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June 2, 2023

Honorable Scott. S. Harris
Clerk
Supreme Court of the United States
Washington D.C., 20543

Re: Application for Certificate of Appealability to Remedy Prior Restraint of Speech
Regina T. Drexler v. Theresa Spahn, et. al., No. 22-A-999

Dear Mr. Harris,

On May 15, 2023, Regina T. Drexler sought a certificate of appealability to challenge the denial of her writ of habeas corpus arising from a prior restraint on speech and severe restraints on her freedom of movement imposed under Colo. Rev. Stat. § 18-3-602(1)(c).[1]

The Honorable Neil Gorsuch, Circuit Justice for the United States Court of Appeals for the Tenth Circuit, denied the application on May 18, 2023.

Pursuant to Supreme Court Rule 22.4, Ms. Drexler hereby renews her application to The Honorable John G. Roberts, Jr., Chief Justice of the United States Supreme Court. There is no deadline for an application for a certificate of appealability under § 2253(c)(1); the

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[1] Colo. Rev. Stat. § 18-3-602(1)(c) is the same statute on which the Court recently heard oral argument in *Counterman v. Colorado*, No. 22-138. Although during oral argument, Colorado's Attorney General assured that § 18-3-602(1)(c) permits sanction only for "true threats" (Arg. Tr. at 59-60, 66-67, 70), the statute's plain language is substantially broader, allowing sanction for non-threatening speech, including "communications" causing "serious emotional distress"; the statute permits the imposition of serious criminal and civil sanctions for the exercise of protected speech, including, as here, the sanctioning of non-threatening *literary essays* published in academic literary journals and not directed to any particular person. Significantly, the statute has never been interpreted to limit its application to true threats.

[2] The state court cited other activities in support of its "pattern" finding under § 18-3-602(1)(c), but all of the other cited activities were also protected First Amendment activities and none included anything approaching a true threat (nor involved communication directed to the complainant); in this regard, the state court also cited a 2012 public literary reading at a talent show, as well as two offers to mediate that Ms. Drexler communicated to third parties officials (in response to the officials' requests that she mediate with the complainant).

application was also filed by the deadline for certiorari petition, as extended by Justice Gorsuch. A grant of a certificate of appealability is not restricted by law to Circuit Justice Gorsuch, and the denial was without prejudice. Accordingly, as provided by Rule 22.4, please direct this letter and the attached renewed application to the Chief Justice.

I. Custody Is Imposed on Ms. Drexler Under § 2254 by the Prior Restraint of Her Future Literary Speech and Compelled Physical Movement.

As detailed in the attached application, Ms. Drexler was punished by the Colorado state court under § 18-3-602(1)(c) for writing and publishing two literary essays that were published in academic literary journals and received Best American Essays Notable Essay Awards. Neither contained any speech that is proscribable under the First Amendment. Nor was there any contention that the speech at issue was false or directed to any specific person**.** Nevertheless, under § 18-3-602(1)(c), the Colorado state court punished the literary essays as "communications" causing "serious emotional distress" under § 18-3-602(1)(c) because they included "confidences" that were purportedly "embarrassing" to one of the persons referenced.

Not only was Ms. Drexler explicitly punished for writing and publishing the non-threatening literary essays, the state court issued orders that it expressly intended to act as a prior restraint preventing her from writing any future essays, in order to permanently protect against any similar future embarrassment of the complainant. Thus, the permanent orders prohibit Ms. Drexler from engaging in future literary speech "about" or even purportedly "about" the complainant or such "confidences." Based on the application of § 18-3-602(1)(c), which permits punishment of clearly protected speech, Ms. Drexler has been subjected to this permanent restraint for eight (8) years. Thus, she is explicitly and permanently restrained from writing and publishing literary essays because of their content. In issuing the orders, the issuing court not only expressly punished Ms. Drexler for writing and publishing the essays, it explicitly characterized the essays as qualifying under § 18-3-602(1)(c) as "stalking" (and "following"), as well as "a pattern of abuse," "harassment" "contact," "intimidation," "manipulation," and "retaliation" (all undefined under the statute), and simultaneously entered orders explicitly restraining the same conduct by the identical terms:

The Court Orders that you, **the Restrained Person,** shall not contact, harass, stalk, injure, intimidate, threaten, touch, sexually assult, abuse, or molest the Protected Persons named in this action, or harm, take, transfer, conceal, or dispose of or threaten harm to an animal owned, possessed, leased, kept or held by any protected party, a minor child of any other party, or otherwise violate this Order. You shall not use, attempt to use, or threaten to use physical force against the Protected Persons that would reasonably be expected to cause bodily injury. You shall not engage in any conduct that would place the Protected Persons in reasonable fear of bodily injury.

In the permanent orders, the state court also repeatedly referenced Ms. Drexler's literary essays in justifying imposition of the orders, including e.g., her (i) "painful publication * * * of the essays," and (ii) the fact that she "authored *** a nonfiction piece."[2]

In making clear that it intended to impose a prior restraint of future literary speech by imposition of the permanent orders, and after Ms. Drexler repeatedly objected to being punished and restrained for writing and publishing literary essays, the issuing court stated,

> "I am not interested in the validity of the First Amendment claims";

and thereafter stated:

> I'm also a bit concerned about *this fine line between free speech and harassment/stalking* *** but when I hear Ms. Drexler talk about her concerns and how important freedom of speech is for her and that this protection order is restraining her freedom of speech, that's a little concerning to me because...if the only subject matter that this protection order restrains Drexler from writing about is *about RB,* my concern is that *if I lift the protection order, that we're going to be crossing that line right back into harassment/stalking*." (emphasis added).

This intrusion on Ms. Drexler's First Amendment liberties stands in a class of its own and is constitutionally intolerable. It is certainly worthy of an appeal of the federal district court's summary denial of habeas relief based on its finding that "custody" was not thereby imposed under 28 U.S.C. § 2253.

The permanent state court orders—imposed to punish Ms. Drexler's protected literary speech—also impose severe restraints on her physical movements, including compelling Ms. Drexler's future movements at the risk of criminal sanction for disobedience, which most circuits have recognized imposes sufficiently severe restraint to meet the "custody" requirement of § 2254.[3]

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[2] The state court cited other activities in support of its "pattern" finding under § 18-3-602(1)(c), but all of the other cited activities were also protected First Amendment activities and none included anything approaching a true threat (nor involved communication directed to the complainant); in this regard, the state court also cited a 2012 public literary reading at a talent show, as well as two offers to mediate that Ms. Drexler communicated to third parties officials (in response to the officials' requests that she mediate with the complainant).

[3] These permanent orders also caused an "automatic" imposition of a firearm ban on Ms. Drexler under The Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(g)(8) (prohibiting subjects of civil protection orders from purchasing or possessing firearms), and also now subject her to new "red flag" firearm confiscation and search warrants under Colo. Rev. Stat. §§ 13-14.5-103, 13-14.5-104

II. The Lower Federal Courts Denied Ms. Drexler the Right to Appeal Based on Misunderstanding the Explicit Terms of the Permanent Orders and Disregarding the Express Intent of the Issuing Court to Permanently Restrain Ms. Drexler's Future Literary Speech.

Notwithstanding these severe intrusions on her liberty, Ms. Drexler was denied a certificate of appealability to appeal the federal district court's summary dismissal of her habeas petition. The federal court dismissed her petition based solely on its determination that it was not "reasonably debatable" that she was in "custody." It making this finding, the federal district court did not consider the principal basis alleged to support "custody"—the prior restraint of her future speech. Instead, it erroneously found that the permanent orders included only "distance" and "contact" restrictions—which is a clearly erroneous finding contradicted by the plain terms of the orders themselves. The federal court also dismissed Ms. Drexler's habeas challenge to the order's severe physical restraints arising from compelled physical movements.

Thereafter, despite explicitly recognizing that Ms. Drexler's protected speech provided the "reasoning" behind the state court's imposition of the permanent orders, the Tenth Circuit found that it was not "reasonably debatable" that she was in "custody" because the prior restraint of "speech" was not explicit within the four corners of the permanent orders "themselves."

Thus, the Tenth Circuit ignored that punishment of protected speech—here, repeated punishment by the state court—it itself sufficient to support prior restraint. *See Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right."); *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972) (where speech is punished, "persons whose expression is constitutionally protected may well refrain from exercising their rights" to engage in future speech); *Alexander* v. *United States*, 509 U.S. 544, 550 (1993) (injunctions "forbid[ding] speech activities," are a "classic" form of prior restraint); *Tory* v. *Cochran*, 544 U.S. 734, 738 (2005) (such restraints are "the most serious and the least tolerable infringement on First Amendment rights") (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967) ("[T]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [writers and speakers] what is being proscribed."). *See also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (prior restraint is imposed where state action is intended to chill protected speech and the chilling effect is

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(permitting any "community member," "law enforcement official" or "law enforcement agency" to petition for expedited firearm confiscation and search warrants to enforce the same).

based on "an objectively justified fear of real consequences"); *NAACP* v. *Claiborne Hardware Co.*, 486 U.S. 886, 893 (1982) ("Speech does not lose its protected character *** simply because it may embarrass others."); *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (speech does not lose its protected status merely because it is about a private person).

The Tenth Circuit also supported its denial of a certificate of appealability based on a purported "clarification" of the permanent orders made—years later—by a collateral state court, which suggested the orders did not explicitly restrain future speech because they were directed at preventing "abuse," "manipulation," and "intimidation." But that ruling was clearly erroneous for several reasons. First, the issuing court made clear that these terms included Ms. Drexler's protected expression, because those were the same terms it used to explicitly and repeatedly punish her for writing the literary essays.

Second, the Tenth Circuit was required to conduct its own de novo review, not act in reliance on a belated collateral order of a different state court. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 505 (1984) ("[T]he Court *** conduct[s] an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits").

Third, under Colorado law, only the issuing court has jurisdiction to "clarify" its orders, and any such "clarification" must accord with the actual issuing court's intent based on a review of the record and its findings of fact. *People* v. *Kriho*, 996 P.2d 158 176 (Colo. App. 1999) (under Colorado law, a remand to the trial court was required to clarify an ambiguous order); *McElvaney* v. *Batley,* 824 P.2d 73 (Colo. App. 1991) (subsequent "clarification" of an order by another collateral court was ineffective); *Commerce City Drug* v. *State Board of Pharmacy*, 511 P.2d 935, 937 (Colo. App. 1973) (where order "taken as a whole is ambiguous *** action must be remanded *** for clarification"); *see also* 46 Am. Jur. 2d Judgments § 65 ("Trial courts have the inherent authority to interpret and clarify their judgments for the purpose of removing any ambiguity") and *United States* v. *DAS Corp.*, 18 F.4th 1032, 1041 (9th Cir. 2021) (any later "clarification" is obliged to "give effect to the intention of the issuing court, considering the entire record" and "findings of fact"). Here, the issuing court's intention was clear, not only in punishing Ms. Drexler's speech by the same terms it then imposed as explicit restraints, but also by its record statements which made this intention explicit.

The Tenth Circuit also erred in ruling that it was not "reasonably debatable" that the substantial physical restraints imposed on Ms. Drexler supported "custody"— also because the compelled physical movements were not explicitly contained within the four corners of orders under review—and because such restraints were akin to restraints imposed by "sex offender" registration requirements.

However, most circuits have found that when a petitioner's physical movements may be compelled by government officials at the risk of criminal sanction for disobedience, a

petitioner is in custody under § 2254, and this is even true even where they are "ostensibly free to come and go as they please." *Dry* v. *CFR Ct. of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1208 (10th Cir. 1999); *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist*., 411 U.S. 345, 351 (1973) (custody is met where petitioner may be compelled to appear at certain times and places, he "cannot come and go as he pleases," and where "disobedience" "is itself a criminal offense"). "[I]n the end, an individual who is required to be in a certain place *** is clearly subject to restraints on his liberty not shared by the public generally." *Williamson* v. *Gregoire*, 151 F.3d 1157, 1183 (9th Cir. 1998) (quotations omitted).

Also, the circuits are split as to whether the physical restraints imposed by "sex offender" registration are sufficient to support custody. *See* e.g., *Piasecki* v. *Court of Common Pleas, Bucks Cnty., PA*, 917 F.3d 161, 170-171 (3d Cir. 2019) (holding that Pennsylvania's sex-offender requirements rendered petitioner "in custody" because they compelled petitioner's movements"). Thus, even according to the Tenth Circuit's own reasoning, it is clearly "reasonably debatable" among jurists that the physical restraints imposed on Ms. Drexler are sufficient to support "custody" under § 2254.

III. Application for Certificate of Appealability Requires a Merits Ruling.

Here, Circuit Justice Gorsuch made no substantive ruling on the merits of the application for a certificate of appealability as required under § 2253(c)(1) (nor does it appear from the docket that he even demarked the denial on the application as required by Rule 22.4). A substantive ruling is required on the merits of the application under § 2253(c)(1), which provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals..." *See* B. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. App. Prac. & Process 177, 182-184, 186 (2003) ("The obligation to consider an application for a certificate of appealability is mandatory and not discretionary. A Circuit Justice cannot deny the certificate without "meaningfully engaging in the legal analysis required by Section 2253"; "A COA is not an 'extraordinary' writ or any other type of extraordinary remedy or process that the Court possesses complete discretion to grant or deny irrespective of the merits of the application. When Congress bestows jurisdiction in a federal court, as it has on the Supreme Court (or at least on a single Circuit Justice) in 28 U.S.C. § 2253, it is well established that there is a 'strict duty' and 'virtually unflagging obligation to exercise the jurisdiction given...There appears to be no principled basis for the exercise of a certiorari-type discretion"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), citing, *inter alia, Cohens* v. *Virginia*, 19 U.S. 264 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not").

Given the explicit grant of jurisdiction under section 2253(c)(1), an application for a certificate of appealability must be considered on the merits by a circuit justice; relief is not discretionary. 5 J. App. Prac. & Process at 186-187 (an applicant "need not demonstrate anything "'extraordinary' or 'exceptional' about his case."). Importantly, too, "[n]o court has

ever suggested that, under 28 U.S.C. § 2253[,] *** a habeas petitioner only may seek a COA from either a circuit judge or a circuit justice *** but not both sequentially. The plain language of the statute and rule would not support such an interpretation." *Id*. at 185. Of course, in response to an application or certiorari petition, the Court separately "possesses discretionary jurisdiction to grant certiorari and reverse a Court of Appeals decision denying a COA." *Id.* at 184 n. 38 (citing *Hohn* v. *United States*, 524 U.S. 236, 253 (1998) and *Lozado* v. *Deeds*, 498 U.S. 430 (1991)). For these reasons, Ms. Drexler requests, as set forth in the renewed application, that a merits determination be made thereon.

IV. The Minimal Showing Required for Certificate of Appealability Is Amply Met and the Application is Properly Granted After Merits Review.

Ms. Drexler requests no more than the opportunity to appeal the federal district court's summary dismissal of her habeas petition. She has amply met the minimal showing required to obtain a certificate of appealability to support her right to do so.

A certificate must issue whenever there is a "showing that reasonable jurists could debate (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). This standard "does not require a showing that the appeal will succeed," and an application should not be declined "merely because [a court] believes a petitioner will not demonstrate an entitlement to relief." *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003) (A petitioner seeking a COA "must prove 'something more than the absence of frivolity' or the existence of mere good faith on his or her part..."We do not require petitioner to prove, before the issuance of a [certificate of appealability], that some jurists would grant the petition for habeas corpus.") (citations omitted).

As set forth above and in detail in the attached renewed application, Ms. Drexler is in "custody" under § 2254 as a result of the restraint on her future literary speech—as was explicitly imposed and intended by the Colorado state court based on § 18-3-602(1)(c)—and as a result of government-compelled physical movements, for which there is a risk of criminal sanction for disobedience.

Habeas relief provides the only remaining legal remedy available to Ms. Drexler to restore her right to free expression and allow her to resume her prior successful writing career. Importantly too, given that the Tenth Circuit deemed that the "reasoning" for the state court's imposition of the permanent orders was Ms. Drexler's literary speech, she otherwise would be entitled to habeas relief given that the First Amendment infringement of Ms. Drexler's rights is contrary to and involves an unreasonable application of this Court's clearly established First Amendment precedent. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (under § 2254, habeas relief is properly granted "if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application

of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication") (quotations omitted). A ruling on the merits of Ms. Drexler's application provides a clear opportunity for the Chief Justice and/or the Court to make the point—even more explicitly than it already has—that sanction of protected speech by the government itself causes speech to be chilled and effectively acts as a prior restraint thereof.

As set forth above and in the attached application, it is more than "reasonably debatable" among jurists of reason that the severe restraints imposed on Ms. Drexler by the Colorado state court based on § 18-3-602(1)(c) are sufficiently severe restraints on liberty to support "custody" under § 2254. Ms. Drexler thus respectfully requests that the Honorable Chief Justice review her application and grant a certificate of appealability.

Respectfully submitted,

J. Carl Cecere

cc: See Attached Service List

No. _____

In the Supreme Court of the United States

REGINA T. DREXLER,

Applicant,

v.

HONORABLE THERESA SPAHN, in her official capacity; HONORABLE CHELSEA MALONE, in her official capacity; DENVER COUNTY COURT, CITY AND COUNTY OF DENVER; PHILLIP WEISER, ATTORNEY GENERAL, in his official capacity for the state of Colorado,

Respondents.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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To the Honorable Neil Gorsuch, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

INTRODUCTION

Permanent civil protection orders exist in a perpetually uneasy balance with constitutional liberties. Virtually all of the more than one million permanent orders issued every year include some form of contact and distance restrictions that interfere with subjects' freedom of movement.[1] Such orders typically also include permanent restrictions curtailing the possession and purchase of firearms and may also serve as predicates for "red flag" orders that permit firearm confiscation, imposing substantial intrusions on Second Amendment rights.[2]

The very expediency which makes protection orders readily available often prevents courts from making a full and frank assessment of the constitutional problems they may create in specific cases. Such protection orders usually result from expedited proceedings where the due process protections afforded most other civil and criminal litigants are curtailed. And such proceedings are "conducted within a structure that pressures judges to

[1] *See* Nat'l Ctr. for State Courts, *Restraining Orders Issued and in Effect in the U.S.* (2008), https://www.acrosswalls.org/statistics/restraining-orders/ (estimating that courts issue between 1.2 and 1.7 permanent civil protection orders annually).

[2] *See* The Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(g)(8) (prohibiting subjects of civil protection orders from purchasing or possessing firearms). Colorado law permits firearm bans upon issuance of a civil protection orders even more broadly than permitted under the Brady Act, *see, e.g.*, Colo. Rev. Stat. § 13-14-105.5; *see also* Colo. Rev. Stat. §§ 13-14.5-103, 13-14.5-104 (permitting a "community member," "law enforcement official" or "law enforcement agency" to petition for expedited firearm confiscation and warrants for civil protective orders based on stalking under Colo. Rev. Stat. § 18-3-602 (the same statute at issue in *Counterman* v. *Colorado*, No. 22-138).

issue injunctions and lowers the safeguards we ordinarily rely upon to prevent constitutional error."[3]

The very potency and stigmatizing effect of these orders also makes them subject to a high risk of abuse, as some litigants seek them to obtain "tactical advantage" and for litigation "gamesmanship."[4] This is particularly troubling given that these orders are *permanent*—thus subjecting respondents to impositions on their liberty *for the rest of their lives*. For that reason, critics have long warned that civil protection orders may violate constitutional protections even under the best of circumstances, imposing impermissible restrictions on individual liberties protected by the Constitution.[5]

Yet while some protection orders present constitutional risks, the permanent orders imposed on Applicant Regina Drexler stand in a class of their own in their intrusion on constitutionally protected liberty interests. These orders—which were issued by a county court with a limited background in adjudicating First Amendment questions— expressly and repeatedly punished her for past works of literary expression and imposed explicit restrictions restraining her from producing future literary works. They did so even though no one contends that Ms. Drexler's past literary works included any content that was false

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[3] A. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781, 845 (2013).

