

## STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the District of Massachusetts, entered on January 28, 2000, which dismissed all claims in this action. Appellants timely filed a Notice of Appeal on February 8, 2000. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, because this action asserts that a Massachusetts statute violates the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed the suit brought by a group of alleged perpetrators of domestic abuse against the Justices of the Massachusetts Trial Court because state court judges are not proper party defendants in this action seeking declaratory relief under 42 U.S.C. § 1983, as they do not act under color of state law in issuing abuse prevention orders.
2. Whether the District Court correctly concluded that injunctive relief against state court judges is foreclosed by the express terms of 42 U.S.C. § 1983.
3. Whether the District Court properly determined that the ex parte procedure set forth in Mass. Gen. Laws ch. 209A, § 4, satisfies federal due process and equal protection requirements because it meets the relevant tests established by the Supreme Court.
4. Whether the District Court correctly held that persons who are the subject

of a domestic abuse restraining order can be compelled to surrender their firearms during the period in which the order remains in place without running afoul of the Second Amendment.

### STATEMENT OF THE CASE

On September 7, 1999, a group of male plaintiffs, each of whom has been a litigant in domestic relations and/or abuse prevention cases in the Massachusetts trial courts, sued the Justices of the Trial Court of Massachusetts (hereinafter referred to as the “Judicial Defendants”) under 42 U.S.C. § 1983.<sup>1</sup> Joint Appendix (“JA”) at 1, 6-16.<sup>2</sup> In Count I of the Amended Complaint, the plaintiffs sought declaratory and injunctive relief (1) declaring Section 4 of the Commonwealth’s abuse prevention statute, G.L. c. 209A, unconstitutional because it permits state court judges to grant temporary restraining orders at ex parte hearings, and (2) enjoining the Judicial Defendants from further enforcement of Section 4. JA 11. In Count II, plaintiffs sought declaratory and injunctive relief commanding the Judicial Defendants to adopt unspecified measures to prevent discrimination against men in the Probate and Family Court. JA 11-14. In Count III, plaintiffs

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<sup>1</sup> Another plaintiff, the Fatherhood Coalition/CPF, an advocacy organization comprised of males who have been involved in divorce, child custody, and visitation matters in Massachusetts courts, is not a party to this appeal.

<sup>2</sup> On October 1, 1999, the plaintiffs amended their complaint (and hereinafter reference thereto will be denoted as the “Amended Complaint”).

sought declaratory and injunctive relief (1) declaring G.L. c. 209A, § 3B, unconstitutional as constituting an impermissible restriction on the plaintiffs' right to bear arms under the Second Amendment, and (2) enjoining the Judicial Defendants from further enforcement of the entire statute. JA 15-16.

On November 1, 1999, the Judicial Defendants filed a motion to dismiss plaintiffs' Amended Complaint. JA 24-25. The plaintiffs opposed the motion to dismiss. JA 52. Following a lengthy hearing, the District Court (Harrington, J.) issued a memorandum and order, JA 62-81, and an Order of Dismissal dated January 27, 2000, granting the Judicial Defendants' motion to dismiss. JA 61. The District Court held that state court judges could not be sued under 42 U.S.C. § 1983 because they were not acting under color of state law in issuing abuse prevention orders and because § 1983 had recently been amended by Congress to foreclose the sort of injunctive relief that the plaintiffs sought against the Judicial Defendants below. JA 70-74. The District Court further held that the section of G.L. c. 209A providing for the ex parte issuance of temporary restraining orders in domestic abuse cases does not violate the federal due process rights of alleged abusers. JA 75-80. Finally, the District Court held that the plaintiffs could not maintain a claim that the provisions of G.L. c. 209A restricting their possession and use of firearms violates the Second Amendment because that amendment has

never been made applicable to the states. JA 80.

The Clerk entered judgment on January 28, 2000, dismissing the Amended Complaint. JA 1. On February 8, 2000, a notice of appeal was filed on behalf of the plaintiffs. *Id.* The case was docketed in this court on February 18, 2000. JA 4. This appeal is being prosecuted by three individuals (James Nollet, Earl Sholley, and James Carroll),<sup>3</sup> all appearing pro se. JA 5b-5c.

### **THE STATUTORY FRAMEWORK: AN OVERVIEW OF G.L. c. 209A**

General Laws c. 209A (the Massachusetts Abuse Prevention Law) was enacted in 1978 in response to a growing public awareness of domestic violence<sup>4</sup> and the legal system's ineffectiveness in dealing with such violence. JA 64. Chapter 209A provides that a person suffering from abuse from a family or household member may file a complaint<sup>5</sup> in the Superior, Probate and Family, or

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<sup>3</sup> The appellees will refer to the three appellants collectively as "Nollet."

<sup>4</sup> See Commonwealth v. Gordon, 407 Mass. 340, 346, 553 N.E.2d 915, 918 (1990)("[General Laws] c. 209A represents a legislative response to the troubling social problem of family and household abuse in the Commonwealth. Judicial orders issued pursuant to c. 209A afford abused individuals the opportunity to avoid further abuse and to provide them with assistance in structuring some of the basic aspects of their lives, such as economic support and custody of minor children, in accordance with their right not to be abused").

<sup>5</sup> See Trial Court of Massachusetts Form FA-1, Supplemental Appendix ("SA") at 1-4.

District/Municipal court,<sup>6</sup> which generally includes a request for a civil order to protect the plaintiff from future abuse. The complaint form requires the execution of an affidavit, signed under the pains and penalties of perjury, attesting to the facts that support the plaintiff's request.<sup>7</sup> The complainant can request protection from: physical harm or attempted physical harm; fear of imminent serious physical harm; and/or forced sexual relations. G.L. c. 209A, §§ 1-3.<sup>8</sup>

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<sup>6</sup> Although the caption of the Amended Complaint denominates the defendants as the "Justices of the Trial Court of the Commonwealth of Massachusetts," JA 6, the paragraph specifically describing the defendants refers only to the judges of the District and Probate & Family Court divisions of the Trial Court. JA 8, ¶ 12. In fact, however, the judges of the Superior and Boston Municipal Court divisions of the Trial Court also hear complaints under G.L. c. 209A and abuse prevention orders issued from those courts have the full force and effect of the law. See G.L. c. 209A, §§ 1, 2.

<sup>7</sup> See Form FA-1, SA at 3.

<sup>8</sup> For purposes of obtaining a protective order under G.L. c. 209A, "abuse" means: "(a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; [or] (c) causing another to engage involuntarily in sexual relations by force, threat or duress." G.L. c. 209A, § 1. The Massachusetts appellate courts have repeatedly stated that a trial court judge must focus on whether serious physical harm is imminent and should not issue a G.L. c. 209A "order on the theory that it will do no harm." Smith v. Joyce, 421 Mass. 520, 523 n.1, 658 N.E.2d 677, 680 n.1 (1995); Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 639, 700 N.E.2d 296, 298 (1998). "Generalized apprehension, nervousness, feeling aggravated or hassled, i.e., psychological distress from vexing but nonphysical intercourse, when there is no threat of imminent serious physical harm, does not rise to the level of fear of imminent serious physical harm." Wooldridge, 45 Mass. App. Ct. at 639, 700 N.E.2d at 298 (*citing* Larkin v. Ayer Div. of the Dist. Court Dep't, 425 Mass. 1020, 681 N.E.2d 817 (1997)).

If, after an ex parte or full hearing, a judge finds, by a preponderance of the evidence,<sup>9</sup> that there is a “substantial likelihood of abuse” and grants the plaintiff’s application for relief, a defendant can be ordered: to refrain from further abuse of the victim; to refrain from contacting the victim; to move from a residence shared with the victim and stay away from the victim’s place of residence or workplace; to temporarily relinquish custody of any minor children;<sup>10</sup> to pay temporary financial support to the victim and/or any minor children; to pay the victim for any money lost as a direct result of the abuse; to refrain from contact with the victim’s minor child(ren); and/or to surrender the keys to the family home. G.L. c. 209A,

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<sup>9</sup> In June 1997, the Administrative Office of the Trial Court published revised *Guidelines for Judicial Practice: Abuse Prevention Proceedings* (“*Guidelines*”), designed in part “to ensure the due process rights of those against whom these orders are sought.” *Guidelines’* Foreword, JA 29. Guideline 5:04 (“Standard of Proof”) states: “The standard of proof in c. 209A hearings is the civil standard of preponderance of the evidence. The plaintiff has the burden of proof, but both sides have the right to introduce evidence.” *Guidelines* (citing Frizado v. Frizado, 420 Mass. 592, 597 (1995)), SA at 5. See also Guideline 3:07 (“Conduct of the Ex Parte Hearing”), Commentary (“The sensitivity that must be shown to one alleging abuse cannot erode the court’s responsibility to view an accusation as just that: an accusation”), at JA 40.

<sup>10</sup> The Judicial Defendants are required, however, to consider a G.L. c. 209A defendant’s relations with his/her child(ren) “apart from the plaintiff’s request that the defendant stay away from her [or him].” Smith v. Joyce, 421 Mass. at 523, 658 N.E.2d at 680. “If there is to be a G.L. c. 209A order that a defendant stay away from and have no contact with his or her minor children, there must be independent support for the order.” Id.

§ 3 (hereinafter, “209A orders”).<sup>11</sup> See Commonwealth v. Munafo, 45 Mass. App. Ct. 597, 599, 700 N.E.2d 556, 558 (1998). If the victim demonstrates a substantial likelihood of immediate danger of abuse, then the court is mandated to order the defendant to immediately relinquish to the police any weapons and ammunition in the defendant’s control, ownership, or possession, and to surrender any license to carry firearms. G.L. c. 209A, § 3B. The court can also recommend, but not order, that the defendant attend a recognized batterers’ treatment program. G.L. c. 209A, § 3. Any relief granted by the court “shall be for a fixed period of time not to exceed one year.” Id.

Upon the filing of the complaint, if the plaintiff demonstrates, by a preponderance of the evidence (including sworn testimony and affidavit), a substantial likelihood of immediate danger of abuse, the court may also enter “temporary relief orders without notice as it deems necessary to protect the plaintiff from abuse . . . .” G.L. c. 209A, § 4. In such instances, the court shall immediately notify the defendant “and give the defendant an opportunity to be heard on the question of continuing the temporary order” within ten business days.

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<sup>11</sup> See Trial Court of Massachusetts Form FA-2 (the standard “Abuse Prevention Order”) at SA 6-7.

Id.<sup>12</sup> Typically, a law enforcement officer will attempt in-hand service of the temporary order. See G.L. c. 209A, § 7; Guideline 4:07, JA 44-46.

Once the defendant is served or receives notice of the ex parte order, a second hearing is held.<sup>13</sup> The plaintiff must appear at this hearing or the temporary order will be vacated.<sup>14</sup> Each party may testify and present witnesses and documentary evidence. Courts are not required to strictly abide by Massachusetts' (uncodified) rules of evidence, and hearsay is admissible as long as "there is fairness in what evidence is admitted and relied on." Frizado, 420 Mass. at 597-598, 651 N.E.2d at 1211. See also Flynn v. Warner, 421 Mass. 1002, 654 N.E.2d

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<sup>12</sup> The Commentary to Guideline 1:02 states that "[w]here possible (and where effective service will not present a problem), the court should limit the duration of an ex parte temporary order to fewer than the maximum ten days in order to minimize the deprivation of the defendant's rights prior to notice and an opportunity to be heard." *Guidelines*, SA at 8. See also Guidelines 3.00 and 5.00, JA 37-38, 47. Guideline 1:02's commentary also states that the court should require evidence that the defendant received notice of an ex parte order as a precondition to the issuance of a "permanent" order. SA 8. See also Guideline 5:05, JA 49-50.

<sup>13</sup> In the Probate and Family Court, the Massachusetts Rules of Domestic Relations Procedures apply to Chapter 209A actions. In the other trial courts, the provisions of the Massachusetts Rules of Civil Procedure may be applied. Guideline 1:03, JA 35-36.

<sup>14</sup> In extraordinary circumstances, if the plaintiff is unable to attend the second hearing for good cause shown, the abuse prevention order may nonetheless be extended. See Guideline 5:06, SA 9.

926 (1995).<sup>15</sup> The court must give each side “a meaningful opportunity to challenge the other’s evidence.” Frizado, 420 Mass. at 598 n.5, 651 N.E.2d at 1211 n.5. Defendants have a general right to cross-examine witnesses. However, for good cause (e.g., cross-examination for purposes of harassment or discovery), a judge may limit or eliminate cross-examination altogether. Id. at 597, 651 N.E.2d at 1210. See Silvia v. Duarte, 421 Mass. 1007, 657 N.E.2d 1262 (1995) (rescript). Cf. Zullo v. Goguen, 423 Mass. 679, 681, 672 N.E.2d 502, 503 (1996) (“Abuse prevention proceedings were intended by the Legislature to be as expeditious and informal as reasonably possible”). Chapter 209A contains other provisions governing, for example, the enforcement of abuse prevention orders, but these provisions do not relate to the matters raised in the Complaint and thus will not be discussed herein.

### **STANDARD OF REVIEW**

The District Court’s dismissal of the Amended Complaint based on lack of subject matter jurisdiction and failure to state a claim for relief, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), is reviewable by this Court under a de novo standard of review. See, e.g., Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998)

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<sup>15</sup> Guideline 5.03 (“Rules of Evidence”) states: “The common law rules of evidence, e.g., those regarding hearsay, authenticity, and best evidence, should be applied with flexibility, subject to considerations of fundamental fairness.” JA 48.

(circuit court reviews de novo a district court's dismissal based on lack of subject matter jurisdiction); Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (circuit court reviews de novo a district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6)). This Court is not restricted to the District Court's reasoning and can affirm on any independently sufficient ground in the record. Mesnick v. General Electric Co., 950 F.2d 816, 822 (1st Cir. 1991).

“In order to survive a motion to dismiss, the plaintiffs must set forth in the complaint ‘factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery.’” Doyle v. Hasbro, Inc., 103 F.3d 186, 190 (1st Cir. 1996) (*quoting* Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988)). Although this Court (as was true of the District Court) is obliged to “give credence to all well-pleaded facts and indulge all reasonable inferences that fit [p]laintiff[s]’ stated theory of liability,” Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999), neither Court need accept whatever “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like” may be found in the Amended Complaint. Aulson, 83 F.3d at 3.<sup>16</sup> Moreover, in conducting its review

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<sup>16</sup> As this Court stated in Judge v. City of Lowell, 60 F.3d 67 (1st Cir. 1998), “[t]he rule that we accept plaintiff’s well-pleaded factual averments and indulge every reasonable inference hospitable to her case does not entitle a plaintiff to rest on subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts.” Id. at 77 (internal

of this case, this Court is “limited to those allegations contained in the amended complaint.” Doyle, 103 F.3d at 190. This is true both as to facts and as to theories of law. Id. See Mass. School of Law, 142 F.3d at 40 (“the sufficiency of a complaint ordinarily should be tested by examining the claims that are stated therein rather than by weighing afterthought claims that are only mentioned in a legal brief”).

### STATEMENT OF FACTS

Applying the above principles, those “well-pleaded” facts in the Amended Complaint that must be credited are relatively few in number. Plaintiff-appellant James Nollet, a resident of Massachusetts, was a litigant in the Middlesex County Probate and Family Court and in the Woburn District Court, where he was the subject of restraining orders issued pursuant to G.L. c. 209A. JA 7. Plaintiff-appellants James Carroll and Earl Sholley, Massachusetts residents, were litigants in the Middlesex County Probate and Family Court. JA 7, 8. In Carroll’s divorce case, Carroll alleges that the presiding judge awarded his entire retirement pension and “virtually his entire life savings[,] as well as the marital home[,]” to Carroll’s former wife. JA 12. Sholley avers that he was the subject of a restraining order

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citations and quotation marks omitted). This Court has also cautioned that “the law does not require us struthiously to ‘credit conclusory allegations or draw farfetched inferences.’” Massachusetts School of Law v. American Bar Association, 142 F.3d 26, 34 (1st Cir. 1998) (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994)).

issued by the Framingham District Court, which resulted in the denial of his request for a firearm permit. JA 8. The Amended Complaint contains similarly cursory allegations concerning three additional individual plaintiffs and the Fatherhood Coalition, who are not parties to this appeal. JA 7-8. The defendants in this matter are the approximately 345 justices of the Trial Court of the Commonwealth of Massachusetts who preside over domestic relations, child custody, and abuse prevention matters in four divisions of the Trial Court.<sup>17</sup> JA 8. Each of the individual plaintiff-appellants allege that he “has suffered gender-based discrimination by the defendants.” JA 8, ¶ 11. As a result, they claim to have been harmed thereby through “loss of property, companionship of their children, loss of assets, income and reputation.” JA 14. As part of their official responsibilities, the Judicial Defendants are called upon, from time to time, to issue ex parte restraining orders under G.L. c. 209A, commanding alleged perpetrators of domestic violence to vacate their homes. JA 9. See The Statutory Framework, supra. Nollet alleges that a substantial majority of the defendants in G.L. c. 209A cases are male.<sup>18</sup> Once a restraining order issues under G.L. c. 209A, the name of

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<sup>17</sup> See footnote 6, infra.

<sup>18</sup> The Amended Complaint alleges that “[t]he defendants in these cases are overwhelmingly male.” JA 9, ¶ 13. However, the Court may take judicial notice of official government statistics [see Jackson v. City of Columbus, 194 F.3d 737,

the defendant is recorded in a non-public, statewide, domestic violence record-keeping system. JA 9. See Vaccaro v. Vaccaro, 425 Mass. 153, 155, 680 N.E.2d 55, 57 (1997).<sup>19</sup> Some 209A orders require the defendant to immediately relinquish to the local police any weapons and ammunition in the defendant's control, ownership, or possession, and to surrender any license to carry firearms. G.L. c. 209A, § 3B.

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745 (6th Cir. 1999)] demonstrating that 82% of the defendants in G.L. c. 209A cases are male and 18% are female. See Mass. Probation Service, "Registry of Civil Restraining Orders Summary (July 1, 1998 to June 30, 1999)," SA 10-11 (27,850 restraining orders issued against men statewide, versus 6,129 orders issued against women). See also JA 118.

<sup>19</sup> The Supreme Judicial Court has noted that there is a carefully drawn statutory and administrative scheme in place to ensure the confidentiality of 209A records. Vaccaro, 425 Mass. at 159, 680 N.E.2d at 60. Access to the record-keeping system is limited to judges and law enforcement agencies that require such information in order to further the protective purpose of G.L. c. 209A. Id.

## SUMMARY OF ARGUMENT

Whatever grievances Nollet may have with the procedures employed under Chapter 209A, he cannot maintain any of his claims against the Judicial Defendants because they are immune from suit. Indeed, recent amendments to 42 U.S.C. § 1983 specifically prohibit the injunctive relief sought herein against the Judicial Defendants. Moreover, as this Court has recognized, state judges when acting in their adjudicatory role are not persons acting under color of state law for purposes of stating a cognizable claim under Section 1983. In re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982).

Should this Court rule that the Judicial Defendants are not entitled to judicial immunity, Nollet's claim should be dismissed under Rule 12(b)(6) because Chapter 209A does not violate his due process rights. The Supreme Court of the United States has recognized that due process calls only for "th[os]e protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1975). The ex parte procedures challenged here are designed to respond to emergency situations in which the threat of death or serious bodily injury is both real and immediate. Under the circumstances, notwithstanding Nollet's fundamental interest in maintaining his familial relationships, the procedural devices employed in these cases satisfy the due process test established by the Supreme Court in

Mathews v. Eldridge and its progeny. In addition, Massachusetts has established readily-available avenues of judicial review for an individual such as Nollet seeking to challenge the issuance of a 209A order in his or her individual case. Zullo v. Goguen, 423 Mass. 679, 672 N.E.2d 502 (1996).

The requirement that a person who is the subject of a domestic violence restraining order surrender his or her firearm does not run afoul of the Second Amendment because that provision does not apply to the several states. Presser v. Illinois, 116 U.S. 252, 265 (1886). Moreover, both the Supreme Court and the Supreme Judicial Court have held, under the United States and Massachusetts constitutions respectively, that there is no unfettered, personal right to possess a firearm. United States v. Miller, 307 U.S. 174 (1939); Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976).

## ARGUMENT

### I. THE JUDICIAL DEFENDANTS ARE IMMUNE FROM SUIT UNDER 42 U.S.C. § 1983.

The District Court commenced its analysis of the judicial immunity question by noting correctly that it is well established that any judicial officer, acting within the scope of his or her judicial function, is absolutely immune from civil liability, even if his or her actions are in excess of authority or evince a failure to comply with elementary principles of procedural due process. E.g., Stump v. Sparkman,

435 U.S. 349, 355-360 (1978).<sup>20</sup> Here, Nollet is seeking prospective declaratory and injunctive relief, once thought of as falling outside of the contours of the traditional zone of judicial immunity. E.g., Pulliam v. Allen, 466 U.S. 522, 541-542 (1984). But today the law unmistakably bars Nollet’s claims under 42 U.S.C. § 1983 for both declaratory and injunctive relief.

In 1996, Congress passed the Federal Courts Improvement Act, which amended 42 U.S.C. § 1983 to state that “. . . in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983 (amended by Pub.L. 104-317, Title III, § 309(c), 110 Stat. 3853). The narrow exception permitting injunctive relief against judges in rare circumstances is plainly irrelevant here, as Nollet cannot

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<sup>20</sup> Judicial immunity is abrogated only where the judicial officer acts in a non-judicial context, or in the clear absence of any cognizable jurisdiction. Mireles v. Waco, 502 U.S. 9, 11-12 (1991). “[J]udicial immunity is not overcome by allegations of bad faith or malice.” Id. at 11. Nollet does not allege any facts that would potentially give rise to an abrogation of immunity. The judges named as defendants in this suit are precisely those judges authorized by statute (see, e.g., G.L. c. 209A, §§ 1-2) to hear the matters at issue in this case, and they act purely in their adjudicatory role when considering those matters. As such, they are absolutely immune from liability under Section 1983. See In re The Justices of the Supreme Court of Puerto Rico, 695 F.2d 17, 22-23 (1st Cir. 1982) (“In re Justices”).

show either that the Judicial Defendants have violated a declaratory decree<sup>21</sup> or that declaratory relief is unavailable.<sup>22</sup> Accordingly, Count II of the Amended Complaint, which seeks solely injunctive relief, was properly dismissed by the District Court under the express terms of 42 U.S.C. § 1983, as amended.<sup>23</sup>

The two remaining counts in the Amended Complaint were properly dismissed due to the prohibition on seeking declaratory relief against judicial officers, explicitly recognized by this Court, where the claim concerns the

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<sup>21</sup> If a declaratory decree curtailing the ability of the Judicial Defendants to act under G.L. c. 209A were in existence (and to the best of counsels' knowledge, no such decree exists), it would be Nollet's affirmative duty to plead its existence. See Montero v. Travis, 171 F.3d 757, 761 (2d Cir. 1999).

<sup>22</sup> Indeed, Nollet is affirmatively seeking declaratory relief in the Amended Complaint. Moreover, the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., (the "Act") is undoubtedly "available" to Nollet in this circumstance, assuming a proper party defendant. The Act provides: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree . . . ." 28 U.S.C. § 2201.

<sup>23</sup> Other federal courts that have dismissed claims seeking injunctive relief against judicial officers on this ground include Montero v. Travis, 171 F.3d 757, 761 (2d Cir. 1999); Ackermann v. Doyle, 43 F.Supp.2d 265, 272 (E.D.N.Y. 1999); and Kampfer v. Scullin, 989 F.Supp. 194, 201 (N.D.N.Y. 1997). Cf. Hill v. Sciarrotta, 140 F.3d 210, 215 (2d Cir. 1998) (noting Pub.L. No. 104-317, § 309(c), but dismissing claim against probation officers on other grounds).

constitutionality of a state statute.<sup>24</sup> One of the elements of a viable claim under 42 U.S.C. § 1983 is that the conduct complained of was committed by a person acting under color of state law. See, e.g., Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir. 1999). As the District Court correctly held, the actions of the Judicial Defendants in adjudicating the merits of complaints brought under G.L. c. 209A do not constitute “state action.” JA 74. Almost twenty years ago, this Court ruled that “[Section] 1983 does not provide relief against judges acting purely in their adjudicative capacity.” In re Justices, 695 F.2d at 22.<sup>25</sup> In other words, any action taken by a state judge solely in his or her adjudicatory role, such as the actions of the Judicial Defendants in considering the merits of G.L. c. 209A complaints, does not constitute state action. See id. at 22-23. This Court further noted that, as a

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<sup>24</sup> In In re Justices this Court addressed a similar challenge to the constitutionality of a Commonwealth statute, in the context of a suit against the Justices of the Supreme Court of Puerto Rico seeking (as here) injunctive and declaratory relief. 695 F.2d at 20.

<sup>25</sup> This reasoning has been adopted by at least two other Circuit Courts of Appeal. In Grant v. Johnson, 15 F.3d 146 (9th Cir. 1994), the plaintiff sued a state court judge, challenging the constitutionality of a state statute permitting the ex parte deprivation of her liberty, and seeking declaratory relief under Section 1983. Id. at 147. The Court expressly concurred with In re Justices, “holding that judges adjudicating cases pursuant to state statutes may not be sued under § 1983 in a suit challenging the state law.” Id. at 148. Similarly, the Eighth Circuit Court of Appeals has stated that “[i]n In re Justices . . ., Judge Breyer cogently demonstrated that in most section 1983 cases, federal courts should refuse to grant relief against state judges.” R.W.T. v. Dalton, 712 F.2d 1225, 1232 (8th Cir. 1983).

matter of comity, it is unwise to force judges to participate as defendants in a federal suit attacking state law because such action requires them to abandon their neutrality and tends to undermine their role as judges. Id. at 25. Accordingly, in line with the holding of In re Justices, the Judicial Defendants are not proper parties to this action.<sup>26</sup>

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<sup>26</sup> In re Justices also suggests a credible alternative ground for the District Court's holding: namely, that Nollet has failed to present a "case or controversy" within the meaning of Article III of the United States Constitution. See In re Justices, 695 F.2d at 21-22. Article III prevents federal courts from adjudicating claims when the parties lack the required adverse legal interests. E.g., Grant, 15 F.3d at 147. Here, Nollet and the Judicial Defendants possess no such "adverse legal interests," for the Judicial Defendants' only function in hearing cases brought under G.L. c. 209A is to act as neutral adjudicators, finding facts and determining law in a neutral and impartial fashion. It is for this reason that "[s]uits against state judges who are adjudicating cases pursuant to state law raise serious questions about the existence of a justiciable controversy between the parties." Grant, 15 F.3d at 147. As this Court stated in In re Justices, "ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute. Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy." 695 F.2d at 21. More recently, the Sixth Circuit decided that a group of plaintiffs who sued a state court judge in the course of challenging the constitutionality of a state statute failed to meet the "case or controversy" requirement because they lacked standing to seek declaratory relief. Johnson v. Turner, 125 F.3d 324, 336-339 (6th Cir. 1997).

## **II. CHAPTER 209A DOES NOT VIOLATE NOLLET’S DUE PROCESS RIGHTS.**

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Even if the Judicial Defendants were deprived of their judicial immunity, Nollet’s claims must also be dismissed under Fed. R. Civ. P. 12(b)(6) because G.L. c. 209A does not impermissibly deprive individuals of any clearly established right, privilege, or immunity guaranteed by the United States Constitution or federal laws. See Rodriguez -Cirilo v. Garcia, 115 F. 3d 50, 52 (1st Cir. 1997). The ex parte procedure outlined in G.L. c. 209A, § 4, the main focus of Nollet’s claimed due process deprivation, is constitutional because it provides all of the due process protections that are necessary in emergency situations in which persons need protection from the very real prospect of imminent bodily harm.

### **A. G.L. c. 209A Fully Satisfies Nollet’s Procedural Due Process Rights.**

#### **1. The Ex Parte Provision In G.L. c. 209A, § 4, Contains Adequate Procedural Protections.**

As the District Court noted, “[d]espite the fact that every state in the union has a domestic abuse statute similar to Chapter 209A, there is very little case law on the constitutionality of an ex parte temporary restraining order procedure like Chapter 209A. What case law there is, however, has upheld the constitutionality of such laws.” JA 75.<sup>27</sup> Accordingly, the Judicial Defendants submit that a useful

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<sup>27</sup> The Judicial Defendants have found only one relevant circuit court

analogy is drawn from the Supreme Court's decisions involving ex parte attachments of real or personal property.

“Due process is flexible and calls for such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S. 319, 334 (1975)(citations omitted)(emphasis added); EEOC v. Steamship Clerks Union Local 1066, 48 F.3d 594 (1st Cir. 1995), citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In Mathews v. Eldridge, the Supreme Court held, “the specific dictates of due process generally require consideration of three distinct factors,” as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. See also Connecticut v. Doehr, 501 U.S. 1, 10-11 (1991) (applying the same threefold

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opinion, Eisenbart v. State of Wisconsin, 1993 WL 134608,\*3 (7th Cir. 1993). In Eisenbart, the Seventh Circuit cited with approval the District Court's opinion in Blazel v. Bradley, 698 F. Supp. 756 (W.D. Wis. 1988), in which the District Court upheld the constitutionality of an ex parte restraining order substantially similar to the one challenged here. See 698 F.Supp. at 763-65.

factors and voiding Connecticut's pre-judgment attachment statute).<sup>28</sup>

As the District Court stated, a 209A order “can have a significant effect on both an alleged abuser’s property interest in his/her home and an alleged abuser’s liberty interest in his/her familial relationship with his/her children.” JA 77.<sup>29</sup> Nevertheless, the Judicial Defendants maintain that given the profound state interest in protecting a person who is subject to “a substantial likelihood of immediate danger of abuse,” G.L. c. 209A, § 4, the District Court correctly determined that the ex parte provisions of Chapter 209A did not violate Nollet’s

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<sup>28</sup> In contrast to the Connecticut statute voided in Doehr, 209A orders cannot be issued unless the complainant convinces the court that he or she is faced with “a substantial likelihood of immediate danger of abuse,” and files an affidavit which must be signed under the pains and penalties of perjury. The Connecticut statute provided for ex parte attachments of a defendant’s property “merely because the plaintiff believe[d] the defendant is liable, or because the plaintiff [was able] to make out a facially valid complaint.” 501 U.S. at 13-14. Significantly, the Court did note that a “properly supported claim” that Doehr was about to transfer his property or otherwise make it unavailable to satisfy a judgment, would constitute an “exigent circumstance” justifying the postponement of any notice or a hearing until after the attachment was effected. Id. at 16.

<sup>29</sup> Of course, one is not entitled to the full panoply of due process simply because a law impacts adversely his or her interest in a familial relationship. Compare Lehr v. Robertson, 463 U.S. 248 (1983) (state is not required to provide notice in an adoption hearing to the putative father of a two year old child when the father had never sought to establish a substantial relationship with the child), with Stanley v. Illinois, 405 U.S. 645 (1972) (where children of unwed parents were involved, following the death of the children’s mother, the state could not take the children into custody without first giving a hearing to their father, where there was no showing of his unfitness or their neglect).

due process rights.<sup>30</sup> See, e.g., FDIC v. Mallen, 486 U.S. 230, 240 (1987) (“An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation”); Steamship Clerks Union Local 1066, 48 F.3d at 607-08 and n.17 (absent “exigent or other extraordinary circumstances,” notice and an opportunity to be heard should ordinarily be given to affected parties before awarding equitable relief).

The exigency of the circumstances in this case is obvious: the immediate threat of death or serious bodily harm to oneself and one’s children. For those threatened, this is a dystopic world far more real than imagined. In addition, while a parent may have his own interest in maintaining the family unit, it is not the only interest at stake. Where a child is involved, the child’s interest in preserving the family unit exists only to the extent that such a continuation is not inimical to the child’s well-being. In this regard, Nollet’s statement that “[t]he best interest of the

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<sup>30</sup> The Massachusetts Supreme Judicial Court has ruled that an order that a defendant vacate and remain away from a shared residence or marital home (even if the defendant is the sole owner or lessee or wholly responsible for rent or mortgage payments) does not violate a defendant’s due process rights under the Massachusetts Constitution, because the implementation of the order does not involve confiscation of property as a punishment for the commission of a crime. Frizado, 420 Mass. at 594-95, 651 N.E.2d at 1209.

child standard is an intrusion into the rights of a parent” clearly misses the mark.

App. Br., p. 14.<sup>31</sup>

Hence, after discussing the “framework” provided by Mathews and Doehr, the District Court went on to adopt the due process analysis and structure provided by the Blazel court, as follows: “participation by a judicial officer; a prompt post-deprivation hearing; verified petition or affidavits containing allegations based on personal knowledge; and risk of immediate and irreparable harm.” JA 78, citing Blazel, 698 F.Supp. at 163-64. All of these procedural safeguards are included in Chapter 209A proceedings. First, only a judge may issue a 209A order. G.L. c. 209A, § 4. JA 23<sup>32,33</sup>. Next, a post-deprivation hearing must be held no later than

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<sup>31</sup> The Second and Seventh Circuits have found that where a child’s life is threatened, his pre-hearing removal from the family home does not violate the parents’ due process rights. Robinson v. Via, 821 F.2d 913, 922 (2d Cir. 1987); Lossman v. Pekarske, 707 F.2d 288, 291-92 (7th Cir. 1983)(no due process violation stemming from ex parte order removing children from father’s custody where later adversary hearing showed that on the date the ex parte order entered, father was a menace to his children).

<sup>32</sup> Unlike the constitutional infirmity found by the Supreme Court in Fuentes v. Shevin, 407 U.S. 67 (1972), under G.L. c. 209A it is the court and not the litigant or an administrative official which determines that a sufficient showing has been made to support the issuance of a 209A order. Hence, the risk of “erroneous deprivation” is lessened considerably.

<sup>33</sup> Notably, a 209A order is temporary: it does not permanently sever the parent-child relationship. Pursuant to G.L. c. 209A, § 4, these ex parte orders lapse automatically within ten days unless they are renewed by the court following notice and hearing. This accords with the provisions of Fed. R. Civ. P. 65(b). Cf.

ten business days from the issuance of the 209A order. Id.<sup>34</sup> The court may enter a temporary restraining order only if the petitioner files a complaint demonstrating “a substantial likelihood of immediate danger of abuse.” Id.<sup>35</sup> Finally, the person seeking a 209A order is required to sign his/her supporting affidavit and complaint

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Rivera v. Minnich, 483 U.S. 574 (1987), in which the Court found that a state, consistent with due process guarantees, could allow a mother or child seeking support from a putative father to prove paternity by a preponderance of the evidence. The Court rejected the father’s argument that a clear and convincing proof standard should obtain, because the lower standard allowed for a fair determination of paternity and the proceedings did not involve the possibility of terminating the parent-child relationship. By contrast, in Armstrong v. Manzo, 380 U.S. 545, 550 (1965), the Supreme Court voided a Texas statute which resulted in the natural father’s being “permanently” deprived of custody without adequate notice in violation of his due process rights. See also Santosky v. Kramer, 455 U.S. 745 (1982) (before a state may sever completely and irrevocably the rights of parents in their child, due process requires that the state support its allegations of neglect by clear and convincing evidence).

<sup>34</sup> The ten-day period is a matter that is appropriately left to the sound discretion of the Massachusetts Legislature. Cf. Pro-Choice Network of Western New York v. Schneck, 519 U.S. 357 (1996) (upholding 25 foot fixed buffer zone around abortion clinics but striking related “floating” buffer zone); FDIC v. Mallen, supra, (upholding ex parte suspension of bank officer where statute required post-suspension hearing within 30 days and decision within another 60 days thereafter).

<sup>35</sup> Contrary to Nollet’s assertion, there is nothing in the Record to support his claim that one who commits perjury in these proceedings is free from prosecution. App. Br., pp. 27-28. Similarly, Nollet’s outrageous charge that “judges advise women to alter signed divorce agreements,” App. Br., p. 5, is completely baseless and will not be addressed by the Judicial Defendants. Suffice to say, however, such conduct is criminal under Massachusetts law. G.L. c. 268, §§ 1, et. seq.

under the pains and penalties of perjury.<sup>36</sup>

2. The G.L. c. 209A Statutory Scheme Affords Nollet An Adequate Means of Redressing Any Alleged Due Process Deprivations In State Court.

Nollet complains that the District Court restricted its jurisdictional analysis to a consideration of the constitutionality of the ex parte proceedings under G.L. c. 209A, § 4, and it did not engage in an extensive discussion of the facial constitutionality of other provisions of G.L. c. 209A; nor did the District Court address, to Nollet's satisfaction, the claim that G.L. c. 209A is unconstitutional as applied. App. Br. pp. 3, 26-28. The District Court appropriately recognized, however, that it only had jurisdiction to consider the constitutionality of the initial, ex parte procedure under a narrow exception to normal abstention principles,

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<sup>36</sup> Nollet also appears to be arguing that Chapter 209A violates his right to a jury trial. App. Br., p. 16. This claim does not appear in the Amended Complaint and thus need not be considered by this Court. See Mass. School of Law, 142 F.3d at 40; Doyle, 103 F.3d at 190. Nonetheless, the Judicial Defendants note that this "right" is not as broad as Nollet suggests and, in any event, it is not violated by Chapter 209A. Significantly, although violations of G.L. c. 209A orders can be punished criminally, proceedings instituted thereunder are civil in nature. G. L. c. 209A, § 3A; see Frizado v. Frizado, 420 Mass. 592, 596, 651 N.E.2d 1206, 1210 n.3 (1995) (209A proceedings do not require a jury trial under the Massachusetts Constitution). Moreover, the Supreme Court has held that the Seventh Amendment's right to a jury trial does not apply to state court civil proceedings. Minneapolis and St. Louis R.R. Co. v. Bambolis, 241 U.S. 211 (1916). But cf., Duncan v. Louisiana, 391 U.S. 145 (1968) (Fourteenth Amendment's due process clause requires states to provide a jury trial in most criminal cases).

because it is only the initial state court that do not afford litigants an adequate opportunity to assert a federal challenge to the constitutionality of the ex parte process. JA 68-70. As noted in *The Statutory Framework* section, supra, the ex parte hearing is always followed by a second hearing at which the defendant does have an opportunity to be heard and assert claims. Once a Chapter 209A defendant receives notice of the complaint, he or she is in a position to raise federal constitutional claims in the state court.<sup>37</sup> The Younger abstention doctrine then precludes federal court review of these claims. Younger v. Harris, 401 U.S. 37 (1971).<sup>38</sup> The Younger doctrine thus disposes of Nolle's facial challenge to those

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<sup>37</sup> The Massachusetts appellate courts have delineated several ways in which a Chapter 209A defendant can properly preserve an appeal challenging the constitutionality of the statute. See, e.g., Commonwealth v. Laskowski, 40 Mass. App. Ct. 480, 482-483, 665 N.E.2d 124, 126-127 (1996). Laskowski addressed a defendant's claim that a G.L. c. 209A order violated his constitutional right to familial association without providing him the requisite due process of law. 40 Mass. App. Ct. at 481, 665 N.E.2d at 126. The Appeals Court stated that, in Laskowski's particular case, proper avenues of redress open to him included raising the constitutional challenge through a dispositive motion in the trial court, filing a motion for modification pursuant to G.L. c. 209A, § 3, or an appeal to a single justice or the Supreme Judicial Court pursuant to G.L. c. 211, § 3. 40 Mass. App. Ct. at 482, 665 N.E.2d at 126. But see Zullo v. Goguen, 423 Mass. 679, 672 N.E.2d 502 (1996) (amending the procedure for appellate review of G.L. c. 209A orders to provide for the filing of an appeal in the Appeals Court, rather than with a single justice pursuant to G.L. c. 211, § 3).

<sup>38</sup> Younger requires that federal courts abstain from interfering with ongoing state court proceedings when: (1) the state proceedings are judicial in nature; (2) the proceedings implicate important state interests; and (3) they provide

provisions of G.L. c. 209A other than the ex parte procedure (which itself is constitutional for the reasons stated in Point II.A.1, supra), as well as any claim by appellant James Carroll, to the extent he is still subject to ongoing judicial proceedings under G.L. c. 209A. See JA 69.

Nollet’s “as applied” challenge to G.L. c. 209A is barred by the Rooker-Feldman doctrine<sup>39</sup> and the principles of res judicata.<sup>40</sup> The lower federal courts

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an adequate opportunity to raise federal constitutional challenges. Bettencourt v. Board of Registration in Medicine, 904 F.2d 772, 777 (1st Cir. 1990). Here, each of the three Younger factors are present. First, court proceedings leading to the issuance of 209A orders are plainly judicial. Second, these proceedings implicate important state interests in protecting its citizenry and facilitating the resolution of those involved in domestic disputes. See Malachowski v. City of Keane, 787 F.2d 704, 708 (1st Cir. 1986) (“The fact that ‘family law’ is at issue . . . makes ‘abstention’ particularly appropriate”). Lastly, appellate review gives 209A litigants an opportunity to raise federal constitutional claims. See Laskowski, supra. See also Taft v. Taft, 388 Mass. 331, 446 N.E.2d 331 (1983) (considered and vacated Probate Court’s order on ground of right of privacy); Doe v. Roe, 23 Mass. App. Ct. 590, 504 N.E.2d 659 (1987) (considered and reversed Probate Court’s order on equal protection grounds). That the Supreme Judicial Court has already rejected claims similar to Nollet’s on the merits, Frizado v. Frizado, supra, has no bearing on this requirement under Younger. It is only where state law “deprives a plaintiff of the opportunity to make [an] argument” that Younger does not apply. Duty Free Shop, Inc. v. Administracion de Terrenos De Puerto Rico, 889 F.2d 1181, 1183 (1st Cir. 1989) (emphasis in original).

<sup>39</sup> Under the Rooker-Feldman doctrine, “lower federal courts possess no power whatever to sit in direct review of state court decisions.” Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 296 (1970).

<sup>40</sup> In Willhauck v. Halpin, 953 F.2d 689, 706 (1st Cir. 1991), this Court declared: “When a party should reasonably foresee that an adverse state court judgment will create a constitutional issue, that issue should be argued before the

may not entertain “challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court’s action was unconstitutional.” District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983). See Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). Thus Nollet’s “as applied” claim fails for lack of subject matter jurisdiction.

B. The Commonwealth’s Obligation To Protect Its Citizenry Outweighs Nollet’s Substantive Due Process Right In Preserving His Familial Relations.

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Ensuring the health and safety of its citizens is at the core of the State’s police power. Hill v. Colorado, No. 98-1856, \_\_U.S. \_\_, 2000 WL 826733 (June 28, 2000). “The function of the legislature [in this area] is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.” Weems v. United States, 217 U.S. 349, 379 (1910). Accord Commonwealth v. Pyles, 423 Mass. 717, 721-722, 672 N.E.2d 96, 99 (1996). “The safety and the health of the

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state court. Where it is not, the party is barred by the principles of res judicata from later raising the constitutional claim against the same parties in a federal Section 1983 action.”

people of Massachusetts are, in the first instance, for that Commonwealth to protect and guard.” Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905) (Harlan, J.).

As Nollet argues, the Supreme Court has held that the right to establish a home and raise children are among those liberty interests protected by the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).<sup>41</sup> This right is not absolute, but instead is subject to reasonable regulation designed to promote the general public’s health and welfare under the state’s police power. See, e.g., Reynolds v. United States, 98 U.S. 145 (1878) (upholding Utah’s criminalization of polygamy over defendant’s freedom of religion claim); Sturges & Burn Manufacturing Company v. Beauchamp, 231 U.S. 320 (1913) (Child Labor Act does not violate employer’s due process of law, liberty of contract or equal protection rights); Prince v. United States, 321 U.S. 158 (1944) (upholding Massachusetts’ child welfare law over claim it interfered with guardian’s freedom

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<sup>41</sup> Nollet cites Simmons v. United States, 390 U.S. 377, 394 (1968), for the principle that “one constitutional right should [not] have to be surrendered in order to assert another.” In Simmons, the Supreme Court held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony cannot thereafter be used against him at trial unless he makes no objection, because such use would violate his Fifth Amendment right against self-incrimination. Chapter 209A does not require that Nollet “surrender” his right to preserve family relations in any constitutional sense. What Chapter 209A does do is protect a person’s right to be free from physical assault.

of religion).<sup>42</sup>

For its part, this Court has held that a substantive due process claim “implicates the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government’s conduct, regardless of procedural swaddling, was in itself impermissible . . . . [A]s distinguished from its procedural cousin, then, a substantive due process inquiry focuses on ‘what’ the government has done, as opposed to ‘how and when’ the government did it.” Amsden v. Moran, 904 F.2d 748, 753-754 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991). This Court has instructed that “although the yardstick against which substantive due process violations are measured has been characterized in various ways, we are satisfied that, before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking.” Amsden v. Moran, 904 F.2d at 754 (emphasis in original).<sup>43</sup>

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<sup>42</sup> One of the Supreme Court’s most distinguished jurists recognized that the Fourth Amendment was intended to secure “. . . as against the Government, the right to be let alone -- the most comprehensive of rights and the most valued by civilized men.” Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting). Chapter 209A does nothing more than enable a person, with the judiciary’s assistance, to extend that “right” as against private citizens under the immediate threat of physical abuse.

<sup>43</sup> Nollet alludes to some unspecified First Amendment rights. App. Br.,

The Complaint fails to allege any facts that could support a substantive due process claim; nothing in it remotely hints at any conduct by the Judicial Defendants that could be considered “egregiously unacceptable, outrageous, or conscience-shocking.” Nollet’s substantive due process claim is based on his contention that “the D[ivorce and] D[omestic] V[iolence] I[ndustry] have created an atmosphere of intimidation that promotes a bad faith judicial process and its concomitant harassment of fathers/men.” App. Br., p. 16. According to Nollet, “[t]he interference deprivation under the ‘fear’ standard of the law should require women to go to a battered women’s shelter with no deprivation to the defendant (father).” *Id.*, p. 24 (emphasis added). This proposition simply ignores the volatility which imbues domestic violence proceedings. Chapter 209A was designed to protect men, women, and children from the perils and trauma of domestic violence. The protection of human life is perhaps the state’s greatest

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p.18. However, the First Amendment has little bearing upon Chapter 209A. No argument involving the First Amendment was raised below, and thus it need not be addressed here. Nonetheless, even in cases where legitimate First Amendment concerns are implicated, those rights are subordinate to the protection of human life. See, e.g., *Hill v. Colorado*, *supra*; *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (even if they convey some “expression,” acts of violence “are [not] entitled to constitutional protection”); *Commonwealth v. Thompson*, 45 Mass. App. 523, 524-525, 699 N.E. 2d 847, 849 (1998)(no contact provision in 209A order did not violate defendant’s constitutional right to free speech).

imperative and inarguably constitutes a compelling state interest.<sup>44</sup> Accordingly, notwithstanding the fundamental familial interest involved, the District Court correctly concluded that Nollet could not state a substantive due process claim. Cf. United States v. Salerno, 481 U.S. 739 (1987) (pre-trial detention does not violate due process where person was shown by clear and convincing evidence to be an identifiable threat to the community); Mackey v. Montrym, 443 U.S. 1, 17-19 (1978) (Massachusetts' compelling interest in highway safety, which imposes an automatic 90-day suspension of driver's license for refusal to take breathalyser test, does not violate offending driver's due process rights).

C. Chapter 209A Is Not Unconstitutionally Vague.

Nollet contends that Chapter 209A “rests on vague [sic] standards upon which judges can deprive defendants of the most fundamental liberties.” App. Br., p. 11. This contention is based on the claim that 209A orders rest on the

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<sup>44</sup> Massachusetts' compelling interest in protecting its citizenry, and the alleged “deprivation” caused by 209A orders, pose a significant difference to the statutory scheme voided in the principal case on which Nollet relies: Goldberg v. Kelly, 397 U.S. 254 (1969). As the Goldberg Court noted, New York's interest in reducing its administrative costs did not justify a pre-hearing termination of welfare benefits where such a result “may deprive an eligible recipient of the very means by which to live while he waits.” Id. at 264 (emphasis in original). Accordingly, while determining that something less than a full trial was required, the Court held that a pre-termination hearing -- where the recipient could appear with counsel and cross-examine witnesses -- was required under the circumstances. Id. at 266-69.

“subjective” presentation of the applicant. Id. Since Chapter 209A concerns a fundamental constitutional right, the Judicial Defendants acknowledge that it is subject to more rigorous judicial scrutiny than a statute which does not.

Nonetheless, the Judicial Defendants have found no cases which support Nollet’s claim that, because the supporting affidavits filed in Chapter 209A proceedings are “subjective,” Chapter 209A itself is void-for-vagueness.<sup>45</sup> If that were true, then every ex parte restraining order obtained under Fed. R. Civ. P. 65 or otherwise would likely be unconstitutional. This is not the law. See, e.g., Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, 415 U.S. 423, 438-439 and n.14 (1974); United States v. Jenkins, 974 F.2d 32, 35-36 (5th Cir. 1992).<sup>46</sup>

Moreover, the Massachusetts Supreme Judicial Court has rejected a claim that the operative criterion by which relief is awarded under G.L. c. 209A is impermissibly subjective. Commonwealth v. Gordon, 407 Mass. 340, 553 N.E.2d

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<sup>45</sup> In contrast, the Supreme Court has held that for a person to state a hostile workplace claim under Title VII, the aggrieved person must “subjectively perceive the environment to be abusive . . .” Harris v. Forklift Systems, Inc., 510 U.S. 17,21-22 (1993).

<sup>46</sup> Numerous federal statutes authorize ex parte restraining orders. See, e.g., 15 U.S.C. § 77t (securities); 15 U.S.C. §§ 25, 26 (antitrust); 15 U.S.C. § 1116 (trademarks); 18 U.S.C. § 1963 (RICO); 29 U.S.C. § 160 (unfair labor practices); 42 U.S.C. § 2280 (violations of the Atomic Energy Act).

915 (1990). Subsequently, Massachusetts appellate courts have articulated the criteria for “abuse” and one of its subcomponents, “placing another in fear of imminent serious physical harm,” G.L. c. 209A, § 1. See, e.g., Commonwealth v. Jacobsen, 419 Mass. 269, 273-274, 644 N.E.2d 213, 215-216 (1995); Flynn v. Warner, 421 Mass. 1002, 1003, 654 N.E.2d 926, 927 (1995)(rescript); Smith v. Joyce, 421 Mass. 520, 523 n.1, 658 N.E.2d 677, 680 n.1 (1995); Larkin v. Ayer Div. Of the Dist. Court Dep’t., 425 Mass. 1020, 681 N.E.2d 817 (1997); Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 639, 700 N.E.2d 296, 298 (1998). See also footnote 8, supra (discussing Wooldridge’s explication of “abuse”). The fact that G.L. c. 209A’s definition of abuse is sufficiently clear to support a criminal conviction for violations of abuse prevention orders, e.g., Gordon, 407 Mass. at 343-350, 553 N.E.2d at 917-920, fatally undermines Nollet’s due process claim that G.L. c. 209A is unconstitutionally vague. See Commonwealth v. Butler, 40 Mass. App. Ct. 906, 661 N.E.2d 666 (1996) (held: 209A order not unconstitutionally vague).

### **III. CHAPTER 209A DOES NOT VIOLATE NOLLET’S EQUAL PROTECTION RIGHTS.**

The Supreme Court has stated that:

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only

if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact, that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

Notwithstanding the wide latitude afforded Massachusetts in exercising its police power, Nollet claims that Chapter 209A violates his right of equal protection under the Fourteenth Amendment, asserting that the "Divorce/Domestic Violence Industry" has and continues to conspire against men, resulting in "the operational destruction of fathers under court judgments." App. Br., p.14. He contends that "fathers are operationally singled out [under Chapter 209A] . . . and receive dissimilar treatment and punishment from women even under similar circumstances and often under the guise of administrative convenience as in divorce court." *Id.*, p. 17.<sup>47</sup>

Assuming Chapter 209A impacts Nollet's important interest in maintaining his familial relationship, it still passes constitutional muster even under a strict scrutiny analysis. This much is apodictic: Massachusetts has a compelling interest in protecting persons from immediate bodily harm, and 209A orders are rationally

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<sup>47</sup> It bears repeating that Chapter 209A is gender neutral. This point was made clear during argument before the District Court. JA, 118.

related thereto. Next, as discussed in Point II.A. above, the means employed by Chapter 209A are narrowly tailored to meet this state interest. Under the circumstances, the assertion that 209A orders have a disparate impact on men is of no moment. Accordingly, the District Court properly dismissed Nollet's equal protection claim. See, e.g., Judge v. City of Lowell, 160 F.3d 67, 72 (1st Cir. 1998); Rubinovitz v. Rogato, 60 F.3d 906, 909-910 (1st Cir. 1995). See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), on remand for certification of state law issues, 475 F. Supp. 109, aff'd, 445 U.S. 901 (1980)(gender neutral statute which has disparate impact on women does not violate Equal Protection clause).

In addition, the Amended Complaint does not allege the discriminatory animus required to sustain an equal protection claim. The allegations in Count II are merely conclusory and fail to set forth facts showing an unlawful intent on the part of the Judicial Defendants to injure Nollet on account of his gender -- a basic requirement to establish an equal protection violation. See, e.g., Coyne v. City of Somerville, 972 F.2d 440, 442 (1st Cir. 1992). This Court's words in The Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989), illustrate why Count II fails: "[M]erely juxtaposing the fact of one's [gender] with an instance of discrimination is insufficient to state a claim. Absent some meaningful,

fact-specific allegation of a causal link between defendants' conduct and plaintiffs' [gender], the complaint's [equal protection] count cannot stand." *Id.* at 19 (internal citation omitted).

#### **IV. CHAPTER 209A DOES NOT VIOLATE NOLLET'S SECOND AMENDMENT RIGHTS.**

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The District Court correctly dismissed Nollet's claim under the Second Amendment on the ground that this Amendment applies only to the federal government and not to the states. *Presser v. Illinois*, 116 U.S. 252 (1886).<sup>48</sup> Moreover, both the Supreme Court and a number of lower courts have found that the Second Amendment does not confer an unfettered, personal right to possess a firearm.<sup>49</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939); *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942). See also *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976) (no

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<sup>48</sup> As a threshold matter, since none of the three appellants were required to surrender his firearm, they are without standing to pursue this claim on appeal. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (the plaintiff must establish an injury in fact, which must be "concrete and particularized," not "conjectural" or "hypothetical"; second, there must be a causal connection between the injury and the conduct complained of; and third, it must be "likely" that the injury will be redressed by a favorable decision) (citations omitted).

<sup>49</sup> In this regard, for a discussion of the need to maintain a "well-regulated militia," see Alexander Hamilton, *The Federalist Papers (No. 29)* 182-187 (McLean ed., Times Mirror Publishing 1961)(1788).

individual right to own firearms under Article 17 of the Mass. Declaration of Rights).<sup>50</sup>

Whatever Second Amendment rights Nollet might possess, they are not absolute. For example, Title 18 U.S.C. § 922(g)(8) prohibits the possession of a firearm by a person who is the subject of a domestic restraining order. The overwhelming majority of courts have found that this provision does not violate the offending party's Second Amendment rights. Kostmayer v. Dept. Of Treasury, 178 F.3d 1291 (5th Cir. 1999); United States v. Henson, 55 F.Supp.2d 528 (S.D.W.Va. 1999); United States v. Spruill, 61 F.Supp.2d 587 (W.D. Tex. 1999). But see United States v. Emerson, 46 F.Supp.2d 598 (N.D. Tex. 1999). Given the foregoing, the District Court correctly dismissed Count Three of the Amended Complaint.

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<sup>50</sup> Because the Supreme Judicial Court has found that there is no independent state source providing a "legitimate claim of entitlement" to own a gun, Nollet would have no cognizable due process claim as it relates to Chapter 209A's gun-surrender provision. Commonwealth v. Davis, *supra*. See also Perkins v. City of St. Paul, 982 F.Supp. 652, 658 (D. Minn. 1997), citing Board of Regents v. Roth, 408 U.S. at 577 (under Minnesota law, no vested property right to renewal of plaintiff's firearms license).

**CONCLUSION**

The Judicial Defendants respectfully submit that the decision of the District Court should be affirmed.

The Justices of the Trial Court of  
the Commonwealth of Massachusetts,

By their attorneys,

THOMAS F. REILLY  
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