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Court of Appeals

STATE OF NEW YORK

CARMEN VALDEZ, Individually and as Mother and Natural Guardian of CEASAR MARTI and ARIEL MARTI,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK and JOSE TORRES,

Defendants-Respondents.

BRIEF OF AMICI CURIAE NEW YORK CITY BAR ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, EMPIRE JUSTICE CENTER, INMOTION, INC., MY SISTERS' PLACE, INC., NEW YORK LEGAL ASSISTANCE GROUP, NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, PACE WOMEN'S JUSTICE CENTER & SANCTUARY FOR FAMILIES, SUPPORTING PLAINTIFFS-APPELLANTS CARMEN VALDEZ ET AL.

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Pursuant to Court of Appeals Rule 500.1 (f), the Pace Women's Justice Center states that it is a legal center within Pace University School of Law.

Pursuant to Court of Appeals Rule 500.1 (f), Sanctuary for Families states that it is a non-profit 501c(3) organization with one subsidiary: Sanctuary for Families Housing Development Fund. Sanctuary for Families has no other subsidiaries and no parent corporation or affiliates.

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INTEREST OF AMICI CURIAE

Amici curiae submit this memorandum to describe the legal framework governing enforcement of orders of protection in New York and to discuss the critical importance of enforcement in ensuring victim safety. The outcome of this case will have a significant impact on the ability of domestic violence survivors to rely on orders of protection when they face life-threatening violence. It could also determine whether any remedy exists when New York State law governing the response of law enforcement to domestic violence is violated.

The New York City Bar Association (the "Association") is a nongovernmental professional association with a membership of more than 23,000 persons, including lawyers, judges, and legal professionals. Its Domestic Violence Committee, which consists of attorneys working with survivors of domestic violence in the civil, criminal and judicial arenas, engages in legal analysis, attorney education and policy advocacy relating to domestic violence. The Association has pushed for reforms to improve orders of protection as a means for ensuring the safety of survivors, including supporting legislation that would increase access to orders and issuing a report that studied barriers to victim access to criminal orders. In 1994, the Association endorsed the Family Protection and Domestic Violence Intervention Act, which reformed New York's domestic violence laws. The decision of the Appellate Division in this case undermines the

Act's promotion of law enforcement responsiveness and victim confidence in police action.

The American Civil Liberties Union ("ACLU") is a national, nonpartisan public interest organization of more than 500,000 members, dedicated to the principles of liberty and equality. Through its Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role in recent years advocating for the rights of survivors of gender-based violence. The ACLU's Human Rights Program, founded in 2004, works to bring a human rights analysis and framework to its U.S. advocacy. Together, they have sought to strengthen governments' response to domestic violence and the remedies available to victims.

Empire Justice Center (formerly known as "Greater Upstate Law Project") is a not-for-profit public interest law firm with offices in Rochester, Albany, White Plains and Central Islip. Established in 1973, Empire Justice Center ("Empire Justice") provides client direct representation, as well as legal trainings, comprehensive technical assistance and support services to the legal services community throughout New York State. Empire Justice also engages in legislative and administrative advocacy on the national, state, and local level. Since its establishment, Empire Justice has developed significant expertise in a variety of substantive law areas, including domestic violence and other poverty law issues, and serves as a resource to domestic violence attorneys, advocates, governmental

and non-governmental organizations throughout the state. Over the decades, Empire Justice has provided countless regional and statewide trainings and engaged in significant public policy work aimed at improving the civil and criminal justice system response to intimate partner abuse and increasing the effectiveness of orders of protection. Because of its statewide impact on victims, Empire Justice participated as amicus in another case before this court. (*See e.g. Nicholson v Scoppetta*, 3 NY3d 357 [2004] (among other rulings, holding that a child merely witnessing domestic violence does not, by itself, constitute neglect).) Empire Justice is a signatory to this amicus brief to provide information to the Court on the broader ramifications of the issues presented in this appeal.

Since 1993, inMotion, Inc. has helped thousands of women free themselves from abusive relationships, stay in their homes and win the financial support to which they—and their children—are legally entitled. Our mission is to make a real and lasting difference in the lives of women— abused, low-income, under-served—by offering them legal services designed to foster equal access to justice and an empowered approach to life. We fulfill our mission by providing free, quality services, primarily in the areas of matrimonial, family and immigration law, in a way that acknowledges mutual respect, encourages personal growth, and nurtures individual and collective strength. Informed by this work, inMotion

promotes policies that make our society more responsive to the legal issues confronting the women we serve.

A not-for-profit organization formed in 1978, My Sisters' Place is the leading resource in Westchester County, New York and the surrounding regions in the field of domestic violence and human trafficking programming, advocacy, and legal services. Throughout our history, My Sisters' Place has offered a holistic approach to the many and varied needs of domestic violence victims, including safety, supportive healing services for themselves and their children, economic opportunity, and housing. Programs include two residential shelters, individual counseling and advocacy, children's programs, support groups, a legal center, life-skills training, school-based domestic violence prevention education and outreach programs. Our full-service Legal Center, founded in 1997, provides legal advice, counsel and representation to domestic violence victims, addressing family law matters such as orders of protection, custody, visitation, abuse and neglect, child support, appeals and uncontested divorces.

Founded in 1990, amicus the New York Legal Assistance Group ("NYLAG") is a not-for-profit organization dedicated to providing free civil legal services to New York's low-income families. The Matrimonial & Family Law Unit of NYLAG provides legal representation to victims of domestic violence on a priority basis. In addition to obtaining orders of protection, NYLAG provides

victims with legal representation in child protection, custody, visitation, child and spousal support, and both contested and uncontested matrimonial matters. NYLAG's Immigrant Protection Unit represents victims of domestic violence in various immigration matters. NYLAG has further demonstrated its commitment to promoting legal services for victims of domestic violence through its Domestic Violence Clinical Center ("DVCC"). The DVCC is an innovative program administered and supervised by NYLAG attorneys, which offers law students the opportunity to learn the substantive and litigation skills necessary to provide exceptional representation to battered women. As such, NYLAG has a special degree of knowledge and expertise in the field of domestic violence.

NYLAG has found that mandatory arrest policies are not consistently implemented despite the fact that they are a critical component of New York State's policy against domestic violence. Moreover, reporting a violation of an order of protection to the police is one of the strongest possible expressions of a victim's need for safety and assistance. NYLAG encourages its clients to call the police as an integral part of their safety planning but this measure is rendered meaningless if the mandatory arrest law is not consistently implemented and if there is no remedy.

The New York State Coalition Against Domestic Violence ("NYSCADV") mission is to create and support the social change necessary to prevent and

confront all forms of domestic violence. As a statewide membership organization, we achieve our mission through activism, education, leadership development, promotion of sound policy and practice, and broad-based collaboration, integrating anti-oppression principles in all our work.

NYSCADV's work with and support of local programs includes being cognizant of issues that regularly affect victims of domestic violence. Law enforcement's action or inaction regarding violations of orders of protection is an ongoing issue of concern around the state. Orders of protection not only serve to enhance and increase the safety of victims, but provide a consequence for violators. Asking victims to enforce their own orders of protection is unreasonable and unjust. If victims cannot and should not rely on law enforcement, then the orders of protection are no more effective or valuable than the pieces of paper they are written on.