[4] *See* David H. Taylor, *et al.*, *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 Kan. J.L. & Pub. Pol'y 83, 86-87 & n.15 (2008).

[5] *See* E. Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1049 (2000); E. Volokh, *One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws and Cyberstalking*, 107 N.W. U. L. Rev. 731 (2013) (each calling for a uniform standard for First Amendment protections in protection order context).

or obscene, contained fighting words or threats, or otherwise constituted unlawful or unprotected speech. The orders nevertheless plainly prevent her from engaging in speech protected by the First Amendment. The extent of this intrusion on liberty is extraordinary, and it is compounded by certain vague and ambiguous terms in the orders. And this infringement on Ms. Drexler's constitutionally protected right of expression has persisted *for nearly eight years*.

The permanent orders also subject Ms. Drexler to other restraints on her freedom of movement. In particular, the orders require her to be placed on state and federal criminal history databases. *See* Colo. Rev. Stat. § 18-6-803.7 and 28 U.S.C. § 534. This has subjected her to a far greater level of government control, including compelled movement, detention, sequestering, and questioning, than imposed on the general population. The orders also include expansive and indiscriminate location, distance, and contact restrictions to which the general population is also not subject.

Yet both the district court and the court of appeals refused to grant Ms. Drexler a federal forum to challenge these restraints on her liberty—and they did so simply by refusing to recognize that these restrictions exist. But the plain terms of the orders and the issuing court's express intent to restrain her liberty cannot be denied. Ms. Drexler is entitled to challenge these restraints by habeas petition under 28 U.S.C. § 2254(a). And at the very least, the question of her custody is "reasonably debatable." A certificate of appealability should therefore be granted under 28 U.S.C. § 2253(c)(1) to permit appellate review of the federal district court's dismissal of her habeas petition.

JURISDICTION

The Circuit Justice has jurisdiction to consider this application for a certificate of appealability under 28 U.S.C. § 2253(c)(1). This application is timely because § 2253(c)(1) imposes no deadline to request a certificate of appealability from the Circuit Justice and the application is filed within the deadline to file a petition for writ of certiorari, which was extended by an order from the Circuit Justice to and including May 13, 2023. Because that date fell on a Saturday, Ms. Drexler has until Monday, May 15, 2023 to file this application.

STATEMENT

This case poses an important question under 28 U.S.C. § 2254: Whether Ms. Drexler is "in custody pursuant to the judgment of a state court" under § 2254(a) where she is (i) permanently deprived of her First Amendment right to freedom of expression pursuant to state-issued permanent civil protection orders; and (ii) her freedom of physical movement is permanently restrained by inclusion in state and federal criminal history databases, as well as by the expansive and indiscriminate location, distance, and contact restrictions imposed by the permanent orders.

A. The protected speech: literary essays and a public reading performance

Ms. Drexler is a survivor of violent domestic abuse who dealt with her traumatic past by creating literary works that have been published by national literary journals, garnered widespread acclaim, and provided her with a burgeoning career. (Vol. 1 at 13 (Amended Verified Complaint ("Comp.") ¶2), 222).[6] Her first essay, *Landslide*, was written in 2010, published in the Colorado Review, a literary journal published by Colorado State

[6] References herein to "Vol. #" refer to the court of appeals' record.

University, in 2012, awarded a Notable Essay award by Best American Essays in 2012, and nominated for The Pushcart Prize. (*Ibid.*; Vol. 1 at 67-85, **Exhibit 1**, *essay*). Her second essay, *Stealing Mannequins*, was written in 2011, published by West Branch, a literary journal published by Bucknell University, in 2013, and received a Notable Essay award by Best American Essays in 2013. (Vol. 1 at 13 (Comp. ¶3), 86-103, **Exhibit 2**, *essay*).

These memoir-style essays powerfully document Ms. Drexler's survival of domestic abuse by her former husband, as well as her evolving relationships with other people in her life as she was escaping that abuse, including with a one-time intimate partner ("RB"). (Vol. 1 at 14, 30 (Comp. ¶¶14, 58-59)). Mental health professionals have used the essays to train therapists in the dynamics of abuse. (Vol. 1 at 13 (Comp. ¶2)).

In 2012, Ms. Drexler performed a 10-minute literary reading performance at an adult school talent show, which included a comedic story "about mannequins," part of which was included in *Stealing Mannequins*. (Vol. 1 at 13-14 (Comp. ¶¶6-7)).[7]

Although the literary essays reference events related to RB and others, neither essay refers to any person by full name, and the 2012 public reading performance never even mentioned RB or any events related to her. (*Ibid.*). Nor did any of these works include content that was false or obscene, contained fighting words or threats, or otherwise constituted constitutionally proscribable speech. Nor were these works directed to RB or any other person. (Vol. 1 at 13-14 (Comp. ¶¶4,7)).

[7] The federal district court denied Ms. Drexler's request for evidentiary hearing, so a recording of the reading is not in the record but is available at the following private and secure link: https://vimeo.com/361530285/369a16f98f.

Yet years after Ms. Drexler produced these literary works, and years after she last had contact with RB (Vol. 1 at 27-28 (Comp. ¶¶41-42))—and after she had written at least 15 other essays and performed at least 3 other public readings (Vol. 1 at 13-14 (Comp. ¶¶5,8))—a county court entered permanent civil protection orders in favor of RB that explicitly punished Ms. Drexler for producing these three works and imposed a permanent prior restraint, and a content-based restriction on her speech, that have prevented her from engaging in any further literary expression for nearly eight years. (Vol. 1 at 26-28 (Comp. ¶¶45-46, 49-50)).

B. The permanent civil protection orders

In 2015, RB requested a permanent protection order, even though Ms. Drexler had not had any contact with her for 6 ½ years—since March 2009. (Vol. 1 at 26-27 (Am. Comp. ¶¶ 41-44)). RB claimed that the three literary works Ms. Drexler had produced years earlier constituted "stalking" under Colo. Rev. Stat. § 18-3-602(1)(c). (Vol. 1 at 16-17, 23-26 (Comp. ¶¶24-25, 33-35, 39)).

The county court granted RB's request, citing Ms. Drexler's protected expression over 26 times in support of the permanent orders—virtually all of its findings supporting a supposed "pattern" of "abuse." (Vol. 1 at 19-22, 27, 28 (Comp. ¶¶32(i)-(xviii), 45, 49)). Among numerous other findings, the court found that Ms. Drexler's "short stories" and public reading were "mean-spirited" and disclosed "confidences," and constituted a "pattern" of "abuse," repeated "attempts to contact" and "years of continued contact"—predicate acts under Colorado law for issuance of a protective order Colo. Rev. Stat. §§ 13-14-101(1.7), 13-14-104.5(1)(a)(V), 13-14-106(1)(a). This was in spite of the fact that the court acknowledged

Ms. Drexler had not had any "direct contact" with RB by the time the essays were published (in 2012 and 2013) and by the time she performed the public reading (in 2012). (Vol. 1 at 28 (Comp. ¶49), 128, 137, 138).[8]

The court also found that Ms. Drexler's 2012 public reading performance was part of this "pattern" of "abuse," despite acknowledging it never mentioned RB and was solely "about mannequins" (Vol. 1 at 21, 35 (Comp. ¶¶32(xv), 72(c)), 125)).

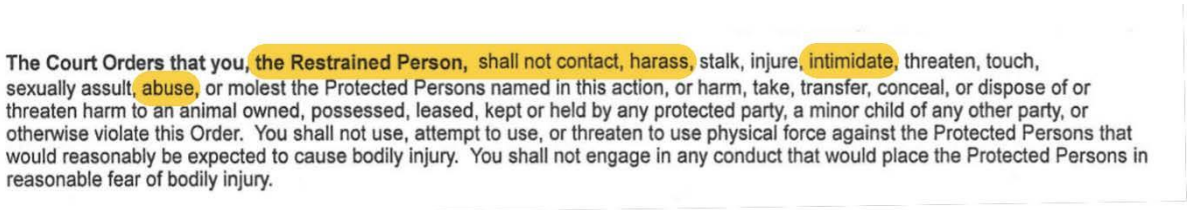
The court further concluded that these literary works constituted "retaliation," "intimidation," "manipulation," and "obsession and fixation," therefore supporting a "continuing need" for permanent orders under Colo. Rev. Stat. § 13-14-106(1)(a) (a permanent protection order shall issue when, "unless restrained[,] respondent will continue to commit such acts or acts designed to intimidate or retaliate against the protected person"). (Vol. 1 at 19-22, 28, 34 (Comp. ¶¶32(i)-(xviii), 49, 72), 137, 140). Accordingly, the county court interpreted Colorado law to permit permanent civil protection orders to be issued against Ms. Drexler based on her protected forms of expression.[9] And the court

[8] The court also found this "pattern" caused RB "emotional distress." (Vol. 1 at 19-21, 27-28, 33 (Comp. ¶¶32(i)-(xv), 48, 66), 116-117 (misstating standard as "emotional distress," not "serious emotional distress"), 138-139 (finding "any reasonable person would suffer emotional distress," and "[RB] has suffered emotional distress").

[9] Colorado's protection order statutes are unlike the statutes of other states in the circuit, which include protections against overbreadth and vagueness. *See* Kan. Stat. Ann. § 60-31a02 (defining "harassment," including scienter element, and excluding "constitutionally protected activity"); N.M. Stat. Ann. § 30-3A-2 (defining "harassment," including scienter element, and excluding conduct serving a "lawful purpose"); Utah Code Ann. § 77-36-1, § 76-5-106 (defining "harassment" to include " written or recorded threat to commit any violent felony" and including scienter element); Okla. Stat. Ann. tit. 22, § 60.1 (defining "harassment" and including scienter element); Wyo. Stat. Ann. § 6-2-506 (defining "harass," including scienter element, and excluding certain protected activities).

summarily rejected Ms. Drexler's repeated objections that punishing her for such protected expression would violate her First Amendment rights. Instead, the court found that relying on such works to support "stalking" under Colo. Rev. Stat. § 18-3-602(1)(c) "has nothing to do with her First Amendment right." (Vol. 1 at 27 (Comp. ¶46)).

The terms of the permanent protection orders that the court then issued mandated that Ms. Drexler not "abuse," "contact," "harass," or "intimidate" RB—incorporating the very terms the court had already interpreted to encompass her protected literary expression.



The Court Orders that you, the Restrained Person, shall not contact, harass, stalk, injure, intimidate, threaten, touch, sexually assult, abuse, or molest the Protected Persons named in this action, or harm, take, transfer, conceal, or dispose of or threaten harm to an animal owned, possessed, leased, kept or held by any protected party, a minor child of any other party, or otherwise violate this Order. You shall not use, attempt to use, or threaten to use physical force against the Protected Persons that would reasonably be expected to cause bodily injury. You shall not engage in any conduct that would place the Protected Persons in reasonable fear of bodily injury.

(**Exhibit 3**; Vol. 1 at 28 (Comp. ¶49); 128, 137, 138; Vol. 2 at 240).

Beyond these explicit restrictions infringing on Ms. Drexler's freedom of speech, the 2015 orders also permanently prevented her from possessing and purchasing firearms and imposed certain narrow physical contact and distance restrictions. (Vol. 1 at 30 (Comp. ¶57)).

On direct appeal, a state district court reversed the protection orders' firearm ban, but otherwise affirmed. (Vol. 2, p. 318). It specifically rejected Ms. Drexler's First Amendment challenge to the orders, holding that they did not infringe her constitutionally protected liberties *because* the county court relied on her literary works to support "harassment," as well as "obsession and fixation" to support the "continuing need" for the permanent orders under Colo. Rev. Stat. § 13-14-106(1)(a). (Vol. 2, p. 316).

After her appeal concluded, Ms. Drexler requested that the county court dismiss the 2015 orders for several reasons, including that they were chilling her protected literary expression. (Vol. 1 at 17, 34 (Comp. ¶¶28, 72)). But the county court not only refused to dismiss the permanent orders, it substantially expanded their intrusions on Ms. Drexler's liberty interests.

The court reaffirmed that Ms. Drexler's protected literary works could serve as statutory predicates for a permanent civil protection order. The court conducted a hearing during which it questioned Ms. Drexler extensively on the content of her literary works and her unwillingness to voluntarily forego future protected speech. (Vol. 1 at 36 (Comp. ¶75)).

The court also found that the 2015 "pattern" of "abuse" finding supported the predicate acts of "stalking under Colo. Rev. Stat. § 18-3-602(1)(c),[10] and even "following," (Vol. 1 at 34-35 (Comp. ¶72(a)-(c)); Vol. 2 at 320-321, 324-25, 327, 328). *See also* Colo. Rev. Stat. § 13-14-101(3) (adopting § 18-3-602's definition of stalking).

The court rejected Ms. Drexler's argument that the protection orders improperly restrained her First Amendment Rights. The court acknowledged Ms. Drexler's concerns and how important freedom of speech is for her and that this protection order would

[10] The Court heard argument on the constitutionality of Colo. Rev. Stat. § 18-3-602(1)(c) in *Counterman, supra*. Although Colorado's Attorney General suggested § 18-3-602(1)(c) allows sanction only for "true threats" (Tr. at 59-60, 66-67, 70), the statute's plain language allows for sanctioning of non-threatening speech, including as repeated "contacts" and "communications" causing "serious emotional distress." During the *Counterman* argument, there was discussion about whether different First Amendment standards should apply in civil and criminal contexts. But, as the Justices recognized, that would be contrary to long-standing precedent. (Tr. at 12, 19, 27).

restrain her freedom of speech. (Vol. 2 at 339-40). But, after stating it was "not interested in the validity of the First Amendment claims" (Vol. 2 at 335), the also court stated:

> I'm also a bit concerned about *this fine line between free speech and harassment/stalking* *** but when I hear Ms. Drexler talk about her concerns and how important freedom of speech is for her and that this protection order is restraining her freedom of speech, that's a little concerning to me because...if the only subject matter that this protection order restrains Drexler from writing about is *about RB,* my concern is that *if I lift the protection order, that we're going to be crossing that line right back into harassment/stalking.*"

(Vol. 2 at 339-340 (emphasis added); *see also* Vol. 1 at 36, 41, 52 (Comp. ¶¶76, 91, 119(c)).

The court thus found that the protection orders' restraint of Ms. Drexler's constitutionally protected expression was justified to prevent Ms. Drexler from writing "about [RB]" to protect RB's "emotional safety." (*Ibid.*; Vol. 2 at 327-328). Accordingly, despite acknowledging that the orders restrain works "about [RB]," the court concluded that "If I lift the protection order *** we're going to be crossing that line right back into harassment/stalking." (*Ibid.*)

After making these additional findings based on the protected works, the county court issued a new set of permanent protection orders in 2018, which included the same proscriptions as the original order, along with a new prohibition against stalking:

> **The Court Orders that you, the Restrained Person,** shall not contact, harass, stalk, injure, intimidate, threaten, touch, sexually assult, abuse, or molest the Protected Persons named in this action, or harm, take, transfer, conceal, or dispose of or threaten harm to an animal owned, possessed, leased, kept or held by any protected party, a minor child of any other party, or otherwise violate this Order. You shall not use, attempt to use, or threaten to use physical force against the Protected Persons that would reasonably be expected to cause bodily injury. You shall not engage in any conduct that would place the Protected Persons in reasonable fear of bodily injury.

(**Exhibit 4**; Vol. 2 at 330). In doing so, the court also cited Ms. Drexler's (i) "painful publication * * * of the essays," (ii) that she "authored and read a nonfiction piece," and (iii) that her public "reading [was] about [RB]" (a finding that was clearly erroneous). (Vol. 1 at

21, 34, 36-37 (Comp. ¶¶32(xv), 72; 77(1), (2)), 125); Vol. 2 at 321-322, 327, 465). Consequently, the county court again imposed explicit restrictions on Ms. Drexler's protected expression by prohibiting the same forms of protected expression it had repeatedly punished—using identical terms.

Thus, over the course of several years, the state courts have repeatedly found that Ms. Drexler's works of protected literary expression constituted a "pattern" of "abuse," "attempts to contact," "contacts," "harassment," "intimidation," "retaliation," "manipulation," "stalking," and "following," and further relied on those protected works to support the "continuing need" for permanent civil protection orders—orders that bar her from engaging in the same protected expression that led up to the entry of the order. (Vol. 1 at 19-22, 28, 34 (Comp. ¶¶32(i)-(xviii), 49, 72); 137, 140; Vol. 2 at 320-321, 324-25, 327). Accordingly, the ongoing orders permanently bar Ms. Drexler from engaging in her therapeutic tool for abuse recovery, furthering her literary craft, advancing her chosen profession, and exercising her First Amendment right to freedom of expression. The orders therefore constitute a prior restraint chilling speech and a content-based restriction on speech. (Vol. 1 at 61 (Comp. ¶128); Vol. 2 at 414-415).

RB has also made clear that she interprets the permanent orders to bar Ms. Drexler from engaging in literary expression and has threatened to bring an action to enforce the protective orders for any future literary works she deems "objectionable." (Vol. 1 at 42 (Comp. ¶93)).

The government respondents too, after conceding that the permanent orders are ambiguous and could be interpreted to proscribe literary speech, have refused to concede

that the orders could not be enforced to sanction Ms. Drexler's future protected literary expression. (Vol. 1 at 41-42 (Comp. ¶92)).

Thus, for nearly eight years, Ms. Drexler has been under continuing threats of contempt and even criminal sanctions under Colo. Rev. Stat. § 18-6-803.5 if she were to produce or publish future expressive works. Based on those threats, Ms. Drexler was advised by counsel to withdraw an essay from a publication contract, which she did. And she has foregone all literary speech since. (Vol. 1 at 14, 42 (Comp. ¶¶11-12, 92); Vol. 2 at 414-415).

Beyond these obvious and serious intrusions on Ms. Drexler's constitutionally protected freedom of expression, the ongoing permanent orders also impose several severe restraints on Ms. Drexler's physical liberty. First, they automatically require her to be permanently listed on Colorado's Computerized Criminal History Database ("CCHD") and the National Instant Criminal Background Check System ("NICD"). Colo. Rev. Stat. § 18-6-803.7; 28 U.S.C. § 534 (Vol. 1 at 53 (Comp. ¶119(e)) which cause her to be permanently subject to government control, including compelled suspicionless physical stops, directed movements, separation and relocation, detention, sequestering, and questioning. (*Ibid.*).[11] Indeed, Ms. Drexler alleged that because of her inclusion on these databases, she has been detained, sequestered, and questioned at ports of entry in the United States after international travel. (*Ibid.*; Vol. 2 at 455; Vol. 3 at 630).

[11] The orders also subject Ms. Drexler to expedited firearm confiscation via a "red flag" petition, which can be filed by any "community member" or any law enforcement officer or agency based on the court's finding of stalking under Colo. Rev. Stat. § 18-3-602(1)(c). *See* Colo. Rev. Stat. §§ 13-14.5-103, 13-14.5-104.

And the permanent 2018 orders substantially expanded upon the location, distance, and contact restrictions in the original orders. (Vol. 2 at 330-332). Among other things, the orders (i) include RB's two adult, sons as protected persons, making all of the protection orders' restrictions applicable to them; (ii) increase the distance proscriptions by 30 times those imposed by the 2015 orders, and (iii) include several broad and indiscriminate location restrictions, including one that bars Ms. Drexler from coming within 100 yards of the entire University of Colorado's Denver campus, encompassing the location of Ms. Drexler's long-time business office (and requiring her to immediately relocate). (*Ibid.*; Vol. 1 at 36, 53 (Comp. ¶¶77, 119(e); Vol. 2 at 328; Vol. 3 at 616).

