No. 01-2312

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SYLVESTER J. SCHIEBER; VICKI A. SCHIEBER, as Co-Personal Representatives of the Estate of Shannon Schieber; SYLVESTER SCHIEBER; VICKI SCHIEBER,
Appellees

v.

CITY OF PHILADELPHIA; STEVEN WOODS, Individually and as a Police Officer; RAYMOND SCHERFF, Individually and as a Police Officer,
Appellants.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania (Civil Action No. 98-5648)

BRIEF OF *AMICI CURIAE* THIRTY-NINE ORGANIZATIONS SERVING SURVIVORS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT, IN SUPPORT OF APPELLEES AND IN FAVOR OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici curiae are thirty-nine non-profit organizations dedicated to improving the response of society and societal institutions to women and children who are victims of domestic violence and sexual assault.[1] They include organizations that provide direct services to survivors, ranging from crisis intervention and counseling to intervention with law enforcement and court accompaniment. Many engage in policy advocacy to improve institutional responses to violence and reduce and eliminate domestic violence and sexual assault. These efforts include law reform and education and training programs designed to raise the awareness of the public, police, and courts about the realities of sexual assault and domestic violence and the dangerous myths that perpetuate violence against women and continue to prevent victims from obtaining justice.

Amici are highly knowledgeable about government policies and practices affecting victims of domestic violence and sexual assault. *Amici* seek to assist the Court by providing the Court with the broad context in which this case arose and by examining the evolution of the legal and law enforcement responses to crimes of violence against women.[2]

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[1] Statements of interest from individual *Amici* are included in the Appendix to this Brief.

[2] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *Amici* have obtained consent to file this Brief from both parties.

ARGUMENT

I. Introduction

This case implicates the continued availability of a narrow legal remedy for women who are victims of private violence in those egregious cases when government officials have acted in a deliberately indifferent manner to create or heighten the danger these women face. Plaintiffs claim that Defendants' response to a 911 call enhanced the danger to Shannon Schieber who was murdered at the hands of a serial sexual predator. *Amici* urge this Court to affirm the district court's ruling rejecting the qualified immunity of Defendants Woods and Scherff and properly applying the well-established state-created danger theory.

The continued vitality of the state-created danger theory is essential for holding government actors accountable for certain affirmative responses to violence against women while providing an impetus to improve that response. This theory is already strictly circumscribed, *see Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996) (establishing four-part test), reaching only affirmative conduct that is shocking to the conscience. *See County of Sacramento v. Lewis*, 583 U.S. 833 (1998). To limit it further, as Defendants suggest, would effectively foreclose these claims altogether. In light of the horrific frequency of violence against women and the persistent failure of our political and law enforcement systems to respond appropriately to such violence, it is particularly urgent to preserve a

meaningful civil remedy when government action in willful disregard of the safety of women increases their peril.

II. Violence Against Women Is Widespread and Frequently Life-Threatening.

In order to understand why the state-created danger doctrine is such an important remedy for the limited class of cases in which the state creates or enhances the danger to women victims of crime, it is necessary to understand the backdrop of violence against women generally. Millions of women face a daily threat of serious injury, sexual assault, and death from criminal violence. From 1992 through 1994, the total number of violent crimes committed against women reached almost 14 million. U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Violent Crime* 1 (1996). According to the 1994 data, each year, 1 rape occurs for every 270 women and 1 assault for every 29 women. *Id*. In general, women are at far greater risk than men to be raped or sexually assaulted and to be victimized by someone they know. *Id*. at 2, 3; *see also* Patricia Tjaden & Nancy Thoennes, National Institute of Justice/Centers for Disease Control and Prevention, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 7 (1998) [hereinafter *Violence Against Women Survey*]. In 1999 alone, the National Crime Victimization Survey reported a total of 383,000 rapes and sexual assaults of persons age 12 and older in the United States, an increase of 50,000 from the

previous year. U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Victimization 1999*, at 3 (2000).

The most recent federal analysis of data on rape and sexual assault determined that 91% of the victims of reported rapes and sexual offenses were female. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 2 (1997) (data from 1995) [hereinafter *Sex Offenses and Offenders*]. Data consistently show that most sexual assault is perpetrated against victims under age eighteen. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 2 (2000) (67% of all victims of sexual assault reported to law enforcement agencies from 1991 through 1996 were under age eighteen at the time of the crime; one-third were under age twelve). Data also demonstrate that most sexual assaults involve no weapon and that three out of four involve a prior relationship with the perpetrator as family member, intimate, or acquaintance. *Sex Offenses and Offenders*, *supra*, at 3, 4.