In 1991, the Pace Women's Justice Center ("Center") was founded at Pace University School of Law as the first academic legal center in the country devoted to training attorneys and others in the community on domestic violence issues. The Center has since grown to be a highly respected, multi-faceted legal services and training center serving victims and survivors of domestic violence. The Center is dedicated to eradicating domestic violence and to furthering the legal rights of women, the elderly, low-income families, and children by providing the education

and legal tools needed to stop the violence, seek economic justice and empower the underrepresented. Each year, the Center provides direct and free civil legal services to thousands of victims and survivors of domestic violence and elder abuse, and trains hundreds of attorneys, judges, prosecutors, police officers, and students on issues impacting the rights of these vulnerable and often underserved populations of litigants, including domestic violence, stalking, elder abuse and sexual assault. Ensuring that vulnerable litigants facing immediate danger can meaningfully rely on the duty and representation of police officers to provide assistance in enforcing orders of protection is critical to the Center's mission.

Sanctuary for Families is dedicated to the safety, healing and self-determination of victims of domestic violence and related forms of gender violence. Through comprehensive services for our clients and their children, including shelter, counseling for adults and children, legal services, and economic empowerment assistance, and through outreach, education and advocacy, Sanctuary strives to create a world in which freedom from gender violence is a basic human right. Sanctuary for Families' Center for Battered Women's Legal Services is the oldest and largest provider of specialized legal services to domestic violence victims in the United States. One of the first organizations in New York State to advocate for mandatory arrest and one of the drafters of the State's mandatory arrest law, the Family Protection Domestic Violence Act of 1994,

Sanctuary for Families strongly believes that the effective implementation of this law is essential to ensuring that survivors of domestic violence are afforded the same rights and protections as other crime victims.

STATEMENT OF THE CASE

Carmen Valdez is a domestic violence victim who obtained an order of protection, duly issued by a court, against her former partner Felix Perez. On July 19, 1996, he called and threatened to kill her—a clear violation of the order. Ms. Valdez reported the violation of the order to police officer Jose Torres and told Officer Torres that she had decided to leave her apartment because of Mr. Perez's threat and was on her way to her grandmother's house. Officer Torres responded: "'Don't worry, don't worry, we're going to arrest him. Go to your home and don't worry anymore.'" (*Valdez v City of New York*, 74 AD3d 76, 79 [1st Dept 2010].) Ms. Valdez testified that she believed the arrest would occur immediately, because Officer Torres "'told me to go back immediately to my house.'" (*Id.* at 80; *see also* Brief for Plaintiffs-Appellants, Oct. 18, 2010, at 5 ("Torres stated that Perez would be arrested 'immediately.'").) It is "undisputed," however, "that Torres had taken no steps to arrest or apprehend Perez." (Brief for Plaintiffs-Appellants, at 6.) Instead, Officer Torres testified that he left work early that day, shortly after the time that Ms. Valdez stated that she had called him. (*Id.*) The next day, Ms. Valdez stepped outside to dispose of her garbage and was repeatedly shot by Mr. Perez in the presence of her five-year-old twin sons. She sustained serious injuries to her face and arm, necessitating several surgeries, and both she and her children

require psychological treatment. (*Valdez v City of New York*, 21 Misc 3d 1107[A], 2008 NY Slip Op 51999[U], *1-2 [2008].)

Ms. Valdez and her children filed a negligence suit based on the existence of a special relationship with the police and won a jury verdict. The Appellate Division reversed, holding that Ms. Valdez, as a matter of law, could not recover. The court held that the plaintiff had not established "justifiable reliance" on the City's promise to act on her behalf because she had failed to show reliance of any kind on Officer Torres's assurance. (*Valdez*, 74 AD3d at 81-82.) Furthermore, any reliance would not have been justified because there had not been confirmation that an arrest had taken place. (*Id.* at 81.) The concurrence by Judge Abdus-Salaam noted that prior Court of Appeals cases suggested that no liability could attach for any discretionary act, including the provision of police protection. (*Id.* at 83-84 (Abdus-Salaam, J., concurring).) Judge DeGrasse, joined by Judge Mazzarelli, issued an opinion dissenting in part. Ms. Valdez filed this appeal.

ARGUMENT

The decision of the Appellate Division undermines New York's system of protecting domestic violence survivors and endangers its victims and their children. New York State's comprehensive legal framework opposing domestic violence is built on interdependent protections for victims that are designed to foster greater victim confidence in police and to provide an effective law

enforcement response to domestic violence. This legal framework penalizes violations of orders of protection, mandates arrest in certain domestic violence cases, and communicates to victims that law enforcement is governed by clear standards, allowing victims to more effectively plan for their safety. Amici curiae argue that, in light of these statutes, international human rights law governing violence against women and existing New York precedent, the Appellate Division erred in concluding that Ms. Valdez could not, as a matter of law, establish justifiable reliance. Affirming that decision would send a perilous message to domestic violence victims: Even when you obtain an order of protection in response to a documented history of domestic violence, report a serious violation of the order, and change your safety plan to follow a police directive relating to its enforcement, you will have no remedy when the police fail to investigate and respond. This message erodes victim confidence in law enforcement and impedes society's interest in preventing the escalation of violence.

I. NEW YORK STATE'S COMPREHENSIVE POLICY OPPOSING DOMESTIC VIOLENCE MANDATES THE PROTECTION OF ITS VICTIMS AND ASSURES VICTIMS THAT POLICE WILL TAKE ACTION

Domestic violence devastates families throughout the state. One in four women across the nation will experience domestic violence during their lifetime,[1]

[1] Patricia Tjaden & Nancy Thoennes, Natl. Inst. of Justice & Ctr. for Disease Control & Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the*

and an estimated 400,000 domestic incidents are reported to New York State law enforcement annually.[2] For Carmen Valdez and her two infant sons, the acts of Mr. Perez, and the failure of the police to respond despite assurances to Ms. Valdez that she could safely return home because Mr. Perez would be arrested "immediately," led to a near-fatal attack with devastating results.

To combat domestic violence, the New York State legislature passed the Family Protection and Domestic Violence Intervention Act (the "Domestic Violence Intervention Act") in 1994—an omnibus bill that "revolutionized the New York justice system's response to cases of family violence." (Julie A. Domonkos, *The Evolution of the Justice System's Response to Domestic Violence in New York State*, in *Lawyer's Manual on Domestic Violence: Representing the Victim* 1, at 1 [Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed 2006], *available at* http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf; *see also* 1994 McKinney's Session Laws of NY, at 786.) Before the Domestic Violence Intervention Act's passage, New York's laws had huge gaps in the protections offered to survivors. For example, New York law limited the choice of forum for pursuing orders of protection, forcing victims to choose between civil and criminal remedies—a choice no other state required.

National Violence Against Women Survey, iii (July 2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[2] N.Y. State Office for the Prevention of Domestic Violence, New York State Domestic Violence Dashboard Project: 2007 Data (2009), http://www.opdv.state.ny.us/statistics/nydata/2007/nys2007data.pdf.