The same county court imposed a $108,000 attorney's fee award against Ms. Drexler under Colo. Rev. Stat. § 13-17-102, based on the fees RB claimed to have incurred on all proceedings related to the protective orders at all levels from 2015-2018, based on its determination that her appeal of the 2015 orders—which was partially successful—constituted attempts to "to harass" RB. (Vol. 1 at 33, 36-38 (Comp. ¶¶65, 76-80)).

On direct appellate review, a state district court affirmed the ongoing permanent orders, determining that they did not infringe on Ms. Drexler's First Amendment Rights; and it affirmed the fee award, finding the county court's failure to hold an evidentiary hearing or make the requisite statutory findings to support a § 13-17-102 fee award did not require reversal. (Vol. 1 at 38-39, 45-46, 61-63 (Comp. ¶¶83, 106-107, 129-132; Vol. 2 at 345)).

C. The state court's habeas review

On state habeas review, a state district court concluded that the permanent orders did not infringe on Ms. Drexler's right to free speech because they do not prohibit "all"

speech and were instead "tailored towards precluding *patterns of abuse*, such as *manipulation* and *intimidation*"—although the issuing court had used identical terms to punish her for her past literary speech. (Vol. 1 at 39-40 (Comp. ¶¶87-88); Vol. 2 at 365).

The court concluded—in conflict with the orders' plain terms, as well as the issuing court's explicit findings and expressed intent—that the orders "merely forbid[] Ms. Drexler from contact with [RB]," and "do not otherwise intrude on her Protected First Amendment Activities," and that "[n]othing in the [orders] prohibit[s] Ms. Drexler from publishing written materials." (Vol. 2 at 364; Vol. 1 at 40 (Comp. ¶88)). The Colorado Supreme Court affirmed this ruling without opinion. (Vol. 1 at 39 (Comp. ¶86); Vol. 2 at 387).

D. The federal district court's habeas ruling

Thereafter, Ms. Drexler filed a habeas petition in federal district court under 28 U.S.C. § 2254. (Vol. 1 at 12-66). She alleged she was "in custody" as § 2254(a) requires because the ongoing permanent civil protection orders inhibit her freedom of expression. (Vol. 1 at 48-53 (Comp. ¶¶116-119(d)). She also alleged the orders severely restrain her freedom of movement—first, because the automatic listings on the CCHD and NICD have caused her to be subject to repeated and compelled and directed physical stops, detentions, movements, separation, relocation, sequestering and questioning by law enforcement, and second, because of the permanent orders' substantially overbroad and indiscriminate location, distance, and contact restrictions. (Vol. 1 at 48, 53-55 (Comp. ¶¶116, 119(e); Vol. 2 at 455; Vol. 3 at 630).

Yet the federal district court dismissed her habeas petition, concluding that it was not even "reasonably debatable" that she was "in custody" under § 2254(a) because the

orders impose only "contact" and "distance" restrictions, which it deemed insufficient to constitute "custody" (Vol. 3 at 595-596, Magistrate's Recommendation)—failing to recognize that the orders imposed restrictions on her freedom of movement beyond mere "contact" and "distance" (Vol. 2 at 330), and that even the "contact" restrictions had been repeatedly interpreted to reach her protected forms of expression.

The federal district court also rejected Ms. Drexler's argument that inclusion in the federal and state criminal databases rendered her "in custody," calling this argument "vague and speculative" (Vol. 3 at 592-593, 596, Magistrate's Recommendation). Accordingly, the district court denied a certificate of appealability, finding no "substantial showing of the denial of constitutional right." (Vol. 3 at 706-707, District Court Order).

E. The court of appeals' decision

A panel of the Tenth Circuit Court of Appeals refused to grant Ms. Drexler a certificate of appealability to allow her to challenge the federal district court's dismissal of her habeas petition, concluding that "no reasonable jurist would treat [the permanent orders] as the imposition of custody under § 2254(a). (Op., **Exhibit 5** at 8). The court of appeals determined that the orders themselves "didn't say anything that would restrict Ms. Drexler's right to speech" and thus "didn't restrict Ms. Drexler's future writings" (Op. 5)—in direct contravention of the protection orders' plain terms, as well as the issuing court's explicit findings and manifest intent.[12]

[12] The court of appeals off-handedly seemed to suggest that Ms. Drexler "followed" RB in addition to "writing about her." (Op. 5). However, no one has alleged that Ms. Drexler physically "followed" RB. Instead, the 2018 "following" finding was itself premised on protected speech.

In so ruling, the court of appeals relied on the state habeas court's supposed "clarification" of the orders in 2020 that "[n]othing in the [orders] *** prohibits Ms. Drexler from publishing written materials" or "otherwise intrude[s] on her protected First Amendment [a]ctivities" but "merely forbids [her] from contact with [RB]." (*Ibid.*). And the court of appeals dismissed Ms. Drexler's argument to the contrary as "conflating the terms of the protection order[s] with the court's *reasoning.*" (*Ibid.*, emphasis added).

The court of appeals avoided analyzing the substantial physical intrusions resulting from Ms. Drexler's inclusion on the CCHD and NICD by concluding that the orders themselves do not "address a listing" on those databases. (Op. 8 n.4). The court also determined that it was not reasonably debatable that the orders' expansive contact and distance restrictions could constitute custody because the restrictions "simply kept Ms. Drexler away from [RB], her children, and her houses" and because state law "sometimes authorizes restriction on movement," drawing a comparison to restrictions placed on "sex offenders." (Op. 2, 6).

SUMMARY OF THE ARGUMENT

The Circuit Justice should grant a certificate of appealability to permit appellate review of the dismissal of Ms. Drexler's habeas petition to remedy the substantial restraints on liberty imposed by the permanent orders. Jurists of reason could easily conclude that Ms. Drexler is "in custody" as § 2254(a) requires because, under this Court's precedent, the concept of "custody" embodied in that provision extends to all substantial deprivations of liberty that are not shared by the general public. A reasonable jurist could readily conclude that the deprivations of liberty imposed by the permanent orders meet this standard.

The permanent orders restrain Ms. Drexler's exercise of the most fundamental of American liberties: the freedom of speech and expression. And they do so under the most troublesome terms: by prohibiting her from producing and publishing literary works. The issuing court unquestionably intended to impose a prior restraint and a content-based restriction on Ms. Drexler's speech, and that intention is reflected in the orders themselves. The courts below could not reasonably conclude otherwise without disregarding the orders' plain terms and the issuing court's manifest intent, while giving improper deference to a collateral state court's own misinterpretation of the orders. Ms. Drexler is entitled to challenge that misinterpretation, and to prove that the orders' restrictions on her speech cannot withstand scrutiny. For that reason alone, the Circuit Justice should grant her a certificate of appealability.

Ms. Drexler is also in custody under § 2254(a) because the orders impose multiple, substantial intrusions on her freedom of movement. First, the automatic inclusion in state and federal criminal databases subjects her to permanent ongoing government control, through suspicionless stops and detentions, compelled and directed movements, sequestering, and questioning by law enforcement—restraints not experienced by the general population. Second, the permanent orders' overly broad and indiscriminate location, distance, and contact restrictions impose restraints that render her "in custody" under § 2254(a). For these reasons too, a certificate of appealability is warranted.

ARGUMENT

I. The Circuit Justice must grant a certificate of appealability if jurists of reason could conclude Ms. Drexler is "in custody" under § 2254.

Since the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, habeas petitioners have been required to obtain a "certificate of appealability" before they can appeal the dismissal of a federal habeas claim brought under 28 U.S.C. § 2254. That certificate may be issued by a federal district court, a court of appeals judge, or a "circuit justice." 28 U.S.C. § 2253(c)(1). *See* B. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. App. Prac. & Process 177, 182 (2003) ("The plain language of 28 U.S.C. § 2253 *** empower[s] a single Circuit justice to grant a COA.").

The Circuit Justice's obligation to consider the merits of an application for a certificate of appealability is not discretionary. "A [certificate of appealability] is not an 'extraordinary' writ or any other type of extraordinary remedy or process that the Court possesses complete discretion to grant or deny irrespective of the merits of the application." *Ibid.* Accordingly, "[t]here appears to be no principled basis for the exercise of a certiorari-type discretion" in the Circuit Justice's decision whether to grant a certificate; an applicant need not demonstrate anything "'extraordinary' or 'exceptional;'" and the Circuit Justice cannot deny the certificate without "meaningfully engaging in the legal analysis required by Section 2253." *Id.* at 183-184, 186 (citations omitted).

Further, "[n]o court has ever suggested that, under 28 U.S.C. § 2253[,] *** a habeas petitioner only may seek a COA from either a circuit judge or a circuit justice *** but not

both sequentially. The plain language of the statute and rule would not support such an interpretation." *Id.* at 185.[13]

The showing required to obtain a certificate of appealability is minimal. The certificate must issue whenever there is a "showing that reasonable jurists could debate (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). This standard "does not require a showing that the appeal will succeed," and an application should not be declined "merely because [a court] believes a petitioner will not demonstrate an entitlement to relief." *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003) ("We do not require petitioner to prove, before the issuance of a [certificate of appealability], that some jurists would grant the petition for habeas corpus.").

Review "at the [certificate] stage should be consonant with the limited nature of the inquiry." *Buck* v. *Davis*, 137 S. Ct. 759, 774 (2017). "The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course." *Id.* at 765. At this first stage, the only question is whether Ms. Drexler has shown that "jurists of reason could disagree with the district court's resolution of [her] constitutional claims or *** could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 774. Accordingly, the

[13] Of course, this Court separately "possesses discretionary jurisdiction to grant certiorari and reverse a Court of Appeals decision denying a COA." *Id.* at 184 n.38 (citing *Hohn* v. *United States*, 524 U.S. 236, 253 (1998) and *Lozado* v. *Deeds*, 498 U.S. 430 (1991)).

Circuit Justice must issue a certificate of appealability if it is "reasonably debatable" that she is "in custody" under § 2254(a). Ms. Drexler readily meets this standard.

II. Ms. Drexler is entitled to a certificate of appealability to challenge dismissal of her habeas petition because reasonable jurists could readily conclude she is suffering deprivations of liberty constituting "custody" under § 2254.

"Custody" in the habeas context is "defined broadly." *Minnesota* v. *Murphy*, 465 U.S. 420, 430 (1984). As this Court explained in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), "custody" goes well beyond "actual physical custody" to encompass any circumstance in which a person experiences "restraints" on their "liberty" "not shared by the public generally," *id.* at 240, if they are "severe and immediate," *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 351 (1973). A reasonable jurist could readily conclude that the permanent orders imposed here include multiple restrictions on liberty that meet this threshold.

A. The permanent civil protection orders impose an unlawful prior restraint and a content-based restriction on speech, prohibiting Ms. Drexler from exercising her freedom of expression.

The permanent orders restrict one of the "most fundamental personal rights and liberties": the "[f]reedom of speech." *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938); *see also Chaplinsky* v. *New Hampshire*, 315 U.S.568, 570-571 (1942) ("Freedom of speech protected by the First Amendment is among the most fundamental personal rights and liberties which are protected *** from invasion by state action."). "Any loss of First Amendment freedoms, however intangible or limited in time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). The restrictions on Ms. Drexler's freedom of expression here are not only very tangible, but also have *no limit in time*.

1. The permanent orders impose a prior restraint and a content-based restriction on speech.

The county court that issued the permanent orders made clear its intent to permanently restrain Ms. Drexler from engaging in protected forms of expression. Indeed, the issuing court stated explicitly that it was prohibiting Ms. Drexler from "writing *** about [RB]" to protect RB's "emotional safety." (Vol. 2 at 339-40; 327-328). The court also acknowledged that this prohibition impacted Ms. Drexler's First Amendment rights but deemed this restriction necessary because if it "lift[ed] the protection order," Ms. Drexler would be permitted to engage in protected expression by creating future literary works, which the court believed would allow her to "cross[] that line right back into harassment/stalking." (*Ibid.*). The intent to restrain Ms. Drexler's First Amendment rights could not be more explicit.

This intent is also manifest in the text of the permanent orders themselves, which leave no doubt that Ms. Drexler is explicitly prohibited from producing literary works. They do so by incorporating the very same terms, *i.e.*, "abuse," "harassment," "stalking," "contact," and "intimidation" that the issuing court used as predicates to justify imposition of the permanent orders. (Vol. 2 at 330). The issuing court made clear that these terms encompassed her literary works, including *Landslide*, *Stealing Mannequins*, and the public reading. (Vol. 1 at 19-22, 28, 34 (Comp. ¶¶32(i)-(xviii), 49, 72); 137, 140; Vol. 2 at 320-321, 324-25, 327). The terms of the orders therefore make clear that the issuing court intended not only to punish Ms. Drexler for her *past* expressive literary works, but to restrain her from producing *future* expressive literary works. The court of appeals' conclusions that the orders did not prohibit "speech" and that the issuing court's concern

with her protected works extended only to its "reasoning" for imposing the order (Op. 5) are therefore plainly erroneous.

The issuing court's interpretation of these statutory terms is certainly questionable. After all, writing literary essays directed to a general audience seems completely divorced from the concepts of "contact," "abuse," "harassment," "stalking," "contact," and "intimidation." Yet there is no doubt that the issuing court interpreted those terms to encompass Ms. Drexler's literary essays nor that RB shares this interpretation. (Vol. 1 at 42 (Comp. ¶93). And because this interpretation has twice been affirmed on appeal, there is also no doubt how the issuing court would interpret those terms in any proceeding to enforce the protection orders should Ms. Drexler produce future expressive works. Thus, the risk that Ms. Drexler might be held in contempt and even criminally sanctioned is substantial.

These prohibitions against producing expressive literary speech substantially infringe Ms. Drexler's First Amendment rights. They impose a "content"-based restriction on speech, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015), and a prohibition on "the public expression of ideas," *Street* v. *New Yor*k, 394 U.S. 576, 592 (1969), that the government "has no power" to impose absent the most compelling circumstances. *Reed*, 576 U.S. at 163.

And there is no question that the essays and reading she was repeatedly punished for producing constitute protected speech. The content of those works was not false or obscene and did not include fighting words, threats, or any other category of unlawful or unprotected speech. No one contends otherwise. The fact that RB may have regarded Ms. Drexler's essays and public reading as embarrassing does not deprive them of First

Amendment protection. "Speech does not lose its protected character *** simply because it may embarrass others." *NAACP* v. *Claiborne Hardware Co.*, 486 U.S. 886, 893 (1982). And speech does not lose its protected status merely because it is about a private person. *See Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011). The government cannot claim a legitimate interest—let alone a compelling, narrowly tailored one—in preventing Ms. Drexler from publishing any future literary works on any subject merely because she produced some works that referenced RB in the past.

Injunctions that "actually forbid speech activities," like the permanent orders imposed here, are also a "classic" form of prior restraint. *Alexander* v. *United States*, 509 U.S. 544, 550 (1993). Such restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Tory* v. *Cochran*, 544 U.S. 734, 738 (2005) (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976)). The Court has invalidated numerous similar prior restraints, e.g., *Near* v. *Minnesota*, 283 U.S. 697, 713, 721 (1931) (invalidating injunction perpetually enjoining newspaper publisher, which had published articles found to violate a state nuisance statute, from making any future "malicious, scandalous or defamatory publication"); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 415 (1971) (vacating an order "enjoining petitioners from distributing leaflets"); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (striking down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to indefinitely enjoin future exhibition of films not yet found obscene). The permanent orders here are similarly intrusive.

2. The permanent orders' intrusion on Ms. Drexler's expressive liberty is made worse by the orders' unconstitutional overbreadth and vagueness.

The intrusion on Ms. Drexler's expressive liberty presented by these orders is made worse because of their uncertain contours. There is no question that the orders are intended to bar *certain* expressive works, including any "writing about *** [RB]," and thereby infringe on her freedom of speech. (Vol. 1 at 21, 35 (Comp. ¶¶32(xv), 72(c), 125; Vol. 2 at 327-328). But the extent of that infringement is unclear. After all, the issuing court also punished her for producing a work that had nothing to do with RB—the public reading performance. And many of the proscriptive terms of the orders—including "harass, injure, intimidate," "threaten" and "molest"—are not defined in the Colorado statutes, and do not provide any obvious dividing line to separate prohibited and unprohibited categories of speech. For this reason too, Ms. Drexler has been left with little choice but to refrain from producing literary works altogether, given the substantial risk of civil and criminal sanctions.

This ambiguity and vagueness thus creates a second constitutional problem with the orders, and a separate infringement on her expressive liberty. "[T]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [writers and speakers] what is being proscribed." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." *Ibid.* This presents another reason why the orders also present an unlawful prior restraint on Ms. Drexler.

3. These intrusions on expressive liberty constitute "custody" under § 2254(a).

These intrusions on Ms. Drexler's First Amendment rights qualify as "custody" under § 2254(a). They are clearly serious, substantial, immediate, and permanent restrictions on her liberty to express herself that are not shared by the public generally.

The court of appeals erred in concluding otherwise. The court of appeals' findings that (i) the orders included only "distance" and "contact" restrictions and (ii) that Ms. Drexler was wrongly "conflating the terms of the protection order[s] with the court's *reasoning*" for imposing them (Op. 5) were plainly erroneous. The court of appeals could only reach that conclusion by misinterpreting the plain terms of the orders and the issuing court's intent, as expressed in its findings and record statements. Further, in reaching those conclusions, the court of appeals improperly relied on a collateral state court's *own* misinterpretation of the orders' plain terms and manifest intent.

But federal courts are not entitled to give deference to "clarifications" of orders offered by state courts during collateral review. They must instead conduct an independent review of the record under de novo review. *See Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 505 (1984) ("[T]he Court *** conduct[s] an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits").

Further, state district courts conducting collateral review have no power to "clarify" orders they are reviewing. The only court that may properly "clarify" an order is the one that issues it. *See* 46 Am. Jur. 2d Judgments § 65 ("Trial courts have the inherent authority to interpret and clarify their judgments for the purpose of removing any ambiguity"); *see*

also, e.g., *People* v. *Kriho*, 996 P.2d 158 176 (Colo. App. 1999) (remand to trial court to clarify ambiguous order); *McElvaney* v. *Batley,* 824 P.2d 73 (Colo. App. 1991) (subsequent "clarification" of order by another court was ineffective).

Further, "clarification" is not appropriate unless the order is first deemed ambiguous. *Commerce City Drug* v. *State Board of Pharmacy*, 511 P.2d 935, 937 (Colo. App. 1973) (where board order "taken as a whole is ambiguous *** action must be remanded *** for clarification"); *United States* v. *Oyler*, 1998 U.S. LEXIS 2652 *6 (10th Cir. 1998). But the orders are perfectly clear on the question of whether they prohibit future expressive works (even though some ambiguity remains on the extent of expressive works prohibited). So there was nothing for the state habeas court to interpret.

Moreover, even if the orders were deemed ambiguous, any court interpreting them is obliged to "give effect to the intention of the issuing court, considering the entire record" and "findings of fact." *United States* v. *DAS Corp.*, 18 F.4th 1032, 1041 (9th Cir. 2021). A later court is not free to simply replace the interpretation given to orders by the issuing court or to suggest an interpretation at odds with that court's manifest intent.