The impact of rape is both physical and psychological. Rape victims may suffer physical injury during the rape, with some suffering major injury such as severe lacerations, fractures, internal injuries, or unconsciousness. *Id.* at 12. The psychological injury, characterized by intense fear and acute stress, can be long-lasting and life-altering. Ann Burgess, *The Victim's Perspective, in Practical*

Aspects of Rape Investigation: A Multidisciplinary Approach 27-33 (Hazelwood & Burgess eds., 2d. ed 1999) [hereinafter *Practical Aspects of Rape Investigation*].

On top of the horrifying prevalence of rape and sexual assault, violence against women by their intimate partners has reached epidemic proportions and is chronic in nature. Recent statistics from a study by the National Institute of Justice and the Centers for Disease Control and Prevention show the alarming frequency of domestic violence: 25% of surveyed women said they were physically assaulted and/or raped by a current or former spouse, cohabiting partner, or date at some time in their lives. *Violence Against Women Survey*, *supra*, at 2, 12. Just over half of the women raped by an intimate and two-thirds of the women physically assaulted by an intimate said they were victimized multiple times by the same partner. Patricia Tjaden & Nancy Thoennes, National Institute of Justice/Centers for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* 39 (2000).

Domestic violence is frequently severe, even life-threatening. Forty-one percent of women who have been physically assaulted by intimates report that they were injured during the most recent physical assault. *Violence Against Women Survey*, *supra*, at 9. Domestic violence can be lethal: 30% of the women killed in the United States were murdered by their husbands or partners. *Planned*

Parenthood v. Casey, 505 U.S. 833, 892 (1992) (plurality opinion); U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence* 1 (2000) (reporting that the percentage of female murder victims killed by intimate partners has remained at about 30% since 1976).

The cumulative impact of this epidemic of violence upon women's health and wellbeing, and upon their ability to compete in the marketplace, participate equally in society, and move freely and securely in pursuit of their life's goals, has been noted by Congress in enacting the Violence Against Women Act. Congress found that "the cost to society" resulting from violence against women "is staggering," S. Rep. No. 101-545, at 33 (1990), resulting in "lost careers, decreased productivity, foregone educational opportunities, and long-term health problems," *id.* at 33, and costing "$5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41 (1993). Fear of violence "takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991).

III. Historically, Our Nation Has Sanctioned and Condoned Crimes of Violence Against Women.

Despite the evident seriousness of this epidemic of violence against women, our nation has condoned, excused, or simply ignored these crimes. While government inaction alone in response to criminal violence against women does not violate the Due Process Clause, the egregious cases in which state actors

affirmatively increase the danger to women from third parties can be better understood by examining the myths and stereotypes that have infected our cultural beliefs about sexual assault and domestic violence.

A. Our Nation's Response to Violence Against Women Has Been Shaped by Gender Stereotypes and Myths About Rape and Domestic Violence.

For much of our nation's history, violence against women has been condoned as a state-sanctioned prerogative of husbands. *See* Reva B. Siegel, *"The Rule of Love": Wife-Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2118-20 (1996) (discussing the chastisement prerogative, whereby husband, as master of the household, could subject his wife to corporal punishment or chastisement as long as he did not inflict permanent injury upon her). When not enshrouded in silence, domestic violence has been widely believed to be provoked by deviant women whose failure to conform to feminine stereotypes merited "correction." Among the prevailing beliefs have been that women are masochistic and seek out violent men; that the abuse cannot be that bad or wives would leave; that women provoke men by nagging, not fulfilling "household duties," or refusing sex; that battering only happens to working-class women and "bad" housewives; that women exaggerate to get a quick divorce; that the batterer didn't mean it; and that the battering is not really harmful. *See* Mary P. Koss et al., *No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community* 8-9

(1994) (tbl. 1: Common myths and stereotypes about male violence against women).