(Julie A. Domonkos, *The Evolution of the Justice System's Response to Domestic Violence in New York State*, in *Lawyer's Manual on Domestic Violence: Representing the Victim* 1, at 2 [Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed 2006], *available at* http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf.) A statewide registry of orders of protection did not exist, making it difficult for the police to determine whether a valid order had been violated and whether there was a history of domestic violence. (*Id.*)

Significantly, the law prior to the Act did not emphasize the importance of a law enforcement response. Arrest of the perpetrator was entirely discretionary. (*Id.*) In many cases, the police asked the victim at the scene of the crime whether he or she wished to have the perpetrator arrested, often in the presence of the perpetrator. (*Id.*) Those victims who overcame intimidation and danger to file a complaint could not expect that the police would follow through. It is well-established that police all too often failed to take action in cases that would otherwise warrant investigation and arrest because of the commonly held attitude that domestic violence was a private matter, best handled within the home. (Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale LJ 2117, 2170-72 [1996].) "[R]eluctance on the part of the [New York City] police to intervene in what they reflexively characterized as 'domestic disputes' rather than

criminal offenses" was specifically documented in the case of *Bruno v Codd*, 47 NY2d 582, 590 (1979).

The 1994 enactment of the Domestic Violence Intervention Act dramatically reformed the state's response to domestic violence. In the Act's introduction, the legislature declared that "there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence." (1994 McKinney's Session Laws of NY, at 786.) It further declared:

> [D]omestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. The integrity of New York's families from its youngest to its oldest members is undermined by a permissive or casual attitude towards violence between household members. The legislature further finds and declares that in circumstances where domestic violence continues in violation of lawful court orders, action under the criminal law must remain in place as a necessary and available option. Notwithstanding the evolution of the law of domestic violence in New York, death and serious physical injury by and between family members continues unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.
>
> Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for New York's families consistent with the interests of fairness and substantial justice.

(*Id.* at 786-87 (emphasis added).) Recognizing that "a permissive or casual attitude towards violence between household members" had undermined the safety of families, the legislature concluded that New York must strengthen the response

by law enforcement and the courts, particularly where "domestic violence continues in violation of lawful court orders." Thus, the Domestic Violence Intervention Act was enacted in recognition that action under the criminal law must be "necessary and available" and to ensure an "immediate deterrent action by law enforcement officials and members of the judiciary." Moreover, the law was changed so that standards of protection were "clear and certain" to victims.

Such legislation unquestionably created stronger protections for domestic violence victims. It strengthened the laws pertaining to orders of protection (*see* Family Ct Act § 842) and instituted mandatory arrest procedures (*see* CPL 140.10 [4] ("a police officer *shall* arrest a person" in the event that an order of protection in effect is violated, or a felony or misdemeanor has been committed against a member of the same household or family (emphasis added))). As a result, a violation of an order of protection—or alternatively, a felony or misdemeanor committed against a member of the same household—*mandates* the arrest of the perpetrating party, overriding police discretion. (*See* CPL 140.10 [4] [a], [b], [c].)[3]

The legislature's purpose in compelling a law enforcement response to domestic violence is unambiguous. (*See e.g.* Transcript of NY Senate Debate on Senate Bill S8642, June 23, 1994, at 5593-94 ("It's going to create the ability for

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[3] In misdemeanor cases, police are not required to arrest if the victim affirmatively requests otherwise. The officer cannot inquire as to whether the victim seeks an arrest and cannot threaten arrest for the purpose of discouraging requests for police intervention. (CPL 140.10 [4] [c].)

people to . . . gain access to the full force of the law more readily than has ever occurred in the history of our state." (statement of Sen. Saland)); *id.* at 5604 ("If the batterer comes back and the woman . . . picks up the telephone and calls, unlike the current law, that person *will be* arrested." (statement of Sen. Saland) (emphasis added)).) The legislature sought to give victims "access to the full force of the law," and with this access, the knowledge that the law now required police action. Previously, because arrest was a matter of police discretion, victims had no assurance that their calls to 9-1-1 would result in a law enforcement response. The new Domestic Violence Intervention Act relayed to victims that police would investigate, respond, and arrest and that they could plan their own safety measures accordingly.

While reforming the law regarding arrest and police discretion, the legislature intended for prevailing case law, which allowed for police liability, to continue to govern the issue of municipal liability. (*See e.g. id.* at 5633 ("The existing law [pertaining to municipal liability] which, as I said, is case law is [*sic*] what will continue to govern in this area." (statement of Sen. Saland)).) The decisions of the Court of Appeals in *Sorichetti* and *Cuffy*, discussed *infra* in Section III, had been issued and conclusively recognized the "special duty" exception for municipal liability. The legislature chose not to disturb the standard for municipal liability that had already been established. *Sorichetti*, in particular,

addressed liability for failure to protect domestic violence victims. Thus, in passing the Domestic Violence Intervention Act, the legislature removed police discretion from enforcement actions, while intending for municipalities to continue to be liable for failures to respond pursuant to the special duty exception.

Since the Act's passage, the New York State legislature has continued to pass bills that rely on orders of protection and their consistent enforcement as key to ensuring the safety of domestic violence victims. Over the last 17 years, the state has expanded access to orders of protection and increased penalties for violations. (*E.g.* 1996 NY Senate-Assembly Bill S7930, A11276 (implementing stronger penalties for order of protection violations); 1996 NY Senate-Assembly Bill S6813-A, A10544-A (extending the effective date of the mandatory arrest provision); 1997 NY Senate-Assembly Bill S3208-A, A6442-A (providing for temporary orders of protection where a defendant fails to appear at a proceeding until the defendant appears voluntarily or is caught); 2002 NY Senate-Assembly Bill S7479, A11193 (requiring entry of order of protection into registry); 2003 NY Senate-Assembly Bill S3999, A8691 (extending mandatory arrest provision, again); 2003 NY Senate-Assembly Bill S5532, A8923-A (extending the effective period of orders of protection from one to two years, and from three to five years); 2005 NY Senate-Assembly Bill S3666, A6840 (extending mandatory arrest provision, again); 2006 NY Senate-Assembly Bill S6871, A9907-A (extending the

maximum length of criminal court orders of protection); 2007 NY Senate-Assembly Bill S2106-C, A4306-C (extending the mandatory arrest provision, again); 2007 NY Senate-Assembly Bill S4020, A7370 (prohibiting fees for service of orders of protection); 2008 NY Senate-Assembly Bill S8665, A11707 (extending definition of "family/household member" to include intimate partners, thereby allowing more victims to seek an order of protection in Family Court); 2009 NY Senate-Assembly Bill S5031-A, A9017 (strengthening domestic violence protections existing in the Family Court Act, Domestic Relations Law and Criminal Procedure Law); 2009 NY Senate-Assembly Bill S56, A156-B (extending the mandatory arrest provision, again); 2010 NY Senate-Assembly Bill S8058, A11100 (requiring police officers to serve, or provide for the service of, temporary and permanent orders of protection, and any accompanying papers); 2010 NY Senate-Assembly Bill S5696-A, A8393-A (prohibiting the dismissal of a petition or denial of an order of protection solely on the basis that alleged events are not relatively recent).) Currently, New York is one of twenty-two states that have mandated arrest for violations of orders of protection, while other states have chosen to continue to allow for officer discretion or to encourage arrest.[4]

[4] *See* CPL 140.10 ("a police officer *shall* arrest") (emphasis added); *see generally* April M. Zeoli, Hannah Brenner & Alexis Norris, *A Summary and Analysis of Warrantless Arrest Statutes for Domestic Violence in the United States*, J Interpers Violence (2010), forthcoming publication at http://ssrn.com/abstract=1713229 (collecting statutes).

