No. _____

IN THE

Supreme Court of the United States

CARLIN ROBINSON, INDIVIDUALLY, AS GUARDIAN AND NEXT FRIEND OF I.Y., M.Y., AND A.Y., AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VERONICA WILLIAMS, DECEASED,

Petitioners,

v.

DANIEL A. LIOI, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Which of the widely divergent approaches amongst the circuit courts of appeal, if any, appropriately applies the doctrine arising from this Court's precedent establishing an exception to the general rule that no due process liability exists for harms caused by third parties?

2. Does a state-created danger exist where police officers affirmatively released a violent offender from a locked and secured portion of the police station with full knowledge of a warrant for his arrest, and helped the man to remain free, providing him the opportunity to murder his wife and unborn child?

3. Does the doctrine of qualified immunity shield police officers where the state-created danger doctrine is clearly established in the Fourth Circuit, the officers' conduct constituted such an obvious violation as to warrant denial of immunity even in the absence of prior precedent, and the Fourth's Circuit rigid adherence to prior precedent would necessarily deny all possible state-created danger claims, as no prior precedent involving a successful state-created danger claim currently exists in the Fourth Circuit?

PARTIES TO THE PROCEEDING

Petitioners are Carlin Robinson, individually as Guardian and next Friend of I.Y., M.Y., and A.Y., and as Personal Representative of the Estate of Veronica Williams. Petitioners were plaintiffs in the district court proceedings and appellants in the appellate proceedings.

Respondents are Daniel A. Lioi and Melvin Russell. Respondents were defendants in the district court proceedings and appellees in the appellate proceedings.

RELATED PROCEEDINGS

1. *Robinson v. Lioi*, No. CCB-12-192, United States District Court for the District of Maryland. Judgment Entered: July 18, 2012.
2. *Robinson v. Lioi*, No. 12-1922, United States Court of Appeals for the Fourth Circuit. Judgment Entered: July 30, 2013.
3. *Lioi v. Robinson*, No. 13-667, Supreme Court of the United States. Certiorari Denied: March 10,2014.
4. *Robinson v. Lioi*, No. CCB-12-192, United States District Court for the District of Maryland. Judgment Entered: June 30, 2017.
5. *Graves v. Lioi*, No. 17-1848, United States Court of Appeals for the Fourth Circuit. Judgment Entered: July 16, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the trial court is reported at 930 F.3d 307 (4th Cir. 2019) and is reproduced at App. 1. The Fourth Circuit's opinion denying Petitioner's petition for rehearing *en banc* is unreported at 777 F. App'x 76 (4th Cir. 2019) and reproduced at App. 128. The order of the United States District Court for the District of Maryland granting summary judgment in favor of Respondents is on Westlaw at 2017 WL 2937568 (D. Md. June 30, 2017), and is reproduced at App. 89.

JURISDICTION

This Court has jurisdiction to grant this petition for a writ of certiorari under 28 U.S.C. § 1254(1), which permits review "after rendition of judgment or decree" of a court of appeal. The Fourth Circuit rendered its judgment on July 16, 2019 affirming the decision of the trial court. *Graves v. Lioi*, 930 F.3d 307 (4th Cir. 2019). Petitioners petitioned the Fourth Circuit for a rehearing *en banc*, which was denied on September 18, 2019. *Graves v. Lioi*, 777 F. App'x 76 (4th Cir. 2019). This petition is timely filed pursuant to Rule 13 of this Court as Petitioners filed this petition within 90 days of the denial of a rehearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

42 U.S.C.A. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

No police officer should be allowed to release a violent offender from a locked and secured portion of the police station without arresting him on two open assault warrants, agree to allow him to illicitly remain free for several days, provide letters on department letterhead to ensure he remains free, stand aside as he murders his wife, and escape all accountability because the *officers* did not hold the knife. No citizen should live in fear of arbitrary state action creating third-party threats to their lives. No families should be left with no recourse, no accountability, and no remedy when their loved ones are killed as a result of arbitrary state action.

Under the Due Process Clause, every citizen has a right to life. Every citizen is protected from arbitrary state

action stripping away their property, their freedom, or their lives. But generally, the protective shield of the Due Process Clause ends when the harm was inflicted by a third-party.

Most circuits have read this Court's decision in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) as creating exceptions to the standard rule where a state "played [a] part in [the danger's] creation," or did "anything to render [the plaintiff] any more vulnerable to" the danger. *Id*. at 201, 1006. Every circuit that has recognized the existence of a "state-created danger" doctrine has formulated its own distinct approach to applying the exception. No two circuits have agreed on the breadth or form of the doctrine, resulting at least nine separate approaches.

In the thirty years that have elapsed since *DeShaney*, this Court revisited *DeShaney* once but provided no further guidance regarding the existence, breadth, or application of the exception. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).

Without a clear test, similar cases across the circuits have resulted in significantly varied outcomes. While the estate of an individual murdered by a third-party who had the opportunity to murder her *