Historically, domestic violence was considered a family matter, not a crime. *See, e.g.*, *Bradley v. State*, 1 Miss. 156 (1824) (permitting wife-beating provided that the assaults were committed by husbands "correcting" their wives), *overruled by Harris v. State*, 15 So. 37 (Miss. 1893); *see also* Eve Buzawa & Carl Buzawa, *Domestic Violence: The Criminal Justice Response* 24 (1990) [hereinafter *The Criminal Justice Response*]. The law did not even address domestic violence until the end of the nineteenth century, when anti-wife-beating laws began to appear on the books. *Id.* at 25. Significant change in the law, however, began to occur only with the battered women's movement of the 1970s. *See* Kathleen Ferraro, *Cops, Courts, and Woman Battering*, *in Violence Against Women: The Bloody Footprints* 262, 263 (P. Bart & E. Geil eds., 1993) [hereinafter *Cops, Courts, and Woman Battering*]. As late as 1986, some states still retained the defense of interspousal immunity barring claims for personal injuries inflicted by one spouse against another. *See Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986). Not until the mid-1980s did Pennsylvania recognize the crime of marital rape, and even then treated it as a less serious offense than rape by a non-spouse. *See* 18 Pa. Cons. Stat. Ann. § 3128 (1984) (establishing crime of spousal sexual assault), *repealed by* P.L. 985, Act No. 10 (1995). Only recently have laws been revised to permit

arrests in unwitnessed domestic violence misdemeanor cases, *see The Criminal Justice Response*, *supra*, at 26, and pro-arrest policies evolved. *See Cops, Courts, and Woman Battering*, *supra*, at 264. Despite these extensive reforms, many domestic violence incidents still do not fit within the criminal law framework. *See The Criminal Justice Response*, *supra*, at 119.

Like charges of domestic violence, charges of rape have also historically been viewed with suspicion as a result of societal myths. These myths include beliefs that victims provoke and invite sexual assault; women are full of spite and fabricate allegations of rape; good girls don't get raped; real rape victims fight back; women's sexual fantasies prove that they enjoy rape; attractive women do not get raped; an unwilling woman cannot be raped; real rape occurs in back alleys by strangers; and rapists are monsters. Ann Burgess, *Public Beliefs and Attitudes Toward Rape, in Practical Aspects of Rape Investigation*, *supra*, at 7-12; Harry J. O'Reilly, *Crisis Intervention with Victims of Forcible Rape: A Police Perspective, in Perspectives on Rape and Sexual Assault* 89, 91-97 (June Hopkins ed., 1984). These myths are overwhelmingly refuted by the reality of rape. Toni Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395, 402 (1985).

Despite their inaccuracy, the myths and resulting suspicions aimed at victims of sexual assault led to the development of requirements that inappropriately burdened rape and sexual assault victims and impeded prosecutions. Focusing on the victim's behavior rather than the perpetrator's, the law has required sexual assault victims to physically resist, produce independent corroboration, and prove "fresh complaint," non-consent, and physical force. In addition, sexual assault victims were disadvantaged by evidentiary rules relating to prior sexual conduct by the victim and special jury instructions regarding evaluation of the complaining witness' testimony. Susan Estrich, *Real Rape*, 95 Yale L.J. 1087, 1094, 1105 (1986).

These requirements conflict with the reality of the rape victim's experience. In fact, physical force is not always present. *See* Ian T. Bownes et al., *Rape–A Comparison of Stranger and Acquaintance Assaults,* 31 Med. Sci. & L. 102, 108 (1991). Even when it is, victims often do not resist because they are justifiably terrified of what they have been told will happen if they do: greater physical injury or even death. *See* Sedelle Katz & Mary A. Mazur, *Understanding the Rape Victim: A Synthesis of Research Findings* 172-73 (1979). Some victims are so terrified that they dissociate, a psychological response to extraordinary stress that may preclude resistance. *See* Judith Lewis Herman, *Trauma & Recovery* 42-43 (1992). Delayed reporting is common, due to legitimate concerns about the

responsiveness of law enforcement and the criminal justice system as well as fears about the reactions of family, friends, and employers. Estrich, *Real Rape*, *supra*, at 1140; *see also* National Victim Center, *Rape in America: A Report to the Nation* 6 (1992).

B. While Law Reform Efforts Have Eliminated Many of the Legal Barriers to Prosecuting Violent Crimes Against Women, the Response of Law Enforcement Continues to Reflect the Old Myths.