Finally, the state habeas court's interpretation of the order is irrelevant. Even if the state habeas court's "clarification" were proper and could properly lead the court of appeals to conclude that the orders themselves did not prohibit Ms. Drexler from producing future literary works or that Ms. Drexler's literary expression served only as the "reasoning" for entry of the orders, the impermissible and severe intrusion on liberties remains. When state courts have repeatedly issued permanent civil protection orders to punish Ms. Drexler for her past protected literary speech, that certainly suggests that engaging in future literary

speech would similarly be punished, and that risk produces a significant chilling effect that itself infringes First Amendment rights. *See Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right."); *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972) (where speech is punished, "persons whose expression is constitutionally protected may well refrain from exercising their rights" to engage in future speech); *North Carolina* v. *Pearce*, 395 U.S. 711, 724-725 (1969) (the "threat inherent in *** punitive policy [for exercise of appeal] *** serves to 'chill the exercise of basic constitutional rights'"). *See also* W. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment and the Costs of the Prior Restraint Doctrine*, 67 Cornell Law Review 245, 276 (1982) (risk of "subsequent punishment is calculated to suppress, and does indeed suppress, the publication of speech").

Accordingly, it is absolutely clear, and at a minimum, reasonably debatable, that the permanent orders impermissibly intrude on, restrain, and unconstitutionally chill Ms. Drexler's speech—one of the "most fundamental personal rights and liberties." *Lovell*, 303 U.S. at 450. Thus, she is in custody under § 2254(a). The court of appeals manifestly erred in concluding otherwise and refusing to grant her a certificate of appealability on this basis.

B. The requirement that Ms. Drexler be listed on federal and state criminal databases imposes severe restraints on her freedom of movement.

The permanent protection orders include several other severe restraints on Ms. Drexler's freedom of movement that amount to "custody" under § 2254(a). First, the orders subject Ms. Drexler to automatic inclusion on the CCHD and NICD. Colo. Rev. Stat. § 18-6-803.7; 28 U.S.C. § 534. (Vol. 1 at 53 (Comp. ¶119(e)). Ms. Drexler has demonstrated that

inclusion on these databases has in the past caused her to be subject to detention and search, and renders her permanently subject to a risk of government control, compelled physical stops, directed movements, separation and relocation, detention, sequestering and questioning in the future. (*Ibid.*; Vol. 2 at 455; Vol. 3 at 630). Such restraints both *compel* her movement, requiring her to be escorted and moved to places to be sequestered, detained, and questioned by law enforcement, and *restrict* it, by restraining her movements while being escorted, detained, and questioned. And they do so at the risk of criminally sanction for disobedience. (*Id.*). These are substantial restraints not shared by the general public.[14]

Numerous courts have held that such compelled movement at the sufferance of government officials is sufficient to render people in custody under § 2254(a)—even if they are otherwise "'ostensibly free to come and go as they please." *Dry* v. *CFR Ct. of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1208 (10th Cir. 1999) (petitioners released on their own recognizance meet "custody" requirement); *see also Hensley,* 411 U.S. at 351 (custody is met where petitioner may be compelled to appear at certain times and places, he "cannot come and go as he pleases," and where "disobedience" "is itself a criminal offense"). "[I]n the end, an individual who is required to be in a certain place *** is clearly

[14] Significantly, the orders also automatically subject Ms. Drexler to a petition by "community member" or any law enforcement officer or agency for imposition of an expedited red flag "extreme risk" protection order based on the court's finding of stalking under Colo. Rev. Stat. § 18-3-602(1)(c), which would impose a separate firearm ban. Colo. Rev. Stat. §§ 13-14.5-103, 13-14.5-104.

subject to restraints on his liberty not shared by the public generally." *Williamson* v. *Gregoire*, 151 F.3d 1157, 1183 (9th Cir. 1998) (quotations omitted).

This is true even when the compelled movements occur only infrequently or for a short period of time. *Dow* v. *Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (petitioner's compelled attendance at an alcohol rehabilitation program rendered him "in custody"); *Barry* v. *Bergen Cnty. Prob. Dep't*, 128 F.3d 152 (3d Cir. 1997) (community service obligation rendered petitioner "in custody"). And it likewise remains true even when detention has not yet occurred or may not occur at all—like the location restriction banishing from an Indian reservation as ordered but not yet enforced in *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996). To these courts, "even restraints on liberty that might appear short in duration or less burdensome than probation or supervised release are severe enough because they required petitioners to appear in certain places at certain times, thus preventing them from exercising the free movement and autonomy available to the unrestricted public." *Nowakowski* v. *New York*, 835 F.3d 210, 216 (2d Cir. 2016) (petitioner was in custody where physical movements were compelled and failure to comply caused "the risk of further penal sanction").

The lower courts in this case offered no reason to disagree with these authorities, nor any reason to conclude that compelled movements and detentions caused by inclusion in state and federal criminal databases is any different than the compelled movements and detentions at issue in these cases. The federal district court merely dismissed these allegations as "vague and speculative" despite specific allegations that Ms. Drexler had been repeatedly subject to the restraints. (Vol. 1 at 53 (Comp. ¶119(e); Vol. 2 at 455; Vol. 3

at 630). And the court of appeals dismissed them simply because the orders themselves did not require the listings on the CCHD and NICD. (Op. 8 n.4). However, the orders *do* require Ms. Drexler to be included in these databases. Colo. Rev. Stat. § 18-6-803.7; 28 U.S.C. § 534. And the fact that those requirements arise by operation of law rather than explicit inclusion in the orders is irrelevant. Ms. Drexler's access to the Great Writ cannot be denied based on dubious distinctions about whether restrictions on her liberty appear within the four corners of a court order or merely arise as a necessary and automatic consequence of entry of that order. Either way, the severe restrictions on her liberty remain, and continue to severely restrain her physical liberty.

C. The permanent orders' excessive and indiscriminate location, distance, and contact restrictions also substantially interfere with Ms. Drexler's freedom of movement.

Finally, the excessively broad and indiscriminate location, distance, and contact restrictions contained in the permanent orders impose severe restraints on her freedom of movement also rendering Ms. Drexler "in custody" under § 2254(a). The court of appeals concluded otherwise, deeming such "orders requiring parties to stay away from other individuals" to be categorically insufficient to constitute custody—considering the question not even "reasonably debatable." (Op. at 6, 8).

The court of appeals' reasoning is unpersuasive. The court (Op. at 6) relied on decisions from other courts deeming contact restrictions too "modest," *Vega* v. *Schneiderman*, 861 F.3d 72, 75 (2d Cir. 2017), and lacking the "magnitude of restraint" necessary to constitute custody under § 2254(a), *Austin* v. *California*, No. 20-cv-900-CRB, 2020 WL 4039203, *2 (N.D. Cal. July 17, 2020), because they allow the person subject to the

protective order to "go anywhere at any time and do anything she wants as long as she avoids an intentional confrontation with" the victim. *Vega*, 861 F.3d at 75.

But the permanent protection orders here do not fit that description and are far less "modest" than in those cases. The orders here do not merely limit Ms. Drexler from "confronting" RB. They instead categorically exclude her from coming within 100 yards of an expansive and sprawling downtown university campus, rendering large swaths of downtown Denver off-limits; impose contact and distance restrictions 30 times greater than those in the 2015 orders, requiring her to move her office; and include RB's two adult sons as protected persons, making all of the protection orders' expansive restrictions also applicable to them.

In ruling that it was not "reasonably debatable" that custody was supported by these broad and arbitrary physical restraints, the court of appeals drew an analogy to cases involving sex offender registration laws, which have held to be insufficient to constitute "custody" under § 2254(a). (*See* Op. 6-7, citing *Dickey v. Allbaugh*, 644 F. App'x 690, 692-94 (10th Cir. 2016)). But the circuits are split on whether such sex offender registration laws constitute custody. *See, e.g.*, *Piasecki* v. *Court of Common Pleas, Bucks Cnty., PA*, 917 F.3d 161, 170-171 (3d Cir. 2019) (holding that Pennsylvania's sex-registration requirements rendered petitioner "in custody" because they compelled petitioner's movements by requiring him to check in "at least four times per year."). Thus, clearly the question is reasonably debatable among jurists.

* * *

Because speech is one of the "most fundamental personal rights and liberties," habeas relief is properly invoked to remedy a prior restraint and content-based restrictions on protected speech. Here, habeas provides the only remaining available remedy, the last "safeguard" against the restraint on First Amendment expression imposed on Ms. Drexler. *See Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991) (habeas provides a "precious safeguard" protecting against constitutional infringement); *Gooding*, 405 U.S. at 519 (habeas properly remedies First Amendment violations).

In this case, the federal district court and the court of appeals repeatedly denied that Ms. Drexler is experiencing the restrictions on liberty necessary for custody simply by denying that those restrictions existed. But the lower courts' failure to appreciate the actual custodial effect of an order does not justify denying Ms. Drexler the right to a federal forum to challenge those restrictions. A certificate of appealability should therefore issue to require the court of appeals to consider the actual and severe restraints on liberty arising from the orders.

CONCLUSION

For the foregoing reasons, Applicant Regina Drexler respectfully requests that the Circuit Justice issue a certificate of appealability allowing her to challenge the dismissal of her habeas petition on appeal.

May 15, 2023

Respectfully submitted,

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No. _____

In the Supreme Court of the United States

REGINA T. DREXLER,

Applicant,

v.

HONORABLE THERESA SPAHN, in her official capacity; HONORABLE CHELSEA MALONE, in her official capacity; DENVER COUNTY COURT, CITY AND COUNTY OF DENVER; PHILLIP WEISER, ATTORNEY GENERAL, in his official capacity for the state of Colorado,

Respondents.

APPENDIX

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REGINA DREXLER

LANDSLIDE

Of all natural disasters, landslides are more devastating than most people realize. Worse, they are often triggered by other natural disasters, such as earthquakes and volcanic eruptions. Scientists refer to this as the multi-hazard effect. In one of the deadliest landslides of the last century, in the Ancash region of Peru in 1970, the multi-hazard effect was responsible for the burial and death of over fifty thousand people. Of course, in most circumstances, death comes before burial. Where there are multiple hazards occurring nearly simultaneously, however, it is likely that even if you survive the first disaster, there is another on its way to bury you alive.

Ten years ago, as I was in my new-motherhood panic with an infant baby boy, I met her. I was taking my son out for a walk in the neighborhood with his baby jogger, doing one of my early impressions of an enthusiastic young mother. I was walking past as she called out, "How old is your baby?" It was the pickup line for the stay-at-home-mommy set, women desperate for any kind of adult interaction. "He's four months," I said as I approached. She was holding her son in her arms, standing on her perfectly manicured lawn. He was dressed as a professional golfer.

As she explained that her son was six months old, I noticed that she had not allowed herself the personal-hygiene hiatus that most new mothers, including me, had granted themselves. My hair was falling in clumps from my limp ponytail, and I had stains of breast milk and rice cereal drying on my T-shirt. Her shoulder-length light brown hair was neatly combed beneath her wide-brim sun hat, and she appeared to have just come from the dressing room at Anthropologie.

After introducing our sons, we stood there, watching them and waiting, as if they were going to exchange pleasantries. Then and suddenly, she invited me and my son to join a play-

group. I accepted the invitation, although I did not seem to have a lot in common with her, or anyone else who had a baby. I was a lawyer. She gardened. Not that those things were mutually exclusive, but I know that only now. At the time, I thought we were quite different; the only way it seemed we were alike was that we enjoyed the same movies—I had seen her before at the video store and we had spoken there a few times.

But we were not fast friends. Even after meeting in the same playgroup once a week for several years, we were not friends. At first, if I am honest, for those first several years, she was not interesting to me. She was boring, in fact. Boring in the "My life is perfect, and my son is perfect, and my marriage is perfect, and my house is perfect, and my garden is perfect" way. Boring in the way that only perfect can be, and not worth investing any emotional energy, until one summer—the playgroup's fifth summer.

Her heart had been broken that summer by her lover, an old high school boyfriend who, she had desperately hoped, would help her escape. I could understand what she was hoping to escape from: the idea that this is all there was. This life of wifedom, motherhood, laundry, sex on Saturday mornings (if then), and playing trains on the floor for hours on end. That this was all there was or would be—where time moved so fast that it made us old overnight, but where each day, hour by hour, moved so mind-numbingly slowly.

But he would not help her escape. She somehow managed to keep her heartbreak about this fact contained, and thus her marriage intact. But she had to tell someone, if only because a broken heart is too much for anyone to bear alone.

We had run into each other unexpectedly one late afternoon in the parking lot of the neighborhood grocery. As soon as she saw me, she broke into writhing sobs, the tears from her eyes and the fluid from her nose running together, down her chin and onto her blouse. She could not help herself from repeating, "Why doesn't he love me?" I was shocked and discomforted by her grief and that she would allow me to see it. I said, "Of course he does," thinking that she meant her husband, who seemed too afraid of her not to.

Unfairly frustrated, as if I were somehow to blame for not being up to speed, she bawled, "Not him." As she continued cry-

ing, I felt a pull to embrace and comfort her, but I did not do so, fearing that she would judge such an act too intimate, not yet within the repertoire of our relationship. So instead, I tried to soothe her from a distance, "Everything will be okay. Don't cry." But she was disconsolate, and I could see for the first time that neither she nor her life was as perfect as she'd wanted everyone to believe. And as things went, her imperfections made her human, and interesting, at least to me. Because I did not have a perfect life either.

Her imperfections made her human, and interesting, at least to me. Because I did not have a perfect life either.

Although I did not want it to be true, I was not happily married. I had known this since a few hours after my wedding many years before. My new husband and I were in the presidential suite of a lower downtown hotel after coming from our wedding reception. He had helped himself to both of the chocolate squares that had been carefully laid on the bed next to the towels twisted into swans, their tails forming the shape of a heart appropriate for most wedding nights. He said, "Well, I just made the worst mistake of my life." Confused, I said, although it was not true, "I wasn't going to eat mine anyway." But he clarified: "No, I mean marrying you." I was still in my wedding dress.

And, just like you've heard on daytime talk shows, it got worse. His violent, episodic rages began on our honeymoon. They were terrifying and unpredictable. They were not rational. One night I was taking out my contact lenses, the disposable ones that I had always thrown in the trash, and my husband said, "Hey, you're going to clog my sink with those." Caught off guard by what I had confused as a joke (the sink?), I laughed. Although it would have been an equally big mistake not to laugh had it actually been a joke, it was not.

He erupted, storming toward me and shaking the floor under my feet. He screamed within inches of my face. And I froze—which means, simply, that I mentally shut down and physically became paralyzed, losing all feeling in my arms and legs—becoming so lightheaded that I felt like a yellow bal-

loon, slowly floating away from myself, at risk of popping at any moment. Within moments his voice had gone hoarse and my cheeks were covered with his saliva.

It is not uncommon for people to remain in disaster-prone areas even when it is ill-advised. The reasons people stay vary, but often have to do with underestimating the level of risk, the inability—financial or otherwise—to do anything different, and family ties to the area that make it difficult to leave. I stayed in my marriage for many of the same reasons. The risk of disaster was always present, but the eruptions and upheavals were not predictable enough for me to appreciate the danger inherent in staying.

In any event, after my son was born, it seemed there was no way to extricate myself. I was not in an economic position to walk away, even if I thought my husband would let me. Even more, I was not in an emotional position to accept that I would likely be forced to abandon my infant son in the danger zone, at least on Wednesdays and alternating weekends. Of course, in retrospect, it doesn't make sense to stay in a marriage like that. All I can say, for the defense, is that it is so hard to believe it is happening that it becomes easier to pretend it is not.

At its inception, playgroup had just five kids—three boys and two girls. But none of us stopped at one baby, so by the end of all of our childbearing years, there was a total of eleven kids: three girls and eight boys. Two of those boys were mine, and two of those boys were hers. When people think of a playgroup, they likely think of a horde of kids playing together, and that's what it was. But that's not all it was, at least not to me. Over those years, it became my single emotional escape, a lifeline saving me from the disaster of my marriage and the aftershocks of sadness and grief that I was sure would overcome and crush me amid the wreckage.

I don't think that it is altogether uncommon. Finding happiness outside of marriage. You're lucky to find it at all, really.

At least one afternoon a week, we gathered in one of our kitchens and dispatched the kids to the basement—or if it was nice, outside—to play. Then the wine was opened, and playgroup started. On one of those afternoons, we were in my kitchen. Although I had spent hours cleaning in preparation for

hosting playgroup, oatmeal was still stuck to my countertop. As soon as she noticed the hardened clumps, she did not just politely ignore them like the other moms. Instead, she helped herself to a sponge from my sink, sniffed it, and scrubbed the counter spotless.

As she often did, she brought a discussion topic for the afternoon.

She said, "So my new rule is that I won't give my husband a blow job unless he finishes reading a book." We all knew immediately that he would never get another one. Turning to me, she suggested, "Maybe you should try that, too." I shook my head slowly, taking a long sip of wine, and said, "No, sweetheart, bad idea. If I adopted that policy, I'd end up giving more rather than less, up from none to one or two a year." I directed her: "Under no circumstances are you to mention your 'new rule' to my husband." Laughing, her tiny crow's feet revealing themselves, she said, "I'm not promising anything."

As the afternoon sun went down, it was eventually time for everyone to go home to make their respective dinners. As children's shoes were gathered and tied, my husband walked in the back door, home from work. She was standing next to me as she turned and said to him, "So, have you finished any good books lately?" I looked up quickly, in time to catch her wink. I reached to grab her head, gently shook it, and covered her mouth with my hand. We bent over with laughter as I pushed her toward the front door and out.

In the Ancash region of Peru on May 31, 1970, most of the people in the picturesque mountain town of Yungay were indoors, socializing and watching the Italy-Brazil World Cup Soccer match on television. About three hundred of the town's children had gone to a circus just outside of town.

At 3:23 in the afternoon, there was a loud rumbling and the ground shook from an earthquake off the coast, many miles away. The tremor passed quickly, but the quake caused a large section of glacial ice to dislodge well above the town. In less than three minutes, the town was obliterated by the resulting landslide, buried by the accumulated earth, ice, rock, and debris that had gathered momentum on its violent race downward. Everyone in the town was buried alive, except those few who had

managed to quickly climb, ironically, to the cemetery, which overlooked the town, and the three hundred children who had been led to safety by the circus clown. The entire town was swallowed up by the slide, the tops of four palm trees the only visible markers of the town's former life.

During those years, my husband's violent and explosive outbursts caused periodic instability and tumult, but the playgroup provided a safe haven from those upheavals. Early on, most of our conversations were about how gifted our children were and which new word or trick one of them had learned. Later, she and I traded advice and ideas on toilet training and upscale kindergartens. Later still, we exchanged advice and ideas on how to balance the demands of motherhood against everything else, both of us trying to maintain ourselves amid the mayhem and wonder of these little boys we loved without condition one minute and disdained the next as we were forced, inexplicably, to clean urine off our respective kitchen walls. Over those years, she and I gradually revealed ourselves to each other, building layer upon layer of confidences and shared experiences.

At some point I had also entrusted her with the shameful truth of my marriage. We were the same in that sense, each outwardly pretending our marriages were better than they were.

She had trusted me with her secret in the parking lot that summer day, and at some point I had also entrusted her with the shameful truth of my marriage. We were the same in that sense, each outwardly pretending our marriages were better than they were. We had other similarities as well. We were both smart. We had both married men who were better looking than we were, which brought out similar insecurities in each of us. We were both good boy-moms, healthy and outdoorsy. We liked to snowboard, mountain bike, and camp, but, because neither of us liked to be uncomfortable, we decided to buy a pop-up camper together.

We took all four of our boys with us to purchase the camper. The saleslady at the RV outlet approached us and asked timidly,

"So, will the camper be for the two of you and your sons?" We both spoke quickly, and over each other, "No, no, we're married. We're not together." And we joked, "Not that there would be anything wrong with that," because we thought of ourselves as liberal and open-minded and we had watched *Seinfeld* like everyone else.