The New York City Police Department accepted the obligation to investigate and respond to domestic violence, even prior to the adoption of the Domestic Violence Intervention Act. In *Bruno v Codd*, a consent judgment was entered that required police "to respond swiftly to every request for protection and, as in an ordinary criminal case, to arrest the husband whenever there is reasonable cause to believe that a felony has been committed against the wife or that an order of protection or temporary order of protection has been violated." (47 NY2d at 590.) The Patrol Guide of the Department outlines the procedures that officers must follow when domestic violence is reported, including violations of orders of protection. (*See* New York City Police Department Patrol Guide, Procedure No. 208-36, *Family Offenses/Domestic Violence* [2000].)

As demonstrated by this legal history, it is fair to say that orders of protection and their enforcement have been at the heart of New York's domestic violence policymaking. The state's endorsement of orders of protection and their enforcement as a tool to combat domestic violence, enabling victims to rely on police action, has never wavered and instead has grown deeper. When evaluating the duty owed by law enforcement to a domestic violence survivor, this Court should consider New York's robust policy on orders of protection and their enforcement, which assures victims that police will take action.

II. THE DECISION OF THE APPELLATE DIVISION JEOPARDIZES VICTIM SAFETY AND THE EFFICACY OF NEW YORK'S DOMESTIC VIOLENCE LAWS, AND IS INCONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW

The lower court decision in *Valdez* sends a clear message to victims of domestic violence: violations of orders of protection can be disregarded; changing one's safety plan in accordance with police instructions will not be considered a justified course of action; and municipalities are immune from liability even when police officers fail to carry out clearly articulated state policies regarding investigating and responding to domestic violence. This message jeopardizes the legislature's extensive policies on enforcement of orders of protection, the effect of judicial judgments about their necessity in individual cases, and victim safety. It is also contrary to a vast body of international law on violence against women, which this Court may look to as persuasive authority, that provides that governments' obligations to protect victims of gender-based violence extend to enforcing orders of protection and providing a remedy for failures to protect.

A. *Failing to Enforce Orders of Protection and to Provide a Remedy Endangers Victims and Undermines New York's Anti-Domestic Violence Mandate*

Unless protective orders are enforced, they can prove harmful to victims by creating a false sense of security.[5]

[5] United States Dept. of Justice, Office for Victims of Crime, Legal Series Bulletin #4, *Enforcement of Protective Orders* (Jan. 2002).

Orders of protection alone do not shield victims from further violence. When violations occur, orders must be enforced, and when they are not, victims must be able to hold law enforcement accountable for failures to enforce. The Appellate Division decision blocks any remedy to the victim as a matter of law, undermining the safety of survivors and the protections enacted in New York state law and ordered by a New York court.

Annually, an estimated 400,000 domestic incidents are reported to New York State law enforcement, and "43% of all adult women murdered were killed by intimate partners." (New York State Office for the Prevention of Domestic Violence, New York State Domestic Violence Dashboard Project: 2007 Data [2009], http://www.opdv.state.ny.us/statistics/nydata/2007/nys2007data.pdf.) In 2009, "15,692 people received emergency shelter in New York State" because of domestic violence and "[o]ver 13,000 adults and 16,000 children were denied shelter." (New York State Office for the Prevention of Domestic Violence, New York State Domestic Violence Dashboard Project, 2009 Data [2010], http://www.opdv.state.ny.us/ statistics/nydata/2009/nys2009data.pdf.) Orders of protection are the primary means by which domestic violence victims seek protection. Over 260,000 orders of protection were issued by New York State courts in 2009. (*Id.*)

Research has found that orders of protection reduce violence. Studies routinely find that women who have orders of protection are less likely to report partner violence in the year following the order. (Christopher T. Benitez, MD, et al., *Do Protection Orders Protect?*, 38 J Am Acad Psychiatry Law 376, 381 [2010] ("In a study involving 2,691 women who reported an incident of intimate partner violence to police, Holt *et al.* found that having a permanent protection order in effect was associated with an 80 percent reduction in police-reported violence in the next year.").) The New York State Office of Domestic Violence Prevention conducted a study and found that the likelihood of recidivism decreased when incidents resulted in arrest, concluding that "mandatory arrest along with the issuance of an order of protection dramatically affected the rate of recidivism." (Lisa Fischel-Wolovick, *The Family Protection and Domestic Violence Intervention Act of 1994: Mandatory Arrest Ten Years Later*, in *Lawyer's Manual on Domestic Violence: Representing the Victim*, at 173-74 (citing New York State Office of Domestic Violence Prevention, *Evaluation of DVIA Mandatory Arrest Provisions: Final Report* 24 [2001]) [Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed 2006], *available at* http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf.) These orders help victims "regain a sense of well-being." (United

States Dept. of Justice, Nat'l. Inst. of Justice, Research Preview, *Civil Protection Orders: Victims' Views on Effectiveness*, at 1 [Jan. 1998].)

Enforcement is crucial to the effectiveness of orders of protection because the threat of violence to victims and their children remains real even after orders are issued. (*See id.* at 1 ("Previous research has shown that the effectiveness of civil protection orders for victims of family violence depends on how specific and comprehensive the orders are and how well they are enforced."); *see also* Johanna Sullivan, OPDV & D.A. James A. Murphy, III, *Coordinated and Consistent Enforcement of Violations of Orders of Protection Can Be a Crucial Tool in Stopping Domestic Violence*, Empire State Prosecutor, at 14 [Winter 2010] ("Arrests in violation of order of protection cases could lead to increased reporting of violence, keeping both the victim and society safe from future harm."); Christopher T. Benitez, MD, et al., *Do Protection Orders Protect?*, 38 J Am Acad Psychiatry Law 376, 384 [2010].) Studies have found that women who have orders of protection face greater risk due to their assertion of independence. (*See* Leigh Goodmark, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St Louis U Pub L Rev 7, 24 [2004] ("The very act of seeking legal assistance in a restraining order or other type of case can endanger the battered woman. . . . Retaining a lawyer changes the power differential between the battered woman and her abuser.").)

Domestic violence victims who seek orders of protection therefore have a heightened need for police protection.

When domestic violence victims cannot depend on police officers to enforce their orders of protection and arrest abusers, they stop relying on the police to protect them. (Marsha E. Wolf et al., *Barriers to Seeking Police Help for Intimate Partner Violence*, J Fam Violence [Apr. 2003] at 121, 124 ("A domestic violence victim is less likely to call the police if a previous protection order violation went unpunished after she reported it.").) This consequence of police failure to respond completely thwarts the purpose of domestic violence statutes. In cases involving orders of protection, where a court has already determined that the victim is in need, the failure to enforce is tantamount to permission for the batterer to continue his or her violence.

The Appellate Division decision reinforces the message that orders of protection need not be enforced by withholding a remedy to the victim as a matter of law. When the courts cut off the ability of domestic violence victims to hold police accountable in cases where the police have increased the danger they face, the result is a right to protection without a remedy. In *Town of Castle Rock, Colorado v Gonzales*, 545 US 748, 768 (2005), the Supreme Court found that victims of domestic violence do not have a property interest in orders of protection that is cognizable under the U.S. Constitution. Despite this finding, Justice Scalia

noted that the decision "does not mean States are powerless to provide victims with personally enforceable remedies." (*Id.*)

However, the *Valdez* opinion threatens to block state remedies long existing in case law and envisioned by the legislature when enacting New York's domestic violence law. It immunizes police action. Even worse, the court does so by implying that Ms. Valdez unreasonably relied on a police directive, by returning home as instructed by the officer. In effect, it tells victims that they should not follow instructions from the police. Yet, cooperation and trust between the victim and police are at the root of any effective criminal justice response to domestic violence. Refusing to recognize a special relationship here, as a matter of law, runs contrary to the purposes of New York State's domestic violence statutes: to provide protection, institute law enforcement standards that are clear to victims and non-discretionary, and foster greater trust in law enforcement.

B. *International Law Provides Persuasive Authority that Failing to Enforce Orders of Protection and to Provide a Remedy Violates Governments' Obligations to Protect Victims of Domestic Violence*

International law recognizes that there is a fundamental human right to be protected from gender-based violence, including domestic violence, and to effective remedies when such protection fails. This norm, as reflected in ratified treaties and other international instruments, now forms a part of customary international law, and should help guide this Court's consideration of whether

withholding a remedy to a domestic violence survivor, as a matter of law, comports with governments' obligations to survivors. Amici curiae here do not cite international law as binding precedent but rather because it "cast[s] an empirical light on the consequences of different solutions to a common legal problem . . . ." (*Printz v United States*, 521 US 898, 976-77 [1997] (Breyer, J., dissenting).) Given the rich body of international law on the right to be free from gender-based violence, including victims' access to remedies, this Court can and should look to international law on this issue.

International law has long formed part of the common law of the United States. U.S. courts, including the U.S. Supreme Court and New York state courts, have routinely looked to this body of law as a guide to the proper interpretation of domestic constitutions and other laws. (*See Sosa v Alvarez-Machain*, 542 US 692, 734 [2004] ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); *The Paquete Habana*, 175 US 677, 700 [1900] ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").)[6]

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[6] *See also* Margaret H. Marshall, "*Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 NYU L Rev 1633 (2004) (citing state court cases from around the country that reference international law and noting the relevance and utility of international law in domestic adjudication); Shirley S. Abrahamson & Michael J. Fisher, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra L Rev 273 (1997) (same).

Acknowledging the relevance of international law to domestic adjudication, the U.S. Supreme Court has repeatedly cited to and relied on international and foreign materials in the course of interpreting U.S. law. Most recently in *Graham v Florida*, the Court reaffirmed its "longstanding practice" of "look[ing] beyond our Nation's borders for support for its independent conclusion that a particular sentence is cruel and unusual" for purposes of the Eighth Amendment. (130 S Ct 2011, 2033 [2010].)[7]

New York state courts have a long history of employing foreign and international sources of law and indeed have shown "persuasive power" in the interpretation of customary international law doctrines. (*See generally* Julian G. Ku, *Customary Law in State Courts*, 42 Va J Intl L 265, 291-333 [2001] (detailing the New York state courts' use of foreign and international sources of law and interpreting customary international law doctrines).) More recently, in *People v Scutari*, a trial court "acknowledge[d] that international law is a part of United States Law." (148 Misc 2d 440, 443 [NY Dist Ct 1990].) Recognizing this general principle, New York state courts have looked to treaties and other sources of international law as persuasive authority in determining the issues before them. (*See e.g. Wilson v Hacker*, 200 Misc 124, 135 [NY Sup Ct 1950] (Universal

[7] *See also Roper v Simmons*, 543 US 551 (2005); *Grutter v Bollinger*, 539 US 306, 344 (2003) (Ginsburg, J., concurring); *Lawrence v Texas*, 539 US 558, 576-78 (2003); *Atkins v Virginia*, 536 US 304, 316 n21 (2002); *Thompson v Oklahoma*, 487 US 815, 830-31 (1988) (Stevens, J.).

Declaration of Human Rights); *Beck v Mfrs. Hanover Trust Co.*, 125 Misc 2d 771 [NY Sup Ct 1984] (recognizing the Universal Declaration as a source of legal obligation); *Byrn v NYC Health & Hosps.Corp.*, 31 NY2d 194, 199, 208 [1972] (Burke, dissenting) (the U.N. Convention against Genocide); *Matter of Vilensky*, 102 Misc 2d 765, 768-72 [NY Sur Ct 1979] (Helsinki Accords).)

The right to be protected from gender-based violence and to be afforded effective remedies when such protection fails is recognized in widely-ratified international and regional human rights treaties,[8] including those ratified by the United States, numerous resolutions by the United Nations and other inter-governmental organizations,[9] decisions of international tribunals,[10] and the laws

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[8] *See e.g.* International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, GA res 2200A(XXI), at 52, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 999 UNTS 171 (signed by the United States Oct. 5, 1977, *entered into force*, Mar. 23, 1976) ("ICCPR"); Compilation, Human Rights Commn., Gen. Comment No. 28: Article 3, *The Equality of Rights Between Men and Women*, 68th Sess, UN Doc CCPR/C/21/Rev.1/Add.10 (2000), paras 10,11,14, 16, 21 (identifying protection from various forms of violence and subordination in the family as implicit under articles 6,7,12,18 and 24 of the ICCPR); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, GA Res 34/180, 34 UN GAOR, 34th Sess, Supp No. 46, at 193, UN Doc A/34/46 (1979) *entered into force* Sept. 3, 1981) ("CEDAW"); Compilation, CEDAW Commn., Gen. Recommendation No.19: Violence Against Women (11th Sess 1992), paras 1, 24(b) (recognizing "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms" and recommending that States Parties "ensure that laws against family violence and abuse . . . give adequate protection to women"); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, opened for signature June 9, 1994, 33 ILM 1534 (*entered into force* Mar. 5, 1995).

[9] *See e.g.* Universal Declaration of Human Rights, GA Res 217A (III), at 71, UN GAOR, 3d Sess, 1st plen mtg, Supp No. 13, UN Doc A/810 (Dec. 12, 1948); World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶ 18, UN Doc A/CONF.157/24 (Part I) (Oct. 13, 1993); Declaration on the Elimination of Violence Against Women, arts 1, 2, GA Res 48/104, UN GAOR, 48th Sess, Supp No. 49, at 217, UN Doc A/48/49 (Dec. 20, 1993); Council of Europe, Commn. of Ministers Recommendation Rec(2002)5 to

and practices of other nations.[11] Inherent in this right is the obligation on states to undertake reasonable measures to protect women from acts of violence where there is a real and immediate risk of harm to a particular individual or family. This "due diligence" obligation requires that states adopt measures aimed at preventing such violence from occurring in the first place, investigating it when it does, and punishing perpetrators—an obligation that applies equally whether the perpetrator is a state or private actor.[12] It also requires that states provide compensation and redress for victims and survivors of such violence.[13] The right to be free from

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Member States on the Protection of Women Against Violence, at 3, 5, Commn. of Ministers, 794th mtg. of the Ministers' Deputies (Apr. 30, 2002).

[10] *See e.g. Opuz v Turkey*, App No. 33401/02 (Eur Ct HR June 9, 2009) (holding that states have an obligation to protect women, in particular, from domestic violence and that domestic violence is a form of gender discrimination that states are required to eliminate and remedy); *M.C. v Bulgaria*, App No. 39272/98 ¶¶ 185-87 (Eur Ct HR Mar. 4, 2004); *Maria da Penha Maia Fernandes v Brazil*, Case No. 12.051, Inter-Am CHR, at 704, OEA/Ser.L/V/II.111 Doc 20 Rev. (Apr. 16, 2001).

[11] *See generally* Violence Against Women: Report of the Secretary Gen., UN GAOR, 59th Sess, UN Doc A/59/281 (2004).

[12] *See e.g.* Elimination of Domestic Violence Against Women, GA Res 58/147, ¶ 5, UN GAOR, 58th Sess, UN Doc A/Res/58/147 (Feb. 19, 2004) ("States have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of domestic violence against women and to provide protection to the victims."); World Conference on Human Rights, Vienna Declaration and Programme of Action, para 18, UN Doc A/CONF.157/24 (Part I) (June 14-25, 1993) (recognizing gender violence as a human rights violation requiring system-wide as well as national reforms designed to eliminate such violence); Compilation, CEDAW Commn., Gen. Recommendation No. 19, *supra*, para 9; *see also Opuz v Turkey*, App No. 33401/02 (Eur Ct HR June 9, 2009).

[13] Generally, international law requires that when a government violates its human rights obligations, it must provide those harmed with an adequate and effective remedy. *See* Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (Dec. 12, 1948) art 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights . . . ."); ICCPR, art 2(3) (requiring that states provide "an effective remedy" including "judicial remedy" for victims of violations of the ICCPR and that states "ensure that the competent authorities shall enforce such remedies when granted.") These general principles on the right to a remedy apply equally to remedies for

gender-based violence and the concomitant "due diligence" obligation on states to protect victims from such violence and provide redress when such protection fails is now so well established under international law that it has attained the status of customary international law.[14]

In Ms. Valdez's case, from the issuance of the protective order and her call to the police regarding its violation, the relevant authorities knew of the risk of harm she faced and asserted that an arrest would occur immediately, yet they failed to act. Instead, the police arguably increased the risk of harm to Ms. Valdez by instructing her to return to her home, contrary to her original safety plan. In these circumstances, international law would require that the relevant authorities enforce the terms of the order of protection or otherwise take effective preventive measures, given their knowledge of the threat she faced. (*See* United Nations, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* Rashida Manjoo, *Mission to the United States of America*, A/HRC/17/26/Add. 5, ¶¶ 13, 15, 115 [June 1, 2011] (calling on U.S. institutions to

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victims of acts of gender-based violence. *See e.g.* Beijing Declaration and Platform for Action, Fourth World Conference on Women, at Annex I, ch IV, ¶¶ 125-30, UN Doc A/CONF.177/20 and A/CONF.177/20/Add.1 (1995) (recognizing the right of women to be free from violence by affording "women who are subjected to violence with access to mechanism of justice and . . . to just and effective remedies for the harm they have suffered."); Beijing Declaration, para 125(h); *see also Opuz v Turkey*, App No. 33401/02 (Eur Ct HR June 9, 2009).

[14] Customary international law, historically referred to as part of the "law of nations," is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987).

establish meaningful standards for enforcement of protection orders and to impose consequences for a failure to enforce); United Nations, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Yakin Erturk, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, E/CN. 4/2006/61, ¶ 49 [Jan. 20, 2006] (expressing serious concern about major gaps in the enforcement of protective obligations by police and the judiciary); Inter-American Commn. on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc 68 ¶ 166-68 [2007] (stressing that failure to prevent violence and implement protective orders ranks among the chief obstacles to the practice of due diligence); *Opuz v Turkey*, App No. 33401/02 ¶¶ 128-30 [Eur Ct HR June 9, 2009].) Upon governmental failure to act, international law would also provide that victims "have access to just and effective remedies, including compensation and indemnification." (Inter-American Commn. on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc 68 ¶ 48 [2007].)

International tribunals and bodies have repeatedly held governments accountable for their failure to act with due diligence and given victims of domestic and gender-based violence access to remedies, including compensation, against governments that failed to protect them. For example, the European Court of Human Rights issued a judgment against the government of Turkey and

awarded damages to Nahide Opuz, a domestic violence survivor, because the government had failed to take adequate steps to protect her and her family from repeated violence. (*Opuz v Turkey*, App No. 33401/02 [Eur Ct HR June 9, 2009].) In *Maria da Penha Maia Fernandes v Brazil*, the Inter-American Commission on Human Rights concluded that Brazil had violated Ms. Fernandes's rights by delaying the prosecution of her abusive husband for attempted murder for 15 years. The Commission found that Ms. Fernandes was entitled to prompt and effective compensation from the government, and that Brazil must adopt measures that would ensure actual compensation, because the government had made it impossible "to institute timely proceedings for redress and compensation in the civil sphere." (Case No. 12.051, Inter-Am CHR 704, OEA/Ser. L/V/II.111 Doc 20 Rev. ¶¶ 3, 61 [Apr. 16, 2001].) Similarly, in *M.C. v Bulgaria*, the European Court ruled that the government of Bulgaria owed compensation to a rape victim based partly on its failure to fully and effectively investigate rape cases. (App No. 39272/98 ¶¶ 185-87, 191-94 [Eur Ct HR Mar. 4, 2004].)[15]

These cases establish that a remedy to victims must be available when the government does not meet its legal obligations to protect. Because remedies were

[15] *See also A.T. v Hungary*, Committee on the Elimination of All Forms of Discrimination Against Women, Communication No. 2/2003, ¶¶ 9.3, 9.5, 9.6 (Jan. 26, 2005) (recommending that Hungary provide reparations to a domestic violence survivor whom it failed to protect); *Bevacqua & S. v Bulgaria*, App No. 71127/01 (Eur Ct HR June 12, 2008) (awarding damages to domestic violence survivor where government had failed to protect); *Kontrova v Slovakia*, App No. 7510/04 (Eur Ct HR May 31, 2007) (same); *Branko Tomasic & Others v Croatia*, App No. 46598/06 (Eur Ct HR Jan. 15, 2009) (same).

unavailable in the national courts, the victims had to turn to international bodies. (*See e.g. Opuz* ¶¶ 115-17, 152, 175, 201; *Jessica Gonzales v United States*, Case 12.626, Inter-Am CHR, OEA/Ser./L/V/II.128 Doc 19, ¶¶ 48-50 [July 24, 2007], *available at* http://www.cidh.org/annualrep/2007eng/usa1490.05eng.htm.)[16] Here, Ms. Valdez sought such a remedy through a state court. To set aside the jury verdict as a matter of law would severely damage the availability of recourse for New York victims as guaranteed under international law.

International law also provides guidance on the issue of whether the burden of determining whether protective measures have been taken by the government rests on the government, or on the victim. In *Valdez*, the Appellate Division seems to suggest that Ms. Valdez should have called the police to determine whether an arrest had been made, and that absent such a call, she could not justifiably rely on the police officer's statement that an arrest would occur. (*See Valdez*, 74 AD3d at 80, 81.) This argument entirely places the burden on the victim to ascertain whether protective measures have been taken, even when such measures—like an

[16] In her recent official visit to the United States, the U.N. Special Rapporteur on Violence Against Women criticized the effect of the U.S. Supreme Court's decision in *Town of Castle Rock v Gonzales*, 545 US 748 (2005), for refusing to recognize a federal constitutional right to enforcement of a restraining order. She noted that the effect of this case, and others, is that "even where local and state police are grossly negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call, there is no federal level constitutional or statutory remedy." United Nations, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* Rashida Manjoo, *Mission to the United States of America*, A/HRC/17/26/Add. 5, ¶¶ 70, 71 (June 1, 2011).

arrest—would take place outside of her presence. The Inter-American Commission on Human Rights has rejected this view:

> The IACHR has also been informed that States frequently take the position that victims are themselves responsible for monitoring the protective measures, which leaves them utterly defenseless and in danger of becoming the victim of the assailant's reprisals, even when these women victims were diligent in exercising their right to file a complaint about the failure to enforce the measure.

(Inter-American Commn. on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc 68, ¶ 170 [2007].) Tragically, what the IACHR described is precisely what happened in Ms. Valdez's case. She was told to return home, and was left defenseless there against Mr. Perez's brutal reprisal, following the police assurance that he would be arrested immediately. Due diligence obligations require governments to take responsibility for monitoring protective measures for domestic violence victims, particularly when such measures can only be carried out by the government, such as arrest. Any argument that the failure by a victim to confirm an arrest should vitiate a jury's verdict as to justifiable reliance is therefore deeply flawed.

Accordingly, the decision of the Appellate Division undermines New York's domestic violence laws and victim safety and conflicts with international law because it releases police from their legal obligation to enforce orders of protection, even when the police make an explicit assurance to the victim and as a result, she alters her safety plan.

III. A FINDING OF MUNICIPAL LIABILITY IN THIS CASE IS CONSISTENT WITH PRIOR CASE LAW AND NEW YORK STATE'S STRONG INTEREST IN PROTECTING DOMESTIC VIOLENCE VICTIMS

This Court's precedent on municipal liability establishes that the lower court erred in overruling the jury verdict, particularly in light of the New York domestic violence laws applicable to this case. The Appellate Division's decision ignored and misconstrued that case law in overturning the jury verdict finding justifiable reliance. In doing so, the decision cut off municipal liability as a matter of law, despite the judicial conclusion that protection must be afforded to Ms. Valdez (in the form of an order of protection), the criminal laws governing response to domestic violence in effect, the clear violation of the order of protection, the change in Ms. Valdez's course of conduct as a direct result of police statements, and the jury's conclusion that reliance was indeed justifiable in this case.

Should the Court agree that justifiable reliance was established, a second issue, raised in the concurrence, is how the discretionary and ministerial action analysis of *McLean v City of New York* affects this case. As will be discussed below, the *McLean* analysis does not abrogate municipal liability in cases involving enforcement of orders of protection, where victims must be able to rely on the state's legal framework and police action in order to secure their safety. Should the Court still choose to utilize the discretionary/ministerial analysis, the City's actions can only be characterized as ministerial in light of the governing

statutes and the City's inability to establish that its failure to investigate and respond to Ms. Valdez's complaint involved an exercise of discretion or judgment.

A. *The Appellate Division Erred in Concluding that, as a Matter of Law, Plaintiff Failed to Establish a Special Duty or Special Relationship*

To establish a municipality's liability for its failure to protect a citizen, a special duty must be created. The elements needed to establish such a duty include: (1) the assumption of an affirmative duty to act on behalf of the injured party; (2) knowledge that inaction could lead to harm; (3) direct contact between the municipality and the injured party; and (4) justifiable reliance on the municipality's affirmative undertaking. (*See McLean v City of New York*, 12 NY3d 194, 201 [2009], citing *Cuffy v City of New York*, 69 NY2d 255, 260 [1987].)

The key case of this Court examining special duty in the domestic violence context is *Sorichetti v City of New York*, 65 NY2d 461 (1985). In *Sorichetti*, a special duty was found where the police knew that an order of protection had been violated yet failed to respond accordingly. Fundamental to this holding was the Court's recognition of the plaintiff's "reasonable expectation of police protection." (*Id.* at 469.) Subsequent decisions by this Court have utilized the term "justifiable reliance" to denote such reasonable expectation. (*See e.g. Dinardo v City of New York*, 13 NY3d 872, 874 [2009]; *McLean*, 12 NY3d at 201; *Mastroianni v County of Suffolk*, 91 NY2d 198, 204 [1997]; *Cuffy*, 69 NY2d at 260.)

Sorichetti, which was decided before New York passed the mandatory arrest provisions contained in the Domestic Violence Intervention Act, recognized that an order of protection specifically "evinces a . . . legislative and judicial determination that its holder should be accorded a reasonable degree of protection from a particular individual." (65 NY2d at 469.) Further, the Court recognized an obligation of the police, stating that "when police are made aware of a possible violation [of an order of protection], they are *obligated* to respond and investigate." (*Id.* at 470 (emphasis added).) This obligation has only been strengthened since its codification through the Domestic Violence Intervention Act.

Dismissing the relevance of *Sorichetti*, the court below instead erroneously applied *Cuffy v City of New York*, 69 NY2d 255, 260 (1987). The Appellate Division inappropriately concluded that this case is "factually indistinguishable from *Cuffy*," a case that did not involve domestic violence. (*Valdez*, 74 AD3d at 80.) *Cuffy* involved a dispute between neighbors, where a belief or expectation of police protection was understandably unreasonable when an upstairs neighbor could obviously perceive (by looking out the window) that his downstairs neighbor had not been arrested. Here, Ms. Valdez had no similar mechanism by which to perceive that Mr. Perez had in fact not been arrested. Given the order of protection barring Mr. Perez from her home, she could well have expected that any arrest would take place elsewhere. As the jury found, Ms. Valdez's reasonable belief in,

or expectation of, adequate police protection was supported by the police officer's assertion that Perez would be arrested "immediately," as required by the criminal laws in effect. Moreover, the officer's assertion was made to a domestic violence victim after she informed him that her valid order of protection had been violated, a circumstance that was completely absent in *Cuffy*. *Cuffy* is therefore inapposite to the facts at issue here.

Furthermore, *Cuffy* explicitly recognized that "at the heart" of the cases in which a special duty has been found lies the unfairness in "precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection." (69 NY2d at 261; *see also Dinardo*, 13 NY3d at 877 ("The touchstone of the special duty rule is that the government, by its undertaking to the specific plaintiff, has gone above and beyond the general duty it owes to the public and created a unique relationship with that plaintiff, upon which he or she is entitled to rely." (Lippman, J., concurring)).) The facts here show that the police department's voluntary undertaking (assuring Ms. Valdez that Mr. Perez would be arrested "immediately") lulled Ms. Valdez into a false sense of security. She relied on the police officer's assertion that her abuser would be arrested, changed course, and returned home, forgoing the protection that her grandmother's house would have afforded. The jury verdict

cannot be set aside, as a matter of law, without betraying the heart and touchstone of the special duty cases.

Other decisions by this Court support upholding the jury's finding of justifiable reliance. In *Mastroianni v County of Suffolk*, 91 NY2d 198, 205 (1997), this court recognized that although the mere existence of an order of protection does not in and of itself satisfy the justifiable reliance element, justifiable reliance was found where police officers gave "affirmative undertakings" to the holder of an order of protection. Using *Mastroianni*'s analysis of justifiable reliance, a jury could have found that such an affirmative undertaking occurred when the police officer told Ms. Valdez that she should return to her home because Mr. Perez would be arrested "immediately." The Court in *Lauer v City of New York* noted that a special relationship arose in *Sorichetti* out of "an order of protection, *plus* the City's knowledge . . . , *plus* the City's instruction to the mother . . . , *plus* her reasonable expectation that the police would protect them." (95 NY2d 95, 104 n2 [2000].) In the present case, Ms. Valdez had an order of protection, *plus* the City's knowledge of both her order and Mr. Perez's violation, *plus* the City's instruction to change her course of action and return home because Mr. Perez would be arrested immediately, *plus* her reasonable expectation that the police would protect them given the mandatory arrest laws and the City's assurances. All of the

Sorichetti elements are therefore present in Ms. Valdez's case and should not have been set aside by the lower court.

Once New York's legal framework protecting domestic violence victims and Ms. Valdez's factual circumstances are taken into account, it is clear that the Appellate Division's decision to overrule the verdict was contrary to this Court's precedents.

B. McLean*'s Ministerial/Discretionary Action Analysis Does Not Abrogate Municipal Liability in this Case*

The Appellate Division in this case noted that "the starting point of any analysis as to governmental liability is whether a special relationship existed; and not whether the governmental action is ministerial or discretionary." (*Valdez*, 74 AD3d at 78.) The court cited *McLean* and *Dinardo* for these propositions. (*See McLean*, 12 NY3d at 203 ("In [*Pelaez* and *Kovit*] we found no special relationship or special duty. Thus there could be no liability, whether the actions at issue were characterized as ministerial or discretionary."); *Dinardo*, 13 NY3d at 874 (the Court had no occasion to decide the discretionary versus ministerial issue because there is no rational process by which a jury could have found justifiable reliance).) Thus, a court must first determine whether a special relationship exists, before engaging in any ministerial/discretionary analysis. When the action involves enforcement of an order of protection, however, such a secondary analysis is inappropriate.

In *McLean*, the Court held that government action, if discretionary, may not be the basis for liability. (12 NY3d at 203.) Conversely, when government action is ministerial, and a special duty is found, the failure to act may then be the basis for liability. (*Id.*; *see also Tango v Tulevech*, 61 NY2d 34 [1983].) Discretionary acts involve "the exercise of reasoned judgment *which could typically produce different acceptable results* whereas a ministerial act envisions direct adherence to a governing rule or standard with a *compulsory result*." (*Tango*, 61 NY2d at 41 (emphasis added).)

This Court has already held that liability may attach in cases involving the enforcement of orders of protection and, for that reason, need not engage in the *McLean* analysis. As noted by the dissent below, *Sorichetti*—a case decided 18 months after *Tango* articulated the discretionary/ministerial dichotomy—concluded that actions by the police after they become aware of a possible violation of an order of protection "will be subject to a 'reasonableness' review in a negligence action." (*Valdez*, 74 AD3d at 88 (Degrasse, J., dissenting) (quoting *Sorichetti*, 65 NY2d at 470).)

It should also be noted that *McLean* did not involve police protection. Yet, the difficulty with its analysis is that it promotes a dangerous assumption that almost all government action may be characterized as discretionary. (*Id.*; *see also Dinardo*, 13 NY3d at 877 (Lippman, J., concurring).) As such, despite the "heart"

and "touchstone" of the special duty cases, the concern arises that "a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment." (*Dinardo*, 13 NY3d at 877 (Lippman, J., concurring).) This assumption must be scrutinized and rejected when examining situations involving domestic violence, given the careful consideration by the legislature—and the courts when issuing orders of protection—of the obligations of law enforcement to domestic violence victims.

An additional danger of the ministerial/discretionary dichotomy is its invitation to public officials to "unjustifiably hide behind the shield of discretionary immunity even when their actions have induced a plaintiff to change his or her behavior in the face of a known threat." (*Id.*) The respondents in this case take up this invitation, arguing that they are shielded from liability because their actions were discretionary. Yet, concluding that police action is always "discretionary" and thus confers immunity would have dangerous consequences for domestic violence survivors, such as Ms. Valdez, who rely on and change their safety plans in accordance with the legal framework governing domestic violence and instructions from the police.

Even if the discretionary/ministerial analysis is applied, this Court has never held that action in police protection cases is per se discretionary. In fact, the legal framework dictating the government's action in domestic violence cases supports the opposite conclusion, particularly in cases involving violations of orders of protection. As discussed earlier, *Sorichetti* recognized the obligation of police to respond and investigate when made aware of violations of orders of protection. (65 NY2d at 470.) The Penal Law separately acknowledges the seriousness of violations of orders of protection through the offenses of criminal contempt contained in sections 215.50, 215.51, and 215.52. And CPL 140.10 compels arrest in cases involving violations of orders of protection. (*See also* New York City Police Department Patrol Guide, Procedure No. 208-36, *Family Offenses/Domestic Violence* [2000]; Transcript of NY Senate Debate on Senate Bill S8642, June 23, 1994, at 5595 ("[O]ne of the things that probably motivated this legislation was the arbitrary and perhaps capricious way that police officers and law enforcement people - - not criticizing - - handled orders of protection." (statement of Sen. Galiber)).)

Furthermore, the burden is on the municipality to demonstrate that any of its actions exhibits, utilizes or evidences a shred of discretion or reasoned judgment. (*See e.g. Haddock v City of New York*, 75 NY2d 478, 485 [1990] (finding the City liable where there was no evidence that the City made any decision or exercised

any discretion).) No argument was made that an investigation or arrest could or should not be made given the circumstances of the case. The legal framework governing law enforcement response to domestic violence, coupled with the judicial finding that protection should be afforded Ms. Valdez, compelled a police investigation and response. The failure of the City to adhere to the governing law in the context of a special relationship therefore provided the basis for liability found by the jury.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Appellate Division.

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