Despite reforms in criminal laws and evidentiary rules governing crimes of violence against women, notions of family privacy and stereotypes about women's responsibility for these assaults continue to influence the state response to these crimes. The vast majority of these responses amount to nothing more than inaction, which is not a violation of the Due Process Clause; however, it is essential to understand the historical lack of response when evaluating the need for a legal remedy in the limited group of cases described in Part IV.

Until recently, police frequently ignored domestic violence calls or delayed responding to them. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 47 (1992). When they did respond, they typically did nothing to protect the woman from further violence, telling her "there's nothing we can do; this is a civil matter," making one party leave the home, *see Cops, Courts, and Woman Battering*, *supra*, at 264, or inappropriately encouraging conciliation. *See id.* at 41, 43. While the law now

provides police with greater authority to intervene in domestic disputes, many police officers continue to believe that such intervention is unjustified except in cases of extraordinary violence. *See The Criminal Justice Response*, *supra*, at 26; *see also* Douglas R. Marvin, *The Dynamics of Domestic Abuse*, FBI L. Enforcement Bull., July 1997, at 1. Police and other participants in the criminal justice system often blame battered women for their victimization, presuming that the women either provoke the violence or are in a position to avoid the assault. *See* Barbara Hart, *Battered Women and the Justice System*, *in* Eve S. Buzawa & Carl G. Buzawa, *Do Arrests and Restraining Orders Work?* 98, 101 (1996). Officers also succumb to stereotypes that battered women lie and fail to follow through on complaints. *See Cops, Courts, and Woman Battering*, *supra*, at 265-66.

The inadequacy of the police response to domestic violence was cited and supported by extensive findings by Congress when it adopted the Violence Against Women Act of 1993. *See* S. Rep. No. 103-138, at 37-52 (1993). Despite research finding that pro-arrest policies effectively deter domestic violence, in the vast majority of domestic violence cases, police officers do not make arrests. *See Cops, Courts, and Woman Battering*, *supra*, at 264-65. For example, a study of police response to 19,000 domestic violence calls in the District of Columbia found that arrests were made in only 42 instances. *See* Kerrie Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence*

Against Women Act After Lopez, 96 Colum. L. Rev. 1876, 1889 n.50 (1996) (citing *Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. at 98 (1992) (testimony of Sandra Sands)). A survey of the police departments of large cities from 1984 to 1989 found that police officers simply did not follow their departments' pro-arrest policies. A. Jones, *Next Time She'll Be Dead: Battering and How to Stop It* 142 (1994). At the same time, there has been an increase in the *wrongful* arrest of battered women as part of dual arrest policies. Joan Zorza & Laurie Woods, *Mandatory Arrest: Problems and Possibilities* 16-25 (1994).

Like the response to domestic violence, police response to rape is influenced by the myths surrounding this horrendous crime, *see* O'Reilly, *Crisis Intervention*, *supra*, at 90; Burgess, *Public Beliefs*, *supra*, at 3, 6-7, by whether the incident conforms to the stereotype of "real rape," and by whether the victim meets traditional sex role norms. *See* Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutor Response to Sexual Assaults Against Women*, 81 J. Crim. L. & Criminology 267 (1990). As a result, some police expect rape victims to meet higher standards of conduct than is legally required. Thomas W. McCahill et al., *The Aftermath of Rape* 85 (1979). There is a tendency for police to place blame on the victim and to be suspicious of victims who have a prior relationship with the offender. J.C. LeDoux & R.R. Hazelwood, *Police Attitudes and Beliefs*

Concerning Rape, in Practical Aspects of Rape Investigation, *supra*, at 14, 24.[3] Whether the police pursue a complaint is negatively affected by extralegal requirements such as the victim's substance abuse, reputation for "sexual promiscuity," prior contacts with police, and prior or intimate relationship with the perpetrator. *See* IACP [International Association of Chiefs of Police] National Law Enforcement Policy Center, *Concepts and Issues Paper on Sexual Assaults* 1 (1995). As a result, police disbelieve genuine victims, *see The Aftermath of Rape*, *supra*, at 85 (citing two national studies reporting that the rate at which police conclude that rape complaints are unfounded is higher than the unfounded rate for other crimes), and treat them insensitively and inappropriately, interrogating rather than interviewing them. *See* O'Reilly, *Crisis Intervention*, *supra*, at 89-98.