The years and the weekly playgroup meetings went on, and, by the time nine years had passed and our infants had become young boys, I thought she and I had become as close as sisters. "We might as well be." She said that at the doctor's office, where we were finding out whether the cancer had spread to her other breast. She said that to the nurse who'd said we looked like sisters.

She was diagnosed with breast cancer less than two weeks after our annual playgroup trip to the mountain house. We had all chipped in to rent the house for a long summer weekend. The moms and kids arrived at the house first, late on a mid-July afternoon, the husbands not scheduled to drive up until the next day. The wine was opened, dinner was made and devoured, and the kids fell asleep together in the basement watching a movie, their small arms and legs intertwined.

After we had emptied the third bottle of wine, she opened the tequila. As our friends succumbed to liquor and sleep, eventually only she and I were left awake, reclining in our chairs out on the expansive deck. As the full moon lit up the surrounding peaks and valleys, we listened to her iPod playlist repeat again and again. A song about a sweater poorly knit, playing over and over, forever becoming the soundtrack to that night: *I do not exist, only you exist. I do not exist.*

The chill from the cool mountain air quickly forced us into our thick bulky sweatshirts, and eventually under the single heavy blanket on my deck chair. And, admittedly, I was tired. And, admittedly, I was drunk. And, admittedly, I was not perfect. And because it seemed somehow inescapable, I covered my eyes with the heels of my palms and said, finally, "I think I might be attracted to you." And she said, too quietly, "I know." And then, after too long, after the humiliation started to settle in my chest like a rock, she said, "I think I feel that way, too."

I reached to grasp the front of her sweatshirt to pull her to-

ward me, but my fingers did not catch, and instead skimmed over the slick decal on the front of her shirt. But the intention of the motion was clear, and I leaned forward and kissed her, our teeth striking hard and awkwardly. She seemed stunned, as if she had not imagined that moment before. But when I leaned forward again the next moment, her mouth willingly met mine.

We stayed out on the deck for some time, too distracted by the maneuvering of our tongues and hands to notice the parts of our bodies that were pressed painfully against the hard wood of the deck chair. We stopped to ask each other, repeatedly and too often, "Are you okay?" The answer each time was an audible but inarticulate murmur of assurance and a deeper, longer kiss. Because she was experienced, and she knew that I was not, she asked me, "Doesn't it feel softer with a girl?" I stopped long enough to answer, "It feels the same." Although it was true that it didn't feel softer, it was also true that it did not feel the same. Instead, in that moment, it felt better—kissing someone I liked and who seemed to like me.

As we started to shiver, as much from anticipation as from the cold of the night, she said, "Let's take this inside." Up in her room, she pushed me down on her bed—the bed she would share with her husband the rest of the long weekend. She asked, as she unfolded and tucked herself beneath my arm, "When were you first attracted to me?" I answered honestly, "I think when I grabbed your head at playgroup that time." I gently grabbed her head between my hands, to remind her, and she slowly lifted her lips again to meet mine. She stopped then, slowly pulling away, and said, "I thought this would happen before now." I asked, "When?" As she gathered strands of my falling hair and moved them behind my ear, she lifted her eyebrows and said, "You know when." And I did.

The entire scene had already played out in both of our heads, months earlier, late one night in an empty parking lot where her car was waiting, awash in the harsh light from the nearby streetlamp. I had given her a ride to her car after a red wine dinner at an Italian restaurant. We were sitting in my car, facing each other, first laughing and then too quiet. Because I was afraid of what was about to happen, I started talking about our husbands, sabotaging the moment. On this night in her bed, so

much time having passed since the parking lot, I was still afraid, but I did not mention our husbands.

As she reached up again to touch my breasts, I resisted and gently pushed her hands away. But she was determined and persistent, and ultimately I didn't want to push her away. Alternating between tender affection and breathless lust, with the light of the full moon bending through the long windows, I surrendered to my attraction for her.

After, she said that she wished we could travel around the world together. And again after, feeling a sudden pull to escape that I did not fully understand, I started to get up to go to my bed—the bed that I would share with my husband. As I gently pushed her hair from her face and reached around to move her arm from my back, I started to stand, saying, "I should let you get some sleep." She pulled my arm toward her and said, "Stay and hold me?" I stayed and held her until she fell asleep.

The next morning, the playgroup moms made pancakes for the playgroup kids. As we cracked the eggs, mixed the batter, fried the turkey sausage, set the table, and poured the juice, she and I avoided looking at each other. And although I wanted—at that moment, in that kitchen—to reach out and touch her and tell her that everything would be okay, that we would be okay, I did not do or say anything.

Later that afternoon, the husbands arrived. As her husband came through the door, she moved toward him and kissed him warmly. I had seen her and her husband together many times over the years, but not once had I ever seen her French-kiss him hello. Taking my cue from her, I did the same with my husband. Through the early evening, her displays of affection for her husband became more and more exaggerated. I initially tried to keep pace with her, but I soon gave up, recognizing that I could not muster the energy nor feign the affection for my husband that would be necessary to compete.

After we had made and eaten dinner, and sent the kids off to the basement to play, we all went out to sit on the same deck, under the same full moon, to listen to the same playlist, repeating over and over. She was sitting on the same deck chair, this time resting against her husband's chest, once again in the arms of her seemingly perfect marriage.

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After she was diagnosed with cancer, the playgroup moms went into full cancer-battle mode, using the eight-week, rotating, organic-casserole-dinner defense to ward off our fears about her weakness, a prolonged illness and worse. Because she had cancer, it seemed ridiculous to try to talk about anything else. And what could have been said anyway without risking everything? It seemed safer then to chalk it up to being drunk. So that's what I did.

I decided to try to forget it happened. Her plan seemingly was the same. Given our common strategy, we never talked about it and instead focused on her cancer treatment. She asked me to go to doctor appointments when her husband couldn't, and I did. I sat with her on her couch as she doubled over in heaving sobs, holding her hands and confidently assuring her that she would live to see her boys turn into young men. I promised that I would take care of them if it became necessary, although I told her that I was sure it wouldn't. In truth, I wasn't confident and I wasn't sure—about anything.

By the time the nurse had said we looked like sisters, it was true that we might as well have been. It was also true that we may have been more than that. Later, though, I would understand that, for me at least, it wasn't possible to be anything more than that, that there could never be anything that was more than that.

A few months after she was diagnosed, she and I had our first argument. She was in the midst of radiation treatment and tired, but she had agreed to go to a Halloween party, at the house of a virtual stranger, to which our families had been invited. In the living room, amid the costumed crowd, we started to argue about something of no consequence. Of course, we were really arguing about something of great consequence, but neither of us was ready to acknowledge that. We were arguing, though, and as I had learned to do with my husband, I quickly tried to defuse the conflict. I embraced her and said, "I didn't mean to hurt your feelings" and "I'm sorry." But as I started to back away, she reached for and held both of my forearms, imprinting her fingertips and abruptly halting my backward motion.

Eye contact with her had always, and particularly at that moment, felt too intense. But her eyes were red and wet, and I could not avert mine from hers. In that moment, I did not expect her to apologize for our argument or even accept my apology for it. But even more, I did not expect her to say then, without moving her eyes from mine, and without blinking, "I love you." And maybe because I did not expect it, and maybe because it was exactly the last thing I expected in that moment, and maybe because I was afraid—either of what she meant or of what she may not have meant—I did not say, "I think I feel that way, too." Instead, I pretended that I had not heard her, and I quickly looked away and stepped back. And she did too.

It is often small movements—just one rock moving out of place, a small piece of earth shifting after an early spring thaw—that first suggest that the ground beneath you is about to collapse.

A landslide usually starts with a small incident, a tiny crack in the earth's surface. A seemingly insignificant fissure can fill with water and freeze, making it vulnerable upon a subsequent thaw. Combined with the force of gravity, this freezing and thawing can lead to a crushing avalanche, the earth's surface falling in on itself. When exposed to extreme temperature changes, even rock is likely to crack. Given seasonal weather patterns, this freeze/thaw cycle is most likely to cause disasters in the spring.

It is often small movements—just one rock moving out of place, a small piece of earth shifting after an early spring thaw—that first suggest that the ground beneath you is about to collapse. If you are aware enough to notice these cues in advance, you can try to minimize the potential losses by establishing protective barriers and reinforcement walls. Scientists will tell you that these efforts are, however, much less effective than evacuating. In short, it's safer to simply run away.

It seemed like a small thing, not knowing exactly how to act after she'd said something so unexpected. Trying to act normal. But I had not recognized that I was on such dangerous ground

or that her vulnerability would cause the ground to become much more unstable. And I had not noticed the subtle cues of the impending collapse that would come from her feeling rejected, in a way that was as important to her as anything else. For these reasons, I did not get my emotional walls up in time to provide any protection at all. And although it would have been advisable to do so, I also did not run away.

The place that I thought I inhabited on the planet, that felt stable, that felt safe, was about to slip out from under me.

Everything was shifting under my feet. The place that I thought I inhabited on the planet, that felt stable, that felt safe, was about to slip out from under me. I did not know how to stop the shifting or how to put everything back in place, back where it was safe. And as I lost my footing and started to slide down, I fell further and further away from everything to which I had ever belonged.

I belonged to my family. The one with brothers and sisters, whom you don't abandon. Who doesn't know that? I also belonged to my family—the one with my husband and two boys, whom you also don't abandon. Finally, and more significantly than was reasonable in retrospect, I belonged to playgroup, or thought I belonged.

Because this is what happened as the earth began to shift: it was nearly five months later and she had been declared cancer-free, her seemingly perfect life restored. She and I were at a basement party after coming from the elementary school's spring auction, again in the house of the same virtual stranger, where we'd had our first argument. There was a full bar in the basement. This fact was, as it turned out, unfortunate, because she had always held her liquor better than I.

For a few seconds we were standing there together in the basement. Not on the dance floor, but next to it. At least people were dancing. And although apparently it had been building and gathering momentum during that after-party for more than an hour, her rage seemed sudden and came at me un-

expectedly. Her jaw was locked in anger, and words started spewing from between her clenched teeth. She said, "You had no right to use my babysitter." I eventually understood that she was incensed that I had hired our mutual babysitter to watch my children that evening. She glared at me, unblinking, raging in silence, waiting for me to say exactly the right thing to fix everything. But it was too much anger, and my brain froze, again.

I could not move my mouth to say that I had simply needed a babysitter that night, that she did not have exclusive rights to our shared babysitter, that I had not hired the babysitter to make her angry, that I would not intentionally do anything to make her angry. That I was not going to clog the sink. This dynamic felt so familiar, but it had never happened before with anyone but my husband. I expected it from him, but I never saw it coming from her.

I waited for her to say something. I had no choice but to wait for her to say something. That was the nature of it. I could not say anything, right or wrong, to fix everything or even to break it more. I could not think. And then, and suddenly, she was leaving.

My husband did this, too. Leaving. There was an instant thaw. I knew this, so I knew what to do. I followed her home from the party. And I was standing at her door late at night. But it was not only her door. It was their door. And they were both standing there. And suddenly it seemed like maybe this was not the thing to do.

I cannot now reasonably argue that I did not love her, because in truth I could not have loved her more. But I did not follow her home because I was in love with her and willing to abandon my husband and two boys. It might be more interesting if that were the truth; it might have changed everything. But in that moment, she had left and I had followed, in the same way that I had followed my husband after he'd left many times before.

I followed her that night because I had learned early in my marriage that there would be significant consequences for not following, for not seeming to love someone enough to follow them. But unfortunately, with her, as with my husband, there was never going to be an "enough," no matter how many times

I followed or for how long or how far. But I didn't know that then. And so I was standing at their door, not yet fully comprehending that the disaster of my marriage had already triggered a much larger and much more dangerous threat.

In the harsh light of their floodlit porch, the night air too cold for what had been such a mild spring day, I somehow managed to say, "This is not about the babysitter." And I was right about that, of course, but I could not then say what it *was* about. Her husband was standing there, and she appeared terrified that I would do so right then and there, but I did not go there to ruin her perfect life. She took cover from me all the same, moving behind her husband, retreating into an alliance with him that I had never seen before. As she merged herself with him, I did not recognize anything about her, except her palpable fear of what I might say next. But I would not say anything next. I was there, with my imperfect hand on their perfect doorjamb, unable to say anything else and unable to move. She tried to close the door, and when she noticed my hand there, she opened the door wide enough to pry it loose and started to push me out.

I gave in to the momentum of her push and stepped back. The door closed with a finality incongruent with all the things not said and done.

Initially I could not move from the doorway of the house where I had spent so many long afternoons in deep conversation and fits of laughter. The house where I had brought her sons after feeding them huge helpings of ice cream and assuring them that their mom, just home from the hospital, was going to be fine. The house where I had brought my own sons so many times when I wanted them to feel safe, and when I wanted to feel safe myself, from the fear and uncertainty that surrounded our own home. After a moment, I gave in to the momentum of her push and stepped back. The door closed with a finality incongruent with all the things not said and done.

If you have not evacuated in advance of a landslide, there is little you can do after it starts. Due to its speed and intensity,

once a landslide starts, it is nearly unstoppable. The force and momentum generated are simply too great, and thus anything in its path is likely to be taken down. The resulting losses are extensive, the damage total, and the changes to the landscape are permanent. The effects of a landslide are often so large and dramatic that it is difficult to ever stabilize the affected area. And it is not advisable to ever build there again.

There would be consequences for not saying and not doing exactly the right thing, for not putting everything back in place, and for being too afraid to do anything else. And there would be consequences for not running away. Despite everything—our shared lives, our shared confidences and experiences, our shared intimacies—and maybe because all of those things made her feel too vulnerable, too imperfect—she would start to say to the other playgroup moms, to her husband, to my husband, to her children, to the principal and teachers at the elementary school, to our mutual babysitter, to the virtual stranger, to everyone in our shared community, that I had followed her home because I was a lesbian, a stalker, and an unstable and dangerous threat to her, her husband, and her children. As evidence of my dangerous and erratic propensities, she would say that I had even grabbed her head and shaken it. She would never mention the mountain house or tell anyone that she loved me.

She knew that I would never mention these things either, even in my own defense, because to do so would have exposed me and my sons to the dangers inherent in living with and divorcing an abusive spouse. She was smart enough to know then that she could say anything she wanted about me and that I would not be able to do or say anything to defend myself or my children with the truth. I had made my bed by sleeping in hers, and I would have to lie in it.

She never spoke to me or my sons again. If I was walking down the sidewalk in front of the busy school, and she was also walking down that same sidewalk from the other direction, upon noticing me she would veer off the cement, well into the grass, careful to show that she was maintaining a safe distance. Her sons would run in the opposite direction if they saw me in the school hallway. She would not let her boys play

with or talk to mine. Our playgroup membership was hastily terminated. At the time, my sons were five and nine, and they did not understand what was happening or why they could not play with their friends. I was forty-two, and I could not help them understand. In this story, not even the children would be spared.

Soon, not having any escape from it, I lost my marriage. Admittedly, that may have been no great loss. But like a natural-disaster victim wandering dazed through the remnants of a former life, I slowly came to understand that there had been enormous losses. I had forever lost my friend—my *sister*—my family with the husband and two boys, and the playgroup. I did not belong anywhere. These losses were very real, the destruction total. The truth would be forever covered by her undisputed accusations. I would be buried alive, with all of her secrets buried with me.

In the end it wouldn't matter whether I had fallen in love with her or hadn't. She wouldn't believe or be satisfied with either. And so my life as I knew it would be obliterated, so much so that sometimes, later, I would wonder if it had ever existed at all. My sons would be the only evidence of my former life. They would be daily reminders of my past, but also of my present and future. And in spite of her efforts to help my husband gain custody from me, I had my boys. They somehow survived the landslide with me, and I would build our lives again, this time on different and more stable ground.

After a disaster, survivors often become numb to a world seemingly oblivious to their suffering. In their disoriented state, they move in slow motion through their newly surreal lives, where not even the air feels familiar. They are dismayed that life can go on for anyone as before, that anyone could be so unaffected by the large-scale disaster that has left them in ruins.

It had been nearly five months prior that she had said she loved me. In every moment since and before, there were things that should have been said and things that should have been done. But they weren't said and they weren't done, by either one of us, and so we did not avert or escape the devastation. And although I don't understand how, the world keeps turning on its axis and the seasons keep changing. My thoughts are in

the same place, circling, and circling back, over the vast and battered remains of the emotional landslide. The world goes on without noticing that the landslide has taken me down. And in fairness, it has probably taken her down, too. But it's like the world is oblivious to the heartbreak of it all. And that is a stunning realization at some level. As stunning as the realization that it is spring again.

EXHIBIT 2

2014

The BEST AMERICAN *ESSAYS*

JOHN JEREMIAH SULLIVAN

EDITOR

AUTHOR OF *Pulphead*

Chris Chan
It's Time We Demanded More, *Gilbert Magazine,* September–October.

Kathleen Chaplin
The Death Knock, *New England Review,* vol. 34, no. 1.

James M. Chesbro
From the Rust and Sawdust, *Superstition Review,* Fall.

Joseph Chinnock
Legally Ted, *Gettysburg Review,* Spring.

Jill Christman
Borrowed Babies, *Iron Horse,* vol. 15, no. 3.

Kelly Clancy
Who Are Not, but Could Be, *Massachusetts Review,* Summer.

Bruce Cohen
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Charles Comey
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Eli Connaughton
Sisters, *Carolina Quarterly,* Spring.

Katie Cortese
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Traci Cox
Missed, *Masters Review,* no. 2.

Paul Crenshaw
Work, *Alaska Quarterly Review,* Fall/Winter.

Marian Crotty
It's New Year's Eve, and This Is Dubai, *New England Review,* vol.

Renee E. D'Aoust
You Move Away. You Move Closer, *Trestle Creek Review,* no. 27.

Adam Davies
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Sarah De Leeuw
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Jeremy Denk
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Marcia Desanctis
The Slow Language of Sculpture, The Fast Language of Words, *The Millions,* April 17.

Bonnie Devet
Prince Christian Sound: Iceberg Canyon of the North, *hackwriters .com,* May.

Jaquira Diaz
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Morris Dickstein
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Brian Dillon
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Kristin Dombek
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Brian Doyle
Dawn and Mary, *The Sun,* August.

Regina Drexler
Stealing Mannequins, *West Branch,* no. 72.

Regina Drexler

Stealing Mannequins

I accidentally started waving to the mannequin. Or mannequins really, but only one ever seemed to wave back. The mannequin would be important to the story, but I didn't know that as I waved.

The mannequin belonged to my new neighbor, Linda, but she would not be important to the story. Except that she had a gun. I never saw it, but she once told our other neighbor, Mitch, that she had one. She told him about the gun after his dog somehow got free and ran into her house. She said she would shoot his dog the next time it came into her house. I believed her, and Mitch did too. She was the type of person who would have a gun and shoot a dog. She liked cats.

I was living next to Linda with my husband and two young sons. I was not the type of person who would have a gun. I did have a dog, though, so I had a six-inch cement barrier poured along the fence that separated Linda's yard from mine, to make sure my dog never got out. The last thing I needed was a dead dog.

Linda actually owned three mannequins. I didn't realize there were so many until I found myself on her porch one early summer afternoon, surrounded by them. They were fully dressed, all in winter coats despite the weather, seemingly having a tea party. Two were seated together with porcelain teacups, empty, in front of them. The other one was upright, supported by a solid metal stand connected at her torso. She was holding up one hand, seemingly in friendly greeting to passers-by. The three mannequins appeared to be having a conversation. I decided to steal the standing one, the one to whom I had waved.

I stole the mannequin for my friend Deana.

Since I waved to the mannequin and confided that small embarrassment to her, Deana and I joked about stealing it. We would have to get drunk first (of course), and then we would take her. It became a well-worn subject of conversation over the next several years, yet there was never a clear understanding of our intentions with respect to the mannequin once we had her. But on the morning of the day the "For Sale" sign was placed in Deana's yard, the plan for the mannequin suddenly crystallized, at least for me. I would steal the mannequin and place her next to the "For Sale" sign in Deana's yard. I would use the mannequin to showcase the home, just like the models on *The Price is Right*.

I knew she would move anyway, but by stealing the mannequin for her, I hoped Deana would understand, in a way she otherwise might not, how much she meant to me and how much I wanted her to stay.

Of course, I should have probably considered the potentially deterrent effect of a mannequin, dressed in full winter garb on a warm summer afternoon, on a prospective home buyer. And probably I should have also considered the related potentially detrimental effect of the mannequin on the mood of Deana's husband, should he discover it before she did. But I didn't consider either of these things, and instead, as the morning wore on, I became more and more committed to my plan. So that by the time Linda was leaving for her four-hour nursing shift in the early afternoon, I had become convinced that there simply could be no higher or better use for a mannequin.

A few months after I took the mannequin from Linda's porch, Deana would tell me that her husband had pinned her against the carpet one winter night in their new house. She said, "pinned against the carpet."

Although we had known each other for many years, I did not understand until that moment that we were living similarly secret, violent lives with our husbands. And while I felt a deep connection to her as a result, I did not feel strong enough then

to offer her any support. I had not been able to help myself by that point, so I could provide no assistance to her. When, months later, I could and asked her about it, she explained that she had only meant that her husband had her back against the wall. As in figuratively. But being "pinned against the carpet" is not the same as having your back against the wall. It's not the same at all really. If, as I was surveying the mannequin tea party, I had known about the carpet waiting out in the future for Deana to be pinned against it, I would have understood (in a way that many would not) that Deana would suffer too much for my mannequin stealing, and I would have left the mannequins to their pretend tea.

I suspect Deana's husband was never really angry about the mannequin per se, or really any other specific or definable thing. Instead, I imagine that, like my husband, he was simply angry with life, with anything that disturbed the ordinary sameness of his days. Deana would be pinned against the carpet, perhaps not because of the mannequin itself, but rather for all it threatened to disturb.

Deana was planning to move out of our old, well-established neighborhood to a new tract house in a sprawling development about 20 miles away. She would say that she was relocating so she and her husband would have a bigger home in which to raise their two growing boys. But I understood that she was moving to try to get a fresh start, believing things would be better with her husband simply by changing settings. I had tried that too.

I understood then that she was also moving to distance herself from her feelings for Rachel.

Deana had been living a few blocks away, in the same neighborhood as us, for years, and my sons and I had become accustomed to seeing her and her two sons—along with Rachel and her two sons—every few days for late afternoon playdates and happy hours.

Rachel was also unhappy in her marriage, although her unhappiness stemmed from different issues than Deana's or mine. Simply, Rachel's husband would never satisfy her spousal

expectations. Specifically, he would never be financially successful or provide her with vicarious stature in our small community. Rachel, Deana, and I were all living similar lives, though, in the sense that, despite the fact that we were each unhappy in our marriages, we outwardly appeared to be enthusiastic and cheerful young wives and mothers.

Of our six boys, I had the youngest. But nearly two years after I had given birth to my younger son, I still had not yet shed the many baby-related pounds associated with that pregnancy. During one late afternoon playdate, while sitting in her kitchen, Rachel disclosed her preference for wearing bikini thong underwear. I laughed, assuming she was joking. Registering her confusion at my laughter, Deana explained to Rachel that neither she nor I would wear bikini thong underwear because we both instead needed "ample panties for full fannies." Deana was funny like that, and although she did not have some of the physical attributes typically required for the label, she was beautiful—but more in the way that someone who makes you laugh is inescapably appealing.

Deana described herself as "big-boned," and she seemed comfortable with the idea that she would never appear particularly thin. In contrast, it was important to Rachel that she fit within the strict standards of the beautiful label (and all other labels relevant to social station). So, Rachel worked hard to maintain her appearance and corresponding image. She had quickly lost her baby-related weight and was the first of us to trade in the elastic-waistbands of our sweat pants and pajamas in favor of $180 low-rise, designer-label jeans.

I was not "big-boned" and had instead been thin and fit prior to the body ravaging that came from pregnancy and breastfeeding. And so shortly after my younger son turned two, I started an earnest campaign to lose weight. Following Rachel's advice, I survived solely on protein bars and vanilla lattes for nearly a year. Although it seems likely that I will eventually die of a brain tumor as a result of my diet that year, I lost so much weight so quickly

that I was able to start wearing my pre-pregnancy clothes again before my younger son's third birthday.

And it was soon after, one evening as the three of us were walking to a rare dinner out, to a chic sushi place in the heart of the downtown dating district, that I began to strut my old body down the sidewalk. I was finally feeling the smallest bit attractive again, so it was exceptionally bad timing for Rachel to then turn to me and say, "I have several pairs of jeans that are way too big for me; would you like them?" I stopped mid-strut, turned to her and said, "Thank you, but sweetheart, I will never want your 'fat jeans.'" In a quick effort to mitigate the slight tension arising from the exchange, Deana laughed, took each of us by one arm, and turned us back in the direction of the restaurant. The three of us walked together the rest of the way, arms around each other.

Back then, for years before I stole the mannequin, I thought Rachel, Deana, and I were in a three-way best friendship. But Rachel and Deana called each other "sister-friends." No one ever called me that. At the time, I thought that was because each of them, otherwise sister-less, understood that I, having four actual sisters, was not in need of any more. But now (and it seems so obvious), I understand it meant I was not in any kind of three-way best friendship at all. They were "sister-friends," and I was not.

At some point, though, Deana fell in love with Rachel. Rachel did nothing to discourage it, frequently flirting with and teasing Deana during our late afternoon playdates. Many times, sitting on one of our respective couches, our boys playing together either outside or in the basement, Rachel would kick off her stylish ankle boots, lift her feet, put them in Deana's lap and say, "Will you rub my feet?" Deana would push her feet away, saying, "No, rub your own damn feet." Laughing, Rachel would lift them back up onto Deana's lap and say, "Please, just a little." Deana would not rub her feet then, but she would not push them away again either.

I didn't blame them. For Rachel, I understood it felt good to have someone like you that much, and for Deana I understood

it felt good to like someone that much. Certainly, given my relationship with my husband, I could understand the temptation. But I pitied Deana then, as in, "Poor her. She is in love with someone who will never love her back."

As I struggled to get the metal stand loose from the mannequin's torso under the cover of Linda's shaded porch, I quickly understood that the task of stealing the mannequin was going to be more difficult than I first imagined. When I finally managed to break her free from the stand, I realized she was taller than me by at least two inches, heavy, and quite difficult to manage, particularly given her bulky winter clothes.

I would first need to make sure the coast was clear, that no one would see me take the mannequin from the porch and across my lawn to my backyard gate. I considered the idea that I could simply act confident about it, as though Linda had requested that I remove the mannequins, one by one, from her porch that afternoon. But then I remembered Linda's gun and decided a covert operation would be my best option.

I peeked around the porch column, and not seeing anyone outside on our tree-lined block (so unusual it could mean only that the universe wanted me to take the mannequin at that moment), I decided to make a break for it. I grabbed her around the waist and ran, half-carrying, half-dragging her through Linda's weed-strewn garden and across my manicured lawn. I leaned her against the fence as I fumbled with the gate latch. As the gate sprung open, I grabbed her and secreted her inside my backyard. I had never stolen anything before, and the adrenaline rush was nearly overpowering. As I was surveying the mannequin's full outfit in the safety of my backyard, I checked my watch. I only had an hour before I had to pick up my sons from their elementary school. I had to work fast.

Deana did not want to be in love with Rachel, of course, but that didn't change the fact that she was. And it was likely that Deana

was more afraid of Rachel than in love with her. Sometimes, though, there is such a close relationship between fear and love that it is hard to tell the difference. At least it was for both Deana and me. In significant part, our confusion between the two kept us each in our respective unstable and destructive marriages. It also likely kept us in our relationships with Rachel.

One late afternoon, Rachel and her sons arrived at my house an hour earlier than our scheduled playdate with Deana. Sitting on a barstool at my kitchen counter, Rachel started talking about a virtual stranger, another mother with whom we were both acquainted who was attracted (so obviously) to one of the few stay-at-home dads we knew. Rachel intended to inject herself into the relationship between the virtual stranger and the stay-at-home dad, for no reason other than to prove she could. As she explained her plan, I said, "You're a little bit scary." She smiled and said, playfully, "Do I really scare you?"

I told her that I thought she was safe. But I did not think she was inherently safe. Never that. The reason I thought she was safe in fact had nothing to do with her. Instead, I knew what she was capable of, or at least I thought I knew. And so armed with that knowledge, I thought I could protect myself, in a way that the virtual stranger could not. But what I did not consider was what Rachel was capable of if she was hurt. I never considered that, I think, because I did not understand that she could be hurt. I never considered that her hurt, in fact, would drive everything. Given the truth of that, both Deana and I should have been afraid.

Deana's fear caused her to pull me—neck deep—into the threesome. For many years, I had been on the periphery of their "sister-friendship." I had also been excluded from their "fun group," which consisted of weekly get-togethers with the two of them and their sons. Fun group was a well-kept secret from me for several years. However, over time, likely in direct correlation to her increasing depth of feelings for Rachel, Deana started inviting me to fun group and all other activities involving Rachel. I sometimes now wonder what Rachel thought about that, if she

understood that pulling me in was a defensive move on Deana's part. It hardly matters now, but I sometimes still wonder.

As I was about to load the mannequin into my car, I considered that Deana's house was on Seventeenth Avenue, a busy street. I decided that pulling the mannequin out of the passenger side of my SUV would afford better cover than removing her from the back. I put her in the car, lying across the rear seat, covering my younger son's booster. But as I tried to close the door, I found her feet and high heels were blocking it. I quickly readjusted her, slanting her more sideways on the back seat. Although I heard a small pop, I pushed the door closed with force and drove to Deana's.

The small sound was not insignificant, though, as I discovered in removing the mannequin from my car. As I was lifting her from the backseat, she came apart at her midsection. On Seventeenth Avenue, with traffic speeding by, I found myself holding only the top half of the mannequin. I looked over her shoulder into the backseat. She had been wearing a housedress of some kind underneath her coat, which when removed with her torso left the lower half of her body completely naked, save for her red high heels. I was holding her upper body, awkward with heavy clothing, trying to determine my next move. In retrospect, my next move should have been to put the top half of her back in my car and speed away. But you never do what you should have done in retrospect.

Instead, I pulled the top half of the mannequin, dragging her by her armpits along the ground as if rescuing her from a burning aircraft, to the "For Sale" sign planted in Deana's lawn. I quickly ran back to retrieve the rest of her from my back seat. As I was sitting on Deana's lawn with the two halves displayed before me, and as cars were starting to slow down as they passed to assess the scene, I decided to change my approach from covert to confident. I started acting like I was supposed to be on Deana's lawn lifting the housedress of the mannequin to better calculate

how to reassemble her. I acted with assurance as I picked up her naked lower body, turned her at a ninety degree angle to match up the latching system at her mid-section and twisted her body back together. I calmly stood her up next to the sign, smoothing out her dress and coat and adjusting her winter hat.

She started to tip over, but I righted her quickly. Only when she started slumping over again did I notice I had attached her together backwards, with her feet pointed 180 degrees from the direction of her sharp, pointy breasts. She was unstable, but I had no time to fix her. After propping her up a final time, I calmly walked back to the car, got in, and went to pick up my sons from school.

It is important to say that, a short time after I stole the mannequin for Deana, I slept with Rachel. It seems like I should admit that, even though we didn't do everything there was to do. I'm not sure what to call it if I don't say that we slept together. We hooked up, we messed around, in a bed, and then we fell asleep. But there was no penetration, if that's the standard. I have no idea what the standard is. Whatever it was, I want to say I slept with her so that there is no question about what it is that I should be ashamed of. It was a betrayal of Deana, and I don't want to try to minimize it now by pointing to everything we could have done but did not do.

Rachel was married, yes, and I was also married, yes, and of course I know I should feel bad because I slept with Rachel under those circumstances. But for many reasons, I don't. But I could not feel worse about sleeping with Rachel given how Deana felt about her. It was not a kind friend-thing to do.

Of course, I want to get some credit for saying, for being able to pull away from Rachel long enough to say, "We shouldn't do this. We need to stop." I want there to be some appreciation for how hard that was to do, would have been for anyone to do, to stop kissing her then. And when Rachel, smiling and pulling me back, asked, "Oh yeah, why?" I also want to get credit for

saying, "Deana." And I want even more credit for not then also saying, "Because Deana is in love with you." I will not get credit for any of these things, though, because when Rachel answered, "We can't think about her now," and pulled me back again, I simply shrugged (because her statement seemed so logical) and slept with her anyway.

So there will be no credit given, and instead, there will be a consequence for my betrayal. And there should be, I know, as much as I don't want to deserve one.

As the afternoon went on, Linda's usual four-hour nursing shift seemed entirely too short. Finally, my phone rang. It was Deana's ringtone, the Heartless Bastards' "All This Time." I assumed Deana was calling to acknowledge my incredible mannequin feat. But instead, she simply explained she had left work to pick up her sons from school and wanted to come over for an afternoon playdate and a drink. "Okay," I said, which is what I always said. I was hoping she would drive by her house on the way to mine, but after I opened the door and let her and her sons in, it was clear she had not yet seen the mannequin.

The next call came from Rachel, her ring The High Strung's "She's Not Even Mad at You," also asking to bring her sons over for a playdate. "Okay, but here's the deal and I may need help." I quickly explained the situation. She said only, "We'll see you in five."

The first hour or so of the playdate was uneventful, but as it got closer and closer to 5:30, when Linda was scheduled to return home, I grew more and more concerned about the mannequin. And the gun. Rachel, who was sitting next to Deana at my kitchen counter and less than three feet away from me, started texting. She asked me, "What's your plan?" I texted back, "At a minimum I will need to deliver a ransom note next door very soon." Rachel looked over at her phone casually, but then as she read the text she laughed out loud. And admittedly the whole situation was funny, but I was becoming increasingly distressed and my sense of

humor was waning. Stealing the mannequin was the worst thing I had ever done, but I didn't want to get shot for it.

And then Deana's husband called her. He had no special ringtone. He told her that their neighbor had called him about a "body" in their front yard and she should go home to meet the police whom he planned to call next.

In a moment that should have informed everything that followed, Rachel said, "Well, we better get going." She was out of the house, with her sons, within two minutes.

I started waving at Deana, who was still on the phone with her husband, and quickly said, "It was me. It's the mannequin. It was a joke." Deana smiled, then looked stricken as she listened to her husband rant. I understood then, at 5:15, that I had to go retrieve the mannequin immediately, before Deana's husband or the police arrived at the scene (my fingerprints being all over even the most private parts of the mannequin), and before Linda came home to her gun. I left Deana in my house, futilely trying to explain the humor of the mannequin to her husband, as I ran to my car.

Unfortunately, my eight-year-old son was following closely behind me asking, "What's wrong Mama? Where are you going?" And in my most proud mothering moment to date, and not having the time to try to convince him to stay with Deana for five freaking minutes, I said, "Hurry, get in the car! Get in the car! We have to go get something I took and put it back where I found it right away." And of course, he had a million questions on the three-minute car ride to Deana's house, which were mostly just variations of "Isn't stealing against the law?" and "What were you thinking?"

By stealing the mannequin for Deana, I disturbed a delicate and unstable balance of emotions running between the three of us. Certainly, Rachel would deny being hurt by my juvenile prank. But it must have signaled something significant to her, maybe how much I cared about Deana, maybe how Deana and I had

developed a friendship independent of her. It was an alliance which Rachel could not abide.

At the time I stole the mannequin, I did not understand that doing so would undo the fragile connection holding our threesome together. I only understood that later, after I slept with Rachel.

It is a fair question, why Rachel slept with me instead of Deana. The shortest and easiest answer is that Rachel was not attracted to Deana. Because she was not attracted to her, it was safe for Rachel to flirt with and tease Deana, to keep her engaged for the game, and ego, of it. However, over those years Rachel did become attracted to me. And I to her. Of course, I hate to admit that now.

Because Rachel was attracted to me, she would disrupt the friendship developing between me and Deana by sleeping with me. I realize it is somehow worse, that I slept with Rachel only because I wanted to, without having any other good reason for it. But I think it is also somehow better.

As I pulled up and saw the mannequin lying face and ass down in Deana's yard, I told my son to wait in the car. I ran to get her, and as I struggled to carry her under my arm back to the car, my son, thoughtfully, opened the back hatch for our getaway. I heaved her inside and sped back home. It was 5:25. I pulled into our garage, and leapt out to open the back. I grabbed her and ran to our backyard gate. As I opened the gate and quickly assessed the risk of witnesses (minimal enough), I ran across my front yard with the mannequin in the direction of Linda's porch. My son was trailing just behind me, still insisting on answers to his questions about the legalities of it all.

As I was running back to the porch, the mannequin somehow lost her hat and wig. I started pleading with my son, frantically, "Please, will you just grab the hair? Grab the hair!" And he did because he is a good boy and he loves me. He had become my

accomplice. We put the mannequin back on her stand on Linda's porch, and we agreed that stealing was a very bad idea.

Shortly after I slept with her, Rachel would point to my mannequin stealing as the first evidence that I had become emotionally unbalanced and was not acting "right." Rachel would need for me to be seen as not acting right. To Rachel then, I suddenly became all of the things she was most afraid of being. If I was unstable, she was not. If I was the lesbian, then she didn't have to be. If I was a bad mother, she could finally be a good one. Stealing the mannequin had been a joke, of course. But because I stole the mannequin for Deana, Rachel would even eventually cite it, in the custody battle that ensued with my husband as we were divorcing, as evidence that I had involved my son in criminal activity.

Rachel likely felt hurt, first by the close friendship developing between me and Deana, and later as a result of her confused feelings about me. With respect to the latter, to be fair, it is also likely that she felt scared. But for Rachel, any uncomfortable feeling, whether fear or hurt or otherwise, would only ever come out as anger. Don't ask me why this was so. There are simply people like this.

In her anger, Rachel commenced my undoing. It started seemingly unprompted one day, when she appeared to avoid talking to me. Thereafter, her efforts to evade me became undeniable as she started to act like I intended to set her on fire, routinely moving in the opposite direction whenever I approached. I imagined from the outside, if anyone had been paying attention (which no one ever does), that we looked like opposing magnets, always moving together but staying the same distance apart at all times. I slowly noticed that other people too, once friendly, had started to avoid me. It took me some time to figure out what was happening. My delay was in some part attributable to my unwillingness to believe that I was expendable, that I offered nothing, friendship or otherwise, that she was not

willing to sacrifice. Denial seemed to provide me the only viable form of self-protection.

It is interesting what people don't tell you. No one will ever say, "By the way, Rachel says you are a criminal and a lesbian and unstable and a bad mother. Do you have any comment?" Instead, the mere nature and audacity of the accusations are such that no one will ever repeat them to you. And that makes them indefensible, and will leave you undefended. But I need to stop here, because this is not a story about Rachel. This is a story about Deana.

The only person who would understand how unfair the allegations were, how wrong, was Deana. Deana was the only person who could reasonably explain that stealing the mannequin had been a joke and thus did not itself establish a newly emerging mental illness. Without Deana to defend me, though, there would be only one thing I could say that could reasonably explain the motivations behind Rachel's claims. But that would mean telling the truth about my relationship with Rachel in the midst of my custody battle with my husband. And it would also mean telling Deana.

I had wanted to tell Deana what happened from the beginning, from the first night in Rachel's bed. It felt like too big of a secret, too big of a betrayal, to keep from her, and it felt too difficult for me to manage alone. So I had asked Rachel, as I was getting up to leave her bed, "How are we going to tell Deana?" I don't know what I expected Rachel to say then, but making direct eye contact and giving me a look equal parts distress and disdain, she said, "We are not telling Deana." I did not agree or disagree, but when she asked me to lie back down with her, I did.

It was not until months later, after 10,000 opportunities to tell Deana had come and gone, that I finally told her. When, very late one night on the telephone, it happened that Deana was again speculating about Rachel's change in behavior towards me, her theories so pathetically off-base and ill-informed, I finally felt

compelled to help her understand. Deana was saying, "I don't know, maybe it's because she thinks that you're acting like a 'bitchy sister,' or maybe ..." I cut her off, "No Deana, I am not acting like a 'bitchy sister' or anything else. Rachel is acting so fucking weird because she's freaked out that we hooked up." Silence. "What?" Deana asked quietly. It was a fair question, and there was no going back. I said, "All of this shit is happening because we hooked up." And she asked the only other questions that she would ever ask me about it, "How long ago did it start? Was it about two years ago?" Her time reference confused me then and still does, but I answered, "No, it only happened last summer." And I said, "I'm sorry I didn't tell you before now. I know I should have."

I thought then that if there was anyone in the world who would understand the nature and extent of the trouble I was in, it would have been Deana. But in mistaking her feelings for mine, she only accused, "You're in love with her." And what I thought then but did not say was, "I know you are, but what am I?" Instead, I said, "No, Deana, I am afraid of her." She said she had to hang up then. And with that, our friendship was over.

Deana was never angry at Rachel because she slept with me. Deana had always been afraid that Rachel would hurt her. She was emotionally prepared for that. In contrast, though, Deana trusted me. It was the same way I felt about her. And what we both learned, nearly simultaneously, was that although it is very painful when someone you love hurts you, it breaks your heart only when someone you trust does.

Because I had broken her heart, Deana was not inclined to defend me against Rachel's allegations. The fact that she did not was even more shocking and hurtful than the allegations in the first instance, and in turn unfairly lent the accusations some credibility. And it wouldn't matter to Deana that I was sorry. She would never forgive me. And so she would never help me, no matter how high the stakes. To Deana then also, I was expendable. I became lost in the idea that I was worth so little to people I valued so much.

I still get lost in every part of that.

Sometimes I think this way: I know that the consequences of breaking Deana's heart should be significant. But what if, by sleeping with Rachel, I saved Deana from being the one to sleep with her (which Deana would have, my name likely not coming up at all)? And what if I saved Deana from facing the consequences of sleeping with Rachel, which would obviously turn out to be quite severe? Shouldn't these things be factored into the analysis of what punishment I deserved? And wasn't it enough that I didn't get (or take) the girl? Did I really deserve to have my life ruined? And admittedly, it could have been worse. I could have lost custody of my sons. And although I didn't, I lost nearly everything else as a result of Rachel's accusations. It occurs to me now that I might rather have been shot.

I know it is pointless to think this way, but sometimes I still do.

In the end, it would be Rachel who would take Deana from me. Rachel and Deana would remain friends, and my consolation always would be only that it is an unstable friendship, forever put together ass backwards. It was built mostly of fear rather than love, and it would always be that way. And even with all the time in the world, there would be no way to fix it.

EXHIBIT 3

EXHIBIT 2

☐ Municipal Court ☑ County Court ☐ District Court ☐ Denver Juvenile ☐ Denver Probate
Denver County Court, Colorado
Court Address: **1437 Bannock St., # 170, Denver, CO 80202**
720-865-7275

Plaintiff / Petitioner:
BROWN, RACHEL
V.
Defendant / Respondent:
DREXLER, REGINA
Address:
2054 EUDORA ST
DENVER, CO 80205

▲ COURT USE ONLY ▲

Case Number: **15W1242**

Courtroom: **170**

PERMANENT CIVIL PROTECTION ORDER ISSUED PURSUANT TO §13-14-106, C.R.S.

☐ To Respondent/Restrained Person Protected Person alleges Weapon Involved	Date of Birth	Sex	Race	Weight	Height	Hair Color	Eye Color
DREXLER, REGINA	04/16/1967	Female	White	118	5'04"	Blonde	Green

Full Name of Protected Person	Date of Birth	Sex	Race	Full Name of Protected Person	Date of Birth	Sex	Race
BROWN, RACHEL	03/28/1968	Female	White		00/00/0000		
WEAVER, GEORGE	06/06/2002	Male	White		00/00/0000		
WEAVER, HENRY	08/07/1999	Male	White		00/00/0000		
	00/00/0000				00/00/0000		

The Court Finds that it has jurisdiction over the parties and the subject matter; that the Restrained Person was personally served and given reasonable notice and opportunity to be heard; that the Restrained Person constitutes a credible threat to the life and health of the Protected Persons named in this action; and sufficient cause exists for the issuance of a Civil Protection Order.

The Court Finds that the Restrained Person ☒ is ☐ is not governed by the Brady Handgun Violence Prevention Act, 18 U.S.C. §922(d)(8) and (g)(8).

This Protection Order DOES NOT EXPIRE and only the Court can change this Order.
A violation of a Protection Order is a crime and may be prosecuted as a misdemeanor, municipal ordinance violation, or a delinquent act (if committed by a juvenile) pursuant to §18-6-803.5, C.R.S., and municipal ordinance.

The Court Orders that you, the Restrained Person, shall not contact, harass, stalk, injure, intimidate, threaten, touch, sexually assult, abuse, or molest the Protected Persons named in this action, or harm, take, transfer, conceal, or dispose of or threaten harm to an animal owned, possessed, leased, kept or held by any protected party, a minor child of any other party, or otherwise violate this Order. You shall not use, attempt to use, or threaten to use physical force against the Protected Persons that would reasonably be expected to cause bodily injury. You shall not engage in any conduct that would place the Protected Persons in reasonable fear of bodily injury.

1. *Contact.*

It is ordered that you, the Restrained Person, **shall have no contact of any kind** with the Protected Persons and you shall not attempt to contact said Protected Persons through any third person, except your attorney,

☑ **except as follows:**

The defendant may have ingress and egress to, his/her school and school events, but must remain at least 10 feet from the plaintiff at all times and must not bother, molest, intimidate nor have any sort of communication with the plaintiff. Respondent must stay 100 yards away from both of petitioners homes.

2. *Exclusion from places.*

You must keep a distance of at least 10 ft. from the Protected Persons, where ever they may be found.

It is ordered that you be excluded from the following places and shall stay at least 10 yards away from the following places:
(Please specify address(es) where the Protected Persons reside, work or attend school.)

☐ The Protected Person has requested that the address be omitted from the written order of the Court, including the Register of Actions.

☑ Home: 6220 E 6TH AVE DENVER 80220

☐ Work: Name: _____ Address: _____

☐ School: Name: _____ Address: _____

☑ Other: 22097 HWY 6 (ST JOHNS CONDOS) KEYSTONE, CO 80435

☐ Exceptions:

3. *Care and Control Provisions*

☐ It is in the best interest of the minor children that care and control of these children be awarded to: _____ (name of person)

This temporary care and control order and all other issues concerning the children, including Parenting Time and Interim Decision-Making Responsibilities expires on _____ (date) not to exceed one year from this Order. All other provisions of this Order remain in full force and effect permanently.

This Order gorverns any other Orders concerning the care and control of said children. However, provisions in another Order concerning the children that do not conflict with this Order must be followed.

4. *Issues Concerning Children (Parenting Time and Decision-Making Responsibilities)*

☐ Parenting time is granted, expires on _____ (date) and shall be as follows:

_____

☐ Interim decision-making responsibilities expire on _____ (date) and shall be as follows:

- ☐ _____ (name of person) shall have sole decsion making-responsibilities.
- ☐ The parties shall jointly share decision-making responsibilities.
- ☐ Other as set forth in the "Other Provision" section.

☐ Parenting Time and Decision-Making Responsibilities shall be as previously ordered by the _____ District Court, Case #_____

5. *Other Provisions.*

☐ A Temporary injunction is hereby entered by this Court and is in effect until _____ (date) not to exceed one year after the issuance of this Order. This injunction restrains the Restrained Person from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the Restrained Person has a prior exsiting duty or legal obligation to make such payments or from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities of life and requires the Restrained Person to account to the court for all extraordinary expenditures made after the injunction is entered.

☐ The Restrained Person shall not possess and/or purchase a firearm, ammunition, or other weapon.

☑ The Court waives all fees and no fees for service should be assessed pursuant to §13-14-109, C.R.S.

☐ Fees shall be paid by the ☐ Plaintiff/Petitioner ☐ Defendant/Respondent

☐ Arrangements for possession and care of an animal are as follows:

_____

☐ The Restrained Person shall not interfere with the protected person at the person's place of employment or place of education and shall not engage in conduct that impairs the protected person's employment, educational relationships, or environment.

6. *Mandatory For Domestic Abuse Protection Orders:*

☑ The Restrained Person shall not possess and/or purchase a firearm, ammunition, or other weapon AND, shall relinquish any firearm within 24 hours, and shall relinquish ammunition within 24 hours. The Restrained Person shall file proof of the relinquishment with the court, as required by statute.

☐ It is further ordered that

_____

☐ This Permanent Protection Order is identical to the Temporary Protection Order and does not require service on the Restrained Person.

☑ This Permanent Protection Order is different from the Temporary Protection Order and requires service on the Restrained Party before its provisions become effective.

☑ Served Restrained Party in Open Court on 10/27/2015 (date).

By signing, I acknowledge receipt of this Order or ☐ Restrained Person is not present in courtroom.

10.27.15
Plaintiff/Petitioner **Date**

Therese A Spahn 10/27/15
☑ **Judge** ☐ **Magistrate** **Date**

Therese Spahn
Print Name of Judicial Officer

Defendant/Respondent **Date**

I certify that is true and complete copy of the original order.

Date 10/27/15

J. Lucero
Clerk

Law Enforcement shall use all reasonable means to enforce this Protection Order.

IMPORTANT INFORMATION ABOUT PROTECTION ORDERS

GENERAL INFORMATION

- This Order or injunction shall be accorded full faith and be enforced in every civil or criminal court of the United States, Indian Tribe or United States Territory pursuant to 18 U.S.C. § 2265. This Court has jurisdiction over the parties and the subject matter.

- Pursuant to 18 U.S.C. § 922(g)(8), it is unlawful for any person to possess or transfer a firearm who is subject to a court order that restrains such person from harassing, stalking or threatening an intimate partner of such person or a child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

NOTICE TO RESTRAINED PARTY

- A violation of a protection order may be a misdemeanor, municipal ordinace violation or a delinquent act (if committed by a juvenile) and is a deportable offense. Anyone over the age of 18 who violates this Order may be subject to fines of up to $5,000.00 and up to 18 months in jail. Violation of this Order may constitute contempt of Court. Anyone under the age of 18 who violates this Order may be subject to commitment to the Department of Human Services for up to two years.

- You may be arrested or taken into custody without notice if a law enforcement officer has probable cause to believe that you have violated this Order.

- If you violate this Order thinking that the other party or anyone else has given you permission, YOU ARE WRONG. and can be arrested and prosecuted. The terms of this Order cannot be changed by agreement of the parties.ONLY THE COURT CAN CHANGE THIS ORDER.

- Possession of a firearm while this Permanent Protection Order is in effect, may constitute a Felony under Federal Law, 18 U.S.C. § 922(g)(8).

- You may apply to the Court for a modification or dismissal of a protection order after two years from the date of issuance of the Permanent Protection Order per §13-14-108(2)(b), C.R.S.

NOTICE TO PROTECTED PARTY

- You are hearby informed that if this Order is violated you may call law enforcement.

- **You may initiate contempt proceedings against the Restrained Party if the Order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.**

- You can not give the Restrained Party permission to change or ignore this Order in any way.
  ONLY THE COURT CAN CHANGE THIS ORDER.

- You may apply to the court for a modification or dismissal of a protection order at any time, per §13-14-108(2)(a), C.R.S.

NOTICE TO LAW ENFORCEMENT OFFICERS

- If the Order has not been personally served, the law enforcement officer responding to a call of assistance, shall serve a copy of said order on the person named/Restrained Person therin and shall write the time, date, and manner of service on the Protected Persons copy of such Order and shall sign such statement. The officer shall provide the Court with a completed return of service form. (§13-14-107(2-3), C.R.S.)

- You shall use every reasonable means to enforce this Protection Order.

- You shall arrest or take into custody, or if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the Restrained Person when you have information amounting to probable cause that the Restrained Person has violated or attempted to violate any provision of this Order subject to criminal sanctions pursuant to §18-6-803.5 CRS or municipal ordinance, and the Restrained Person has been properly served with a copy of this Order or the Restrained Person has received actual notice of the existence and substence of such Order.

- You shall enforce this Order even if there is no record of it in the Protection Order Central Registry.

- You shall take the Restrained Party to the nearest jail or detention facility.

- You are authorized to use every reasonable effort to protect the Protected Parties to prevent further violence.

- You may transport, or arrange transportation to a shelter for the Protected Parties.

EXHIBIT 4

☐ Municipal Court ☑ County Court ☐ District Court ☐ Denver Juvenile ☐ Denver Probate

Denver County Court, Colorado

Court Address: **1437 Bannock St., # 170, Denver, CO 80202**

720-865-7275

Plaintiff / Petitioner:

BROWN, RACHEL

V.

Defendant / Respondent:

DREXLER, REGINA

Address:

2054 EUDORA ST

DENVER, CO 80205

▲ **COURT USE ONLY** ▲

Case Number: **15W1242**

Courtroom: **170**

PERMANENT CIVIL PROTECTION ORDER ISSUED PURSUANT TO §13-14-106, C.R.S.

To Respondent/Restrained Person ☐ Protected Person alleges Weapon Involved	Date of Birth	Sex	Race	Weight	Height	Hair Color	Eye Color
DREXLER, REGINA	04/16/1967	Female	White	118	5'04"	Blonde	Green

Full Name of Protected Person	Date of Birth	Sex	Race	Full Name of Protected Person	Date of Birth	Sex	Race
BROWN, RACHEL	03/28/1968	Female	White		00/00/0000		
WEAVER, GEORGE	06/06/2002	Male	White		00/00/0000		
WEAVER, HENRY	08/07/1999	Male	White		00/00/0000		
	00/00/0000				00/00/0000		

The Court Finds that it has jurisdiction over the parties and the subject matter; that the Restrained Person was personally served and given reasonable notice and opportunity to be heard; that the Restrained Person constitutes a credible threat to the life and health of the Protected Persons named in this action; and sufficient cause exists for the issuance of a Civil Protection Order.

The Court Finds that the Restrained Person ☐ is ☒ is not governed by the Brady Handgun Violence Prevention Act, 18 U.S.C. §922(d)(8) and (g)(8).

This Protection Order DOES NOT EXPIRE and only the Court can change this Order.

A violation of a Protection Order is a crime and may be prosecuted as a misdemeanor, municipal ordinance violation, or a delinquent act (if committed by a juvenile) pursuant to §18-6-803.5, C.R.S., and municipal ordinance.

The Court Orders that you, the Restrained Person, shall not contact, harass, stalk, injure, intimidate, threaten, touch, sexually assult, abuse, or molest the Protected Persons named in this action, or harm, take, transfer, conceal, or dispose of or threaten harm to an animal owned, possessed, leased, kept or held by any protected party, a minor child of any other party, or otherwise violate this Order. You shall not use, attempt to use, or threaten to use physical force against the Protected Persons that would reasonably be expected to cause bodily injury. You shall not engage in any conduct that would place the Protected Persons in reasonable fear of bodily injury.

1. *Contact.*

It is ordered that you, the Restrained Person, **shall have no contact of any kind** with the Protected Persons and you shall not attempt to contact said Protected Persons through any third person, except your attorney,

☑ **except as follows:**

NO EXCEPTIONS

2. *Exclusion from places.*

You must keep a distance of at least 100 yards from the Protected Persons, where ever they may be found.

It is ordered that you be excluded from the following places and shall stay at least 100 yards away from the following places:
(Please specify address(es) where the Protected Persons reside, work or attend school.)

☐ The Protected Person has requested that the address be omitted from the written order of the Court, including the Register of Actions.

☑ Home: 6220 E 6TH AVE DENVER 80220

☐ Work: Name: _____ Address: _____

☑ School: Name: UC DENVER Address: 1250 14TH ST. DENVER, CO

☑ Other: 22097 HWY 6 (ST JOHNS CONDOS) KEYSTONE, CO 80435

☐ Exceptions:

3. *Care and Control Provisions*

☐ It is in the best interest of the minor children that care and control of these children be awarded to: _____ (name of person)

This temporary care and control order and all other issues concerning the children, including Parenting Time and Interim Decision-Making Responsibilities expires on _____ (date) not to exceed one year from this Order. All other provisions of this Order remain in full force and effect permanently.

This Order gorverns any other Orders concerning the care and control of said children. However, provisions in another Order concerning the children that do not conflict with this Order must be followed.

4. *Issues Concerning Children (Parenting Time and Decision-Making Responsibilities)*

☐ Parenting time is granted, expires on _____ (date) and shall be as follows:

☐ Interim decision-making responsibilities expire on _____ (date) and shall be as follows:

- ☐ _____ (name of person) shall have sole decsion making-responsibilities.
- ☐ The parties shall jointly share decision-making responsibilities.
- ☐ Other as set forth in the "Other Provision" section.

☐ Parenting Time and Decision-Making Responsibilities shall be as previously ordered by the _____ District Court, Case #_____

5. *Other Provisions.*

☐ A Temporary injunction is hereby entered by this Court and is in effect until _____ (date) not to exceed one year after the issuance of this Order. This injunction restrains the Restrained Person from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the Restrained Person has a prior exsiting duty or legal obligation to make such payments or from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities of life and requires the Restrained Person to account to the court for all extraordinary expenditures made after the injunction is entered.

☐ The Restrained Person shall not possess and/or purchase a firearm, ammunition, or other weapon.

☐ The Court waives all fees and no fees for service should be assessed pursuant to §13-14-109, C.R.S.

☑ Fees shall be paid by the ☐ Plaintiff/Petitioner ☑ Defendant/Respondent

☐ Arrangements for possession and care of an animal are as follows:

_____

☑ The Restrained Person shall not interfere with the protected person at the person's place of employment or place of education and shall not engage in conduct that impairs the protected person's employment, educational relationships, or environment.

6. *Mandatory For Domestic Abuse Protection Orders:*

☐ The Restrained Person shall not possess and/or purchase a firearm, ammunition, or other weapon AND, shall relinquish any firearm within , and shall relinquish ammunition within . The Restrained Person shall file proof of the relinquishment with the court, as required by statute.

☑ It is further ordered that

RESP. IS ALLOWED ON UCD CAMPUS ONLY WHEN ENROLLED AS A UCD STUDENT AND AT ALL TIMES MUST REMAIN 10FT FROM PEITIONER AND SHALL NOT ATTEND PETITIONERS LECTURES. IN ADDITION, RESP. MUST REMAIN 100 YARDS FROM PET. AT ALL TIMES EXCEPT WHEN COMMUTING DIRECTLY TO/FROM AND ATTENDING WORK, AT WHICH TIME, THE BUFFER ZONE IS REDUCED TO 10FT.

☐ This Permanent Protection Order is identical to the Temporary Protection Order and does not require service on the Restrained Person.

☑ This Permanent Protection Order is different from the Temporary Protection Order and requires service on the Restrained Party before its provisions become effective.

☐ Served Restrained Party in Open Court on _____ (date).

By signing, I acknowledge receipt of this Order or ☑ Restrained Person is not present in courtroom.

Sara Marie Baker 2/14/18
Plaintiff/Petitioner **Date**

COUNTY COURT • SEAL • THE CITY AND COUNTY OF DENVER COLO

2/14/18
☑ **Judge** ☐ **Magistrate** **Date**

Chelsea Malone
Print Name of Judicial Officer

_____
Defendant/Respondent **Date**

I certify that is true and complete copy of the original order.

Date 2/14/18

Ashley R. Nunnery
Clerk

COUNTY COURT • SEAL • CITY AND COUNTY OF DENVER COLO

Law Enforcement shall use all reasonable means to enforce this Protection Order.

IMPORTANT INFORMATION ABOUT PROTECTION ORDERS

GENERAL INFORMATION

- This Order or injunction shall be accorded full faith and be enforced in every civil or criminal court of the United States, Indian Tribe or United States Territory pursuant to 18 U.S.C. § 2265. This Court has jurisdiction over the parties and the subject matter.

- Pursuant to 18 U.S.C. § 922(g)(8), it is unlawful for any person to possess or transfer a firearm who is subject to a court order that restrains such person from harassing, stalking or threatening an intimate partner of such person or a child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

NOTICE TO RESTRAINED PARTY

- A violation of a protection order may be a misdemeanor, municipal ordinace violation or a delinquent act (if committed by a juvenile) and is a deportable offense. Anyone over the age of 18 who violates this Order may be subject to fines of up to $5,000.00 and up to 18 months in jail. Violation of this Order may constitute contempt of Court. Anyone under the age of 18 who violates this Order may be subject to commitment to the Department of Human Services for up to two years.

- You may be arrested or taken into custody without notice if a law enforcement officer has probable cause to believe that you have violated this Order.

- If you violate this Order thinking that the other party or anyone else has given you permission, YOU ARE WRONG. and can be arrested and prosecuted. The terms of this Order cannot be changed by agreement of the parties.ONLY THE COURT CAN CHANGE THIS ORDER.

- Possession of a firearm while this Permanent Protection Order is in effect, may constitute a Felony under Federal Law, 18 U.S.C. § 922(g)(8).

- You may apply to the Court for a modification or dismissal of a protection order after two years from the date of issuance of the Permanent Protection Order per §13-14-108(2)(b), C.R.S.

NOTICE TO PROTECTED PARTY

- You are hearby informed that if this Order is violated you may call law enforcement.

- **You may initiate contempt proceedings against the Restrained Party if the Order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.**

- You can not give the Restrained Party permission to change or ignore this Order in any way.
  ONLY THE COURT CAN CHANGE THIS ORDER.

- You may apply to the court for a modification or dismissal of a protection order at any time, per §13-14-108(2)(a), C.R.S.

NOTICE TO LAW ENFORCEMENT OFFICERS

- If the Order has not been personally served, the law enforcement officer responding to a call of assistance, shall serve a copy of said order on the person named/Restrained Person therin and shall write the time, date, and manner of service on the Protected Persons copy of such Order and shall sign such statement. The officer shall provide the Court with a completed return of service form. (§13-14-107(2-3), C.R.S.)

- You shall use every reasonable means to enforce this Protection Order.

- You shall arrest or take into custody, or if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the Restrained Person when you have information amounting to probable cause that the Restrained Person has violated or attempted to violate any provision of this Order subject to criminal sanctions pursuant to §18-6-803.5 CRS or municipal ordinance, and the Restrained Person has been properly served with a copy of this Order or the Restrained Person has received actual notice of the existence and substence of such Order.

- You shall enforce this Order even if there is no record of it in the Protection Order Central Registry.

- You shall take the Restrained Party to the nearest jail or detention facility.

- You are authorized to use every reasonable effort to protect the Protected Parties to prevent further violence.

- You may transport, or arrange transportation to a shelter for the Protected Parties.

EXHIBIT 5

FILED
United States Court of Appeals
Tenth Circuit

November 30, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REGINA T. DREXLER,

Plaintiff - Appellant.

v.

HONORABLE THERESA SPAHN, in her official capacity; HONORABLE CHELSEA MALONE, in her official capacity; DENVER COUNTY COURT, CITY AND COUNTY OF DENVER; PHILLIP WEISER, Attorney General, in his official capacity for the State of Colorado,

Defendants - Appellees.

No. 21-1368
(D.C. No. 1:21-CV-00805-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **McHUGH**, and **MORITZ**, Circuit Judges.

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* We set this case for oral argument, but Ms. Drexler then moved for submission on the briefs. We granted that motion, so we're deciding the appeal based on the briefs.

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

APPENDIX A

This appeal grew out of a feud between Regina Drexler and Rachel Brown. The two women had an intimate relationship, which ended bitterly. In the fallout, Ms. Drexler wrote literary essays about abuse. Ms. Brown characterized the essays as harassment and complained that she was being stalked by Ms. Drexler. The feud led to the entry of a protection order in state court,[1] restricting Ms. Drexler's proximity to Ms. Brown, her children, and her houses.

The protection order spurred Ms. Drexler to bring an action in federal court, where she alleged constitutional violations in the protection order as well as the statutes authorizing that order. In this action, Ms. Drexler

- sought habeas relief against two state-court judges and the state court itself and
- sued the state attorney general under 42 U.S.C. § 1983 for prospective relief and damages.

The district court dismissed the entire action, and Ms. Drexler appeals. The appeal involves two main issues:

1. **Jurisdiction for the habeas action against the two state-court judges and the state court.** Habeas corpus is a remedy entitling an individual to release. So habeas jurisdiction exists only when the claimant is *in custody*. Because the typical form of custody is incarceration, most habeas claims are brought by inmates. But even when the claimant is not incarcerated, the

[1] The state court issued two protection orders. In 2015, Judge Theresa Spahn issued an oral protection order. Three years later, Judge Chelsea Malone modified the order. Though Ms. Drexler refers to both protection orders, the second order served only to modify the first one.

imposition of extraordinary restrictions on freedom can be considered *custody*.

Ms. Drexler complains that the protection order was so restrictive that it effectively constituted *custody*, triggering habeas jurisdiction. The district court disagreed. Ms. Drexler can appeal that determination only if a reasonable jurist could characterize the protection order as the imposition of *custody*. But the protection order simply kept Ms. Drexler away from Ms. Brown, her children, and her houses. No jurist could reasonably regard that restriction as severe enough to constitute *custody*.

2. **Applicability of the *Rooker-Feldman* doctrine in the suit against the state attorney general.** Many times, litigants might feel victimized by a state court's rulings. These litigants sometimes go to federal court to challenge the state-court rulings. But federal courts are not appellate tribunals for state courts because federal and state courts are separate sovereign actors. Because of this dual sovereignty, federal courts have recognized a doctrine—called the *Rooker-Feldman* doctrine—that prevents federal jurisdiction when a litigant challenges a state-court ruling.

In this case, the district court invoked the *Rooker-Feldman* doctrine, treating the entire § 1983 suit as an attack on the protection order. The district court was correct for much of Ms. Drexler's claim. But Ms. Drexler complained about not only the protection order, but also the underlying state statutes authorizing protection orders. The *Rooker-Feldman* doctrine covered Ms. Drexler's challenge to the protection order but not to the underlying statutes. So the district court shouldn't have dismissed the challenges involving the underlying state statutes.

1. No reasonable jurist could regard the restrictions on Ms. Drexler as *custody*.

Ms. Drexler wants to appeal the dismissal of her habeas action. But a habeas claimant can appeal only upon the issuance of a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A).

The district court denied a certificate of appealability, so Ms. Drexler asks us for one. We can grant her a certificate only if she's presented a reasonably debatable argument. *Dulworth v. Evans*, 442 F.3d 1265, 1266 (10th Cir. 2006). Here that argument turns on whether Ms. Drexler was in custody when she sought habeas relief.

Custodial status was required because habeas jurisdiction exists only if the petitioner was "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).[2] Custody can exist when a state court imposes significant restraints on freedom that are not generally shared by the public. *Mays v. Dinwiddie*, 580 F.3d 1136, 1139 (10th Cir. 2009). According to Ms. Drexler, the restraints inhibited her speech and movement.

---

[2] Given the need for custodial status, habeas petitioners like Ms. Drexler must name their custodians as the respondents. 28 U.S.C. § 2242. The custodian is the individual who's able to bring the petitioner to the federal district court. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

When a petitioner isn't incarcerated, the proper respondent is the state attorney general. Rules Governing Section 2254 Cases in the United States District Courts, 1976 advisory comm. note, Rule 2(b)(3). Though Ms. Drexler sued the state attorney general under 42 U.S.C. § 1983, he wasn't named as a respondent in the habeas action. The only named respondents were two state-court judges and the state court, but they were not proper respondents for the habeas action. *See id.* The failure to name the proper custodian may have deprived the court of personal jurisdiction. *See Stanley v. Cal. Sup. Ct.*, 21 F.3d 359, 360 (9th Cir. 1994) ("Failure to name the petitioner's custodian as a respondent deprives federal courts of personal jurisdiction.").

In invoking her right to speech, Ms. Drexler conflates the terms of the protection order with the state court's reasoning. The protection order itself didn't say anything that would restrict Ms. Drexler's right to speech. Rather than rely on the terms of the protection order, Ms. Drexler relies on the state court's reasoning. For example, Ms. Drexler zooms in on the state court's comments about her fixation with Ms. Brown—not only following Ms. Brown but also writing about her. These comments allegedly inhibit Ms. Drexler from writing more essays out of fear that a state court might view them as harassment.

But a court must consider the effect of the protection order based on its terms, and the terms themselves didn't restrict Ms. Drexler's future writings. In fact, the state district court clarified to Ms. Drexler that "[n]othing in the [protection order] . . . prohibits Ms. Drexler from publishing written materials" or "otherwise intrude[s] on her protected First Amendment [a]ctivities" and the protection order "merely forbids Ms. Drexler from contact with Ms. Brown." Appellant's App'x vol. 2, at 364. That clarification eliminates any conceivable characterization of the protection order as a restriction on Ms. Drexler's speech.

Ms. Drexler also complains about the restrictions on her freedom of movement. The protection order requires Ms. Drexler to stay at least

- 100 yards away from Ms. Brown, her children, and her houses; and

- 10 feet away from Ms. Brown when going to or from work.

We must determine whether a reasonable jurist could regard these restrictions as significant constraints on Ms. Drexler's freedom beyond those generally shared by the public. *See Mays v. Dinwiddie*, 580 F.3d 1136, 1139 (10th Cir. 2009); *see also* p. 4, above.

Every year, state courts issue thousands of orders requiring parties to stay away from other individuals. To our knowledge, no court has ever regarded these restrictions on movement as severe enough to constitute *custody*. *See Vega v. Schneiderman*, 861 F.3d 72, 75 (2d Cir. 2017) (concluding that a protection order didn't impose *custody* by requiring the habeas petitioner to stay away from another individual); *Austin v. California*, No. 20-cv-900-CRB, 2020 WL 4039203, at *2–3 (N.D. Cal. July 17, 2020) (unpublished) (holding that a protection order didn't create *custody* by prohibiting the petitioner from returning to his prior residence or being within 100 yards of his son and ex-wife).

State law also sometimes authorizes restrictions on movement. For example, Oklahoma law prohibits convicted sex offenders from living within 2000 feet of a school or childcare center. Okla. Stat. tit. 57, § 590 (2014). We've held that this restriction doesn't constitute *custody* for the

purposes of habeas jurisdiction. *Dickey v. Allbaugh*, 664 F. App'x 690, 692–94 (10th Cir. 2016) (unpublished).[3]

Ms. Drexler complains that her restrictions went even further by preventing attendance at a local university or even her own office. These complaints aren't accurate.

First, she says that she couldn't attend the University of Colorado Denver because Ms. Brown worked there. This statement isn't correct. In fact, the state court told Ms. Drexler that she could freely enroll as a student at the University of Colorado Denver, adding that she just had to avoid Ms. Brown's lectures and keep at least 10 feet away from her. Given this clarification, no reasonable jurist could interpret the protection order as a ban on attending the university.

Second, Ms. Drexler states that the protection order prevented her from going to her own law office. This statement mischaracterizes the protection order. The state court explained to Ms. Drexler that she could go to and from her office, but just had to keep at least 10 feet away from Ms. Brown. Ms. Drexler has not shown that her office was within 10 feet of Ms. Brown.

[3] This opinion is persuasive but not precedential. *See* p. 1 n.*, above.

Without support in the case law, no reasonable jurist would treat the protection order as the imposition of *custody*.[4] Given the inability of a court to find *custody*, Ms. Drexler hasn't presented a reasonably debatable challenge to the district court's jurisdictional determination. We thus deny a certificate of appealability.

2. The *Rooker-Feldman* doctrine doesn't cover the § 1983 challenge to the constitutionality of the state statutes.

Ms. Drexler not only sought habeas relief but also sued the state attorney general under § 1983, claiming that the protection order and underlying state statutes were unconstitutional. The district court concluded that it lacked jurisdiction over these claims.

On appeal, Ms. Drexler doesn't question the ruling as to the protection order itself. She instead argues that the district court should not have dismissed her constitutional challenge to the state statutes. In considering this argument, we conduct de novo review. *Miller v. Deutsche Bank Nat'l Tr. Co.*, 666 F.3d 1255, 1260 (10th Cir. 2012).

---

[4] Ms. Drexler also alleged that she's been put on the state criminal registry and the national criminal database. But the protection order doesn't address a listing on the state criminal registry or the national criminal database. Granted, deliberate disobedience of the protection order could constitute criminal contempt. *People v. Allen*, 787 P.2d 174, 176 (Colo. App. 1989). But we're not aware of any court that has found custody because of the possibility of contempt for violating a protection order. *Cf. Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (holding that a threat of future incarceration for failing to register on the sex offender registry does not constitute *custody* for habeas purposes).

In conducting this review, we conclude that the district court erred in applying the *Rooker-Feldman* doctrine. Under this doctrine, federal district courts generally lack jurisdiction to review the correctness of a state-court order. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283–84 (2005). But this doctrine doesn't prevent federal jurisdiction over a challenge to the validity of state statutes. *Skinner v. Switzer*, 562 U.S. 521, 531–33 (2011). "[A] state-court decision is not reviewable by lower federal courts, but a statute . . . governing the decision may be challenged in a federal action." *Id.* at 532.

In the complaint, Ms. Drexler challenged the constitutionality of the state statutes underlying the protection order: "The Colorado protection order statutes are substantially overbroad and vague, including C.R.S. §13-14-101 and C.R.S. §13-14-106." Appellant's App'x vol. 1, at 59. Consideration of this challenge could incidentally affect the validity of the protection order itself. But this part of the claim addressed only the constitutionality of the state statutes—not the protection order itself. So this part of the claim falls outside of the *Rooker-Feldman* doctrine. *Skinner*, 562 U.S. at 532.

Because the *Rooker-Feldman* doctrine doesn't apply to this part of the claim, a court must address the merits. The district court didn't consider the merits, and the defendants don't address them. So we remand for the district court to consider the merits of Ms. Drexler's challenge to

the state statutes. *See Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010) (stating that the preferred practice is to let the district court decide the issue when it was raised in district court but not yet decided there).

3. The district court did not abuse its discretion by denying Ms. Drexler's request to file a reply brief.

Ms. Drexler objected to the magistrate judge's report and recommendation, and the defendants responded. With the benefit of both sides' submissions, the district court ruled on the objections. Before the clerk entered the order on the docket, Ms. Drexler asked for a chance to file a reply brief. The district court declined, and Ms. Drexler challenges that ruling. We reject this challenge.

In considering this challenge, we apply the abuse-of-discretion standard. *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). Under this standard, we reverse only if we're definitely and fairly convinced that the district court clearly erred in its judgment or made an impermissible choice. *Id.*

The federal and local rules were silent on reply briefs for objections to a magistrate judge's report.[5] *See Bistryski v. Allbert*, 848 F. App'x 804,

[5] Federal Rule of Civil Procedure 72(b)(2) addresses only a party's right to object and the adverse party's right to respond. The rule says nothing about replies.

805 (9th Cir. 2021) (unpublished) ("The district court did not abuse its discretion by considering the magistrate judge's report and recommendation without giving Bistryski an opportunity to reply to defendants' response to his objections because the local rules did not allow for a reply.").[6] And the right to due process didn't entitle Ms. Drexler to file a reply brief. *See NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952) (statement by the Ninth Circuit that it knew of no due process right to file a reply brief). So the district court had discretion to rule before the filing of a reply brief.

Ms. Drexler relies on Colo. Rev. Stat. § 13-6-311. This statute governs appeals from a county court, not proceedings in federal court. And, as Ms. Drexler acknowledges, the cited statute does not authorize reply briefs. Appellant's App'x vol. 1, at 18–19 ("The statute fails to provide for reply briefs."). The federal district court thus didn't abuse its discretion by declining to allow a reply brief under this Colorado statute.

[6] For motions, rather than objections to a magistrate judge's report and recommendation, the district court's local rules generally allow the filing of reply briefs. D. Colo. L. Civ. R. 7.1(d). But these rules also expressly allow judges to decide a motion before the filing of a reply brief. *See id.* ("Nothing in this rule precludes a judicial officer from ruling on a motion at any time after it is filed.").

4. The magistrate judge didn't select the district judge assigned to the case.

Ms. Drexler also alleges that the magistrate judge chose which district judge would handle this case. Ms. Drexler is mistaken.

In the District of Colorado, the clerk's office randomly assigns each civil case to a district judge. So when the complaint was filed, the clerk's office randomly assigned U.S. District Judge Babcock to the case.

District courts vary in how they communicate the assignment of the district judge. In this case, the district court communicated the assignment through an order issued by the magistrate judge. His order stated: "Pursuant to D.C.COLO.LCivR 8.1, the Clerk of Court is directed to assign this matter to Senior Judge Lewis T. Babcock." Appellant's App'x vol. 3, at 585. The cited local rule (Rule 8.1) states that the assignment of judges is governed by Local Rule 40.1, and that local rule requires random assignment of judges under a computerized program maintained in the clerk's office. D.C. Colo. L. Civ. R. 8.1(c), 40.1(b).

The clerk's office used this computerized program to assign Judge Babcock to the case. Like many courts, the District of Colorado opted to communicate that assignment through an order issued by the magistrate judge. But the magistrate judge didn't pick Judge Babcock; the computer in the clerk's office did that. The magistrate judge simply communicated that

assignment to the parties. No impropriety existed in the appointment of Judge Babcock.

5. The district court couldn't *void* the state-court orders.

Finally, Ms. Drexler argues that the district court should have voided the state-court orders. But Ms. Drexler suggests no plausible basis for concluding that the state courts lacked jurisdiction to enter the protection orders. We thus have no reason to question the district court's refusal to void the state-court orders. *See Nixon v. City & Cnty of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong.").

6. Disposition

We deny a certificate of appealability for the habeas appeal. For the § 1983 claim, we affirm in part, reverse in part, and remand for further proceedings.

Entered for the Court

Robert E. Bacharach
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 30, 2022

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Denver, CO 80206

Mr. Marc John Randazza
Randazza Legal Group
4974 South Rainbow Boulevard, Suite 100
Las Vegas, NV 89118

RE: 21-1368, Drexler v. Spahn, et al
Dist/Ag docket: 1:21-CV-00805-LTB-GPG

Dear Counsel:

Attached is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Emily Burke Buckley
Katherine Field

CMW/at

FILED
United States Court of Appeals
Tenth Circuit

January 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

REGINA T. DREXLER,

Plaintiff - Appellant,

v.

HONORABLE THERESA SPAHN, in her official capacity, et al.,

Defendants - Appellees.

No. 21-1368
(D.C. No. 1:21-CV-00805-LTB-GPG)
(D. Colo.)

ORDER

Before **BACHARACH**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk