same police department where officers were dispatched from regarding the plaintiff's report of domestic abuse. 943 F.3d at 1267. After a second report of abuse, officers again came out and did not arrest the abuser, in part because the abuser's father and the supervisor at the scene "had known each other for at least 25 years" and the supervisor, Sanders, stated that the abuser's family were "'good people.'" *Id*. at 1269. After this second report, the female plaintiff was again beaten and sexually assaulted. *Id*.

Regarding Officer Hershberger's liability, the Ninth Circuit noted that he "told Pennington [the abuser] about Martinez's testimony relating to his prior abuse, and also stated that Martinez was not 'the right girl' for him." *Martinez* at 1272. The Court deemed this sufficient under *DeShaney* because "[a] reasonable jury could find that Hershberger's disclosure provoked Pennington, and that her disparaging comments emboldened Pennington to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity." *Id*. Likewise, the Court found that Sergeant Sanders' affirmatively "spoke positively about the Penningtons against the backdrop that everyone involved, including Sanders, knew that Pennington and his father were police officers. While hearing Sanders speak positively about the Penning-

tons, Martinez also 'heard Sanders telling [Yambupah] that, you know, 'We're not going to arrest him. We're just going to turn it over to Clovis PD,' whatever.'" *Id*. at 1273. Regarding Sanders' liability, the Court held that "[a] reasonable jury could find that Pennington felt emboldened to continue his abuse with impunity. In fact, the following day, Pennington abused Martinez yet again. Under these circumstances, the first requirement of the state-created danger doctrine is satisfied." *Id*. While the Ninth Circuit deemed the law not clearly established and applied qualified immunity, it set forth a state-created danger theory where an officer emboldens an abuser when the officer acts in a manner that implicitly "communicates to the abuser that the abuser may continue abusing the victim with impunity." *Id*. at 1277.

And finally, Plaintiff's claims would have survived 12(b)(6) in the First Circuit pursuant to *Irish v. Fowler*, 979 F.3d 65 (1st Cir. 2020). In *Irish*, a female victim reported a former lover (Anthony Lord) had raped her and threatened to "cut her from ear to ear." *Id*. at 68. The police attempted to call Lord to speak with him, and when he did not answer, left a voicemail identifying himself as a police officer and asking Lord to call him. *Id*. at 69. An hour and forty-five minutes later, the female victim called the police and informed them that Lord had set her parents home on fire. *Id.* Later than night, Lord ultimately shot and killed the plaintiff and her family. *Id*. In applying *DeShaney*, the First Circuit held that "the claim is not that the defendant should not have contacted Lord at all, but that the manner in which the officers did so—despite having been warned about Lord's threats of violence and their own acknowledge-

ment that contacting him would increase the risks to Irish and her family—was wrongful." *Id*. at 75.

While Plaintiff's claims would have survived dismissal in the First, Second, Fourth and Ninth Circuit, the same is not true as to other circuits. In *Bright v. Westmoreland County*, 443 F.3d 276 (3rd Cir. 2006), a convicted felon was on probation for "corrupting the morals" of a 12-year old girl. *Id*. at 278. As part of his probation, the felon could not contact his victim or any other minor. *Id*. Yet he continually violated his parole by trying to restart his relationship with his victim, and later murdered her sister as retaliation for the victim's family efforts to keep the original victim away from him. *Id*. at 279. The family sued the probation officer asserting a state-created danger violation.

The Third Circuit noted that the complaint "alleges in conclusory fashion that it was both Officer Whalen's 'confrontation with Koschalk' and the 'inexplicable delay' that 'emboldened' Koschalk." *Bright* at 285. Citing *DeShaney*, the Court held that "only affirmative exercise of state authority alleged in this case—the so-called 'confrontation'—'placed [the Brights] in no worse position than that in which [they] would have been had [the state] not acted at all.'" *Id*.

Much like the Third Circuit, Plaintiff's claims would fail in the Seventh Circuit pursuant to *Wilson-Trattner v. Campbell*, 863 F.3d 589 (7th Cir. 2017). There, the plaintiff was in an abusive relationship with Hancock County, Indiana police officer Scott Roeger. *Id*. at 591. On four occasions, police officers were called to respond to incidents between the plaintiff and Roeger. But the Hancock County Sheriff's Department, which had issued verbal reprimands and counseling

following the events and had generated investigative reports on a few of the occasions, declined to discipline or arrest Roeger until after the last, most severe incident. *Id*. at 592-93.

On appeal, the plaintiff argued that "her claim implicates a state-created danger because the appellees 'conveyed the unmistakable message' to Roeger that they would not interfere with his on-going abuse, thereby emboldening him to reoffend." *Wilson-Trattner* at 593. The plaintiff likewise argued that the officers' "dismissive and indifferent attitudes to each of the incidents above endangered her by progressively emboldening Roeger." *Id*. at 594. Yet the Seventh Circuit held that *DeShaney* and *Town of Castle Rock* foreclosed this type of emboldened theory. *Id*. at 594-595. The Seventh Circuit distinguished *Wilson-Trattner* from *Okin* because "the police expressed solidarity with the victim's assailant . . . " and "took no action in the face of obvious and repeated violence." *Id*. at 595. The Court concluded that the plaintiff's "theory that Hancock County officers increased a danger to her by implicitly condoning violence against her is both questionable in light of *DeShaney* and *Castle Rock* and unsupported by the facts." *Id*. at 596.

One important distinction between all these cases arises in the procedural posture. Most if not all the other decisions cited above reviewed the evidence under Rule 56 on summary judgment and not the pleadings. Indeed, *Lioi* speaks to this difference, as the Fourth Circuit originally denied 12(b)(6) based on the nature of the complaint but then affirmed summary judgement being granted given the Plaintiff's inability to prove the facts as pled. *Cf.*, *Robinson*

v. Lioi, 536 Fed. Appx. 340; *Graves v. Lioi*, 930 F.3d 307 (4th Cir. 2019).

Here, the Sixth Circuit held that "[t]he facts as pleaded . . . simply fail to show, as they must, that defendants took any affirmative action that exposed Rosemarie to any danger to which she was not already exposed." App.15a. Implicit in this reasoning is the conclusion that merely because Rosemarie faced danger before the Defendants assured Jeremy he would not be arrested, she must specifically plead facts that established she faced more danger from Defendants' collusion. Yet this patently disregards this Court's long-standing principle that a complaint must only allege facts to state a claim that is "plausible on its face," meaning "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

There is a plausible inference, "or at least not implausible", that telling Jeremy he was not going to be arrested despite the existence of probable cause to do so—which occurred weeks and/or days before his murder of Rosemarie Reilly—and choosing to collude with Jeremy's father's pleas for leniency while telling Jeremy about the same, increased Rosemarie's risk of this type of harm from Jeremy Kelly. Defendants' repeated communications with Jeremy and his father (affirmative acts the trial court and Sixth Circuit admitted) gave Jeremy a belief of unfettered impunity. This conduct undeniably gave Jeremy a false sense of security and lawfulness in harassing Rosemarie, which rendered Rosemarie much more vulnerable to a police-induced and enraged Jeremy. The final reasonable inferential

leap is that the mailing of the arrest warrants days before the murder, when viewed alongside Defendants' repeated communications with Jeremy and his father, triggered Jeremy's homicidal conduct and severely increased Rosemarie's risk.

Because this is at least "plausible", the trial court and Sixth Circuit erred in dismissing Plaintiff's state-created danger claim against the OCSD and GVSU Defendants. The Sixth Circuit improperly construed the facts to determine that Rosemarie faced just as much violence before Defendants' admitted collusion than after. Such an inference lacks merit given the facts must be construed in the light most favorable to the Plaintiff. The Ninth Circuit's discussion in *Martinez* on this exact issue dictates the Sixth Circuit's error. *Martinez* held that "[w]hether the danger already existed is not dispositive because, 'by its very nature, the doctrine only applies in situations in which the plaintiff was directly harmed by a third party—a danger that, in every case, could be said to have 'already existed.'" 943 F.3d at 1271 (citing *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012)).

This is not a case of Defendants' being liable for failing to arrest or failing to enforce a PPO as Defendants erroneously convinced the trial court. Collusion between the police and the abuser that emboldens and condones abuse, which is followed by escalating violence, far exceeds the type of omission and failures present in *DeShaney* and *Castle Rock*. This case represents a series of impermissible communications and acts leading to Jeremy Kelley's belief he was outside the reach of the law, culminating in the tragic murder of Rosemarie Reilly. And this abuse of police power

represents affirmative conduct sufficient to plead a *DeShaney* claim.

While a circuit split has long existed regarding the specific test for a *DeShaney* due process claim, the split of authority became augmented when viewing *DeShaney* under the purview of a police-abuser collusion set of facts. Many of these cases involve serious police failures, but that principle clearly does not meet *DeShaney* given those failures are akin to negligence. Yet this Court has never addressed *DeShaney* in the context of affirmative collusion between police and a domestic abuser. Indeed, *DeShaney* can be read to hold that improper collusion does violate the due process clause because it epitomizes government abuse and the police acting as an "instrument of oppression." 489 U.S. at 196.

As to Plaintiff's emboldened theory, the divisive split in authority regarding what sort of collusion and affirmative police assurances violates an individual's substantive due process rights warrants this Court's review. An "emboldened" theory stemming from *DeShaney* has been recognized in the First, Second, Fourth and Ninth Circuits. Yet the same type of facts and *DeShaney* theory would be dismissed in the Sixth, Third and Seventh Circuits. This case does not represent just another challenge to various lower court's application of *DeShaney*, most of which this Court has denied certiorari. When the government uses its police power to protect its own and provide safety to violent individuals merely because familial police relationships, that sort of government interference represents disorganized liberty and formulaic oppression. A citizen of the United States may not have a constitutional right to adequate police protection, but she

does have the right to not have her safety and bodily integrity stampeded over because her abuser's father called in a favor resulting in police collusion. The Constitution might not require police officers to timely arrest a violent criminal, but its limits are reached when the police inform the violent criminal that he will not arrested because his father is a police officer resulting in a sense of impunity and increasing violent behavior.

CONCLUSION

Defendants violated Plaintiff's right to bodily integrity as protected by the state-created danger theory regardless of how the contours of the right are framed. Collusion between the police and violent abusers, to the extent they are told "you will not be arrested" because his police officer father sought leniency vitiates the concept of ordered liberty and turns the badge into an instrument of oppression. This sort of "protect thy own" mentality represents the worst of kind of government interference and the oppression of fundamental rights.

Regardless of the emerging contours of the state-created danger theory and the divisive split in authority both regarding what test to apply from *DeShaney* and whether to recognize and "emboldened" theory, no reasonable officer could have believed that telling a violent abuser who repeatedly has violated a PPO he will not be arrested because his father sought leniency would not give rise to a violation of the right to bodily integrity. Considering this Court's statements in *De-*

Shaney and the prevailing law across the nation, Plaintiff has sufficiently stated a due process violation and must be permitted to conduct discovery on this issue.

For these reasons, the Petitioner respectfully requests that this Honorable Court grant its Petition for Certiorari.

Respectfully submitted,

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