These same persistent myths have seriously distorted the response of the Philadelphia Police Department to sexual assault complaints. Interviewed in 1968, Philadelphia police officers stated that only a "very minute" number of reported rapes are founded and that 80% to 90% of sex crime complaints "are not really rapes." Note, *Police Discretion and the Judgment That a Crime Has Been Committed–Rape in Philadelphia*, 117 U. Pa. L. Rev. 277, 279 n.8 (1968). A 1971

[3] Police publications continue to portray victims in a stereotypical manner that does not conform to reality. *See, e.g.*, IACP [International Association of Chiefs of Police] National Law Enforcement Policy Center, *Concepts and Issues Paper on Sexual Assaults* 6 (1995) (stating that doubt about the legitimacy of a rape victim is

study of 1,401 victims in Philadelphia revealed that the Department eliminated many sex crime cases by recoding the complaint as no offense, marking the complaint as unfounded, or simply failing to record the complaint. *See The Aftermath of Rape*, *supra*, at 81, 102. The study uncovered evidence of inappropriate criteria being used to evaluate rape complaints, including a belief that the victim "asked for it" or provoked it, whether the victim had dated the offender or willingly went to his apartment, and whether she was wearing a short skirt or a shirt without a bra. *See id.* at 107. The victim's use of drugs and prostitution were given undue weight in unfounding cases. *See id.* at 105. Additional extralegal variables associated with cases which were unfounded, labeled non-crimes, or never recorded included: the rape occurred at the offender's residence, more than one offender was involved, and, to an inordinate degree, victim characteristics such as heavy drinking, a history of truancy or trouble with the police, prior consenting sexual relations with the perpetrator, obesity, or a history of psychiatric treatment. *See id.* at 109-21. Victims were asked to take lie detector tests, pressured not to press charges, and accused of lying. *See id.* at 88. Upon review of these investigations, serious deficiencies were uncovered, especially where the victim knew the offender. *See id.* at 136-43.

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appropriate if she does not appear highly agitated, distraught, hysterical, with visible injuries and torn clothes and or if she delayed reporting).

Within the past thirty years, Pennsylvania has substantially revised its sexual assault statutes to reflect our current understanding of the nature and seriousness of sex crimes. However, the culture of disbelief and dismissal of sexual assault complaints has continued to pervade the Philadelphia Police Department. In a series of articles beginning in October 1999, the *Philadelphia Inquirer* documented a pattern of rejecting sex crime complaints that was reflected in elevated unfounded rates and use of non-crime codes. Mark Fazlollah et al., *Women Victimized Twice in Police Game of Numbers*, Phila. Inq., Oct. 17, 1999, at A1, A24. The *Inquirer* investigation revealed that thousands of sex crime complaints were placed in the non-crime "investigation of person" classification. *Id.* at A25; Mark Fazlollah et al., *How Police Use a New Code When Sex Cases Are 'Unclear,'* Phila. Inq., Oct. 18, 1999, at A1.[4]

A review of the 3,119 rape complaints placed in non-crime codes between 1995 and 2000, which was ordered by Police Commissioner Timoney following the *Inquirer* publication and City Council oversight, resulted in the reinvestigation and recoding of complaints as founded crimes: 681 were recoded as rapes and

[4] Following questioning about the use of this particular classification from the FBI, the number of cases placed in that category decreased to 75 in 1998, but the unfounded rate for rapes soared to 18% (compared to the typical range of 5%-9%) and the use of another non-crime classification, standing for "investigation, protection, and medical examination," increased. Fazlollah et al., *Women Victimized Twice*, *supra*, at A24; Fazlollah et al., *How Police Use a New Code*, *supra*, at A1, A8-A9.

1,141 were recoded as other crimes. Craig R. McCoy et al., *New Home, Fresh Start for Rape Unit*, Phila. Inq., June 23, 2001, at A1. In some of these reinvestigated cases, arrests have now been made and convictions obtained. Mark Fazlollah et al., *Review of 1996 Rapes Leads to 2 Arrests*, Phila. Inq., Jan. 30, 2000, at B1; Craig R. McCoy & Mark Fazlollah, *A Cry for Help That Went Unheeded*, Phila. Inq., Apr. 6, 2000, at A1; Mark Fazlollah & Craig R. McCoy, *Man Convicted of '96 Rape After Phila. Reopened Case*, Phila. Inq., Dec. 12, 2000, at A1.

Reports by victims and police personnel confirm that the cases coded as non-crimes received little or no investigation. These cases often involved delayed reporting; victims with addictions, criminal records, and mental problems; or victims who were prostitutes, low-income women, or women from high-crime neighborhoods. Clea Benson et al., *Serial Rape Investigation Widens to a Sixth Attack*, Phila. Inq., Oct. 7, 1999, at A1, A26; Fazlollah et al., *Women Victimized Twice*, *supra*, at A25. Police Commissioner Timoney has publicly acknowledged that some women who filed sex crime complaints in Philadelphia were "treated at the least improperly, probably unprofessionally, and probably in a god-awful manner." Craig R. McCoy & Mark Fazlollah, *Review Turns Up Hundreds of Rapes*, Phila. Inq., June 21, 2000, at A1. After a full hearing, Philadelphia City Council acknowledged these deficiencies in adopting a resolution recommending

extensive reforms in the handling of rape complaints.[5] Committee Report on Resolution No. 990775, City Council Committee on Public Safety (Dec. 13, 1999). Plainly, while women have made great progress in reforming longstanding and deeply-rooted myths about rape and abuse, they continue to be subjected to unjust, sometimes overtly dangerous, official action.

IV. The State-Created Danger Theory, Already Strictly Circumscribed, Should Not Be Further Narrowed.

A. In the Past, Courts Have Appropriately Applied This Doctrine When the Actions of Government Officials Have Increased the Danger to Women.

Amici recognize that the Due Process Clause is not a panacea that will cure all the ills described above and do not ask this Court to revisit the basic doctrine of *DeShaney* stating that government inaction alone in response to private violence is not a constitutional violation. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). However, the pervasive myths that surround violence against women and influence official response to domestic violence and sexual

[5] These recommendations included, *inter alia*, working "to assure that professional, courteous and appropriate treatment is provided to victims of sexual assault (particularly in relation to credibility assessment)"; specialized police training on the investigation of sexual assault cases "involving victims who are acquainted with the perpetrator, were unconscious or under the influence of alcohol or drugs, have mental health problems, or are prostitutes"; and training about "the realities and myths associated with rape, including the proportion of perpetrators who are acquainted with the victim, the role of alcohol and drugs and the trauma during the rape and the aftermath." Committee Report on Resolution No. 990775, City Council Committee on Public Safety (Dec. 13, 1999).

assault create a strong potential that state officials will respond in a way that enhances the danger women face from private sources. When state officials react in such a way as to increase the danger to women, redress under the Due Process Clause of the Fourteenth Amendment should continue to be available. Under the state-created danger theory, liability is established when the state takes some action that is deliberately indifferent to foreseeable harm that either places the victim in a dangerous position or increases the danger to the victim. *See DeShaney*, 489 U.S. at 201; *Kneipp v. Tedder*, 95 F.3d 1199, 1207 (3d Cir. 1996).

The state-created danger theory has been applied in several cases involving particularly egregious police responses to calls from domestic violence victims, including *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994). *Smith* involved the death of Karen Guerrant, who had called the police after her former husband assaulted her. In response to her first call, the police told Karen that it was a "civil matter, not a police matter," that neither they nor she could remove her abusive former husband from her home, and that she would have to pursue eviction proceedings to remove him. *Id.* at 1206. When Karen started throwing her ex-husband's clothes out the window, the police told him to "just throw them back in." *Id.* The police twice refused to respond to two additional calls to escalating violence, after which Alfred stabbed Karen to death and cut off part of her child's ear. *Id.* at 1206-07. The district court found the evidence that the police told

Karen that she would have to initiate eviction proceedings in order to remove Alfred and that they told Alfred to throw his clothes back into the house sufficient to show that "the police affirmatively increased the danger to Karen while limiting her ability to help herself and made her more vulnerable to attack, then refused to help her." *Id.* at 1210. Concluding that "Alfred used the apparent authority given to him by the police to remain in his ex-wife's home against her will, and later killed her," the court found sufficient facts to establish a substantive due process violation. *Id.*

Police conduct in *Sheets v. Mullins*, 109 F. Supp. 2d 879 (S.D. Ohio 2000), was similarly determined sufficient to establish a due process violation for having increased the danger to a mother and her child. Theresa Shields called the police for help after her child's father, Roger Montgomery, held her at gunpoint, threatened her children, and took her daughter away. *Id.* at 881. Not only did the police make no attempt to find the child, they told Theresa "not to use self-help to obtain physical custody of her daughter" and to wait instead for a court order. *Id.* The next day, Roger killed the child and himself. Based on these facts, the court found that a reasonable jury could conclude that the police had directed Theresa not to rescue the child on her own and that this greatly increased the child's risk of serious harm or death. *Id.* at 890.

In several cases, courts have found a claim for state-created danger to exist based on police action that encourages and thus gives apparent authority to violent behavior. In *Wright v. Village of Phoenix*, No. 97-C-8796, 2000 U.S. Dist. LEXIS 2182 (N.D. Ill. Feb. 25, 2000), a police officer killed his wife after fellow officers, repeatedly called to the house by the wife and other family members, obeyed the killer's instructions to leave. The court found that the evidence established more than a simple failure to act; rather, "the police took affirmative steps to enhance the danger by coming to the house and then leaving when [the assailant] told them to do so, potentially lulling [him] into an enhanced sense of invulnerability." *Id.* at *15. A claim was also found to be stated in *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270 (N.D. Ill. 1995), involving the city's role in a Chicago police officer's murder of his former wife. The court concluded that the city contributed to the former wife's danger by allowing her murderer to continue to carry a police-issued weapon despite extensive knowledge by supervisory officers in the department of the violent abuse he had committed. *Id.* at 276. Similarly, in *Freeman v. Freeman*, 911 F.2d 52 (8th Cir. 1990), the court reinstated a state-created danger claim based on the affirmative acts of a police chief who instructed his officers not to enforce a protection order against his close friend. By interfering with protective services that would otherwise have been available, the police chief's affirmative acts

increased the danger to the decedent and potentially ratified the perpetrator's violent conduct. *Id.* at 54-55.

The state-created danger theory has been applied to other state actors whose affirmative acts have made women more vulnerable to violence. In *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), a registered nurse at a state correctional institution was instructed to work alone with a known violent sex offender who subsequently assaulted, battered, kidnapped, and raped her. *Id.* at 120. Because the defendant supervisors required the plaintiff to care for the inmate alone despite the inmate's criminal history and the plaintiff's vulnerability, the Ninth Circuit found that the defendants had created "the opportunity for and facilitated" the assault. *Id.* at 122. Likewise, in *Swader v. Virginia*, 743 F. Supp. 434 (E.D. Va. 1990), an inmate serving a life sentence for rape was allowed onto the grounds outside the prison where the employees lived and then raped and strangled a prison-worker's daughter. *Id.* at 435. Because the state had required its employees to live on prison property and knew about this inmate's violent past, the court sustained a claim of state-created danger against the prison authorities. *Id.* at 444.

Violence against young women in the schools may also be actionable as state-created danger when the school affirmatively acts to increase the student's vulnerability to harm. In *Maxwell ex rel. Maxwell v. School District of Philadelphia*, 53 F. Supp. 2d 787 (E.D. Pa. 1999), the court found a civil rights

claim stated in the case of a special education student raped by fellow students in a classroom. With knowledge of the assailants' behavior, the substitute teacher in charge of the classroom informed the class that she would not control them and participated in locking the plaintiff inside the classroom with her assailants, effectively blocking her ability to leave. *Id*. at 793. The court found that these actions enhanced the danger to the student and that the complaint properly alleged a state-created danger claim. *Id*.

B. Defendants' Formulation of the State-Created Danger Theory Would Effectively Eliminate the Doctrine.

The state-created danger theory appropriately requires police and other governmental officials not to place women in danger from their abusers or worsen the danger they already face. By focusing on whether the governmental officials' affirmative act created or exacerbated a foreseeable risk to the victim, *see Morse v. Lower Merion High School*, 132 F.3d 902, 915 (3d Cir. 1997), the doctrine holds government responsible for egregious violations without opening the floodgates to unlimited third-party liability.

Defendants, however, propose a new constricted formulation of the state-created danger theory, wherein two of the doctrine's requirements–that "the state actors used their authority to create an opportunity that would not have existed for the third party's crime to occur" and that the "state actor acted in willful disregard for the safety of the plaintiff," *Kneipp*, 95 F.3d at 1208–would be so narrowly

interpreted that the doctrine would disappear almost completely. In contrast to *Kneipp*'s holding, under Defendants' formulation of the doctrine, the use of authority requirement would be met only in cases in which the government official threatens to arrest or physically remove potential rescuers. For the culpability requirement, Defendants would require that the state actor actually has a malicious motive to harm the victim or, at the very least, actually knows that harm will follow. By concentrating on the most outlandish (and least common) behavior along the spectrum of affirmative government acts, Defendants would reduce the state-created danger theory to an all but useless doctrine that arguably would not have protected any of the women whose claims were sustained in the cases discussed above in Part IV.A.

Defendants argue that the district court incorrectly construed this Court's holdings on the authority and culpability prongs of the state-created danger doctrine, but Defendants plainly misstate the legal standards. According to Defendants, in cases involving the prevention of private rescue, "only deliberate exercises of authority" by governmental officials, *id.* Br. Appellants at 18, that involve an officer "asserting his authority to forcibly prevent a potential rescuer from acting" or "remov[ing] victims of private violence or harm from relative safety or the reach of potential rescuers" constitutes "use of authority" under the substantive due process doctrine. *Id.* at 25.

Defendants' formulation of the "use of authority" standard renders the state-created danger doctrine completely useless in virtually every case. There is no denying that under the rubric of government "use of authority" there is not only one type of affirmative action that satisfies the requirement but rather a spectrum of actions. What Defendants have done is argue that only the most extreme affirmative acts qualify as "use of authority" and that everything else constitutes non-liable "inaction" under *DeShaney*. However, that argument ignores that police officers can actively use their authority in many ways short of threatening arrest or physically removing a person from a safe environment.

In fact, if Defendants' argument were to prevail, none of the cases previously cited in which a governmental actor was found liable under the state-created danger theory for an act of violence against a woman by a third party would have turned out as they did. None of those cases involved a police officer using his power to threaten to arrest or to physically remove a private rescuer. Instead, they involved the police or other state actors in positions of authority who acted affirmatively to increase the invulnerability of the third party or the danger to the victim. *See Wright*, 2000 U.S. Dist. LEXIS 2182 at *15; *Sadrud-Din*, 883 F. Supp. 270 at 276; *Freeman*, 911 F.2d at 54-55. By going beyond inaction and actively increasing the danger to the victim, albeit without any threat of arrest or

physical removal, the state actors exerted their authority and were subject to liability under this doctrine.

Defendants further argue that the officers must knowingly act to dissuade intervention. Br. Appellants at 26-27, 37-39. This strict "knowing" standard is belied by the seminal case from this Court that Defendants cite so insistently. In *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), there is no suggestion at all that the officers actually knew that they were subjecting Samantha Kneipp to danger by sending her husband home. Rather, the important matter was that by their actions they objectively placed Samantha at risk of danger and were deliberately indifferent to Samantha Kneipp's safety. *Id.* at 1210. The degree of culpability in a case like this, where there is ample time for the official to deliberate, need be no higher. *See Nicini v. Morra*, 212 F.3d 798, 810-11 (3d Cir. 2000); *County of Sacramento v. Lewis*, 523 U.S. 822, 850-51 (1998).

With the standard correctly stated, it is clear that Defendant officers' conduct meets both the use of authority and culpability prongs of the state-created danger doctrine. *See* Br. Appellees at 14-33. There is no need to show that the officers used their power to threaten arrest or to physically remove a potential rescuer from the scene. It is sufficient to show that the officers acted under their authority as police officers to decrease the likelihood that a neighbor would intervene to rescue Ms. Schieber. Likewise, there is no need to show that the

officers knew that their actions would have that effect. Instead, it is sufficient to show that their actions objectively placed Ms. Schieber at a greater risk and that they were deliberately indifferent to that substantial risk. Viewing the evidence in a light most favorable to Plaintiffs, this standard has been satisfied.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the district court's order denying summary judgment.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, Terry L. Fromson, hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

I, Terry L. Fromson, hereby certify that the foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 29(d) in that it contains 6,364 words.

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Terry L. Fromson

CERTIFICATE OF SERVICE

I, Terry L. Fromson, hereby certify that on this 28th day of September, 2001, I caused two true and correct copies of the foregoing Brief of *Amici Curiae* to be served by U.S. first-class mail on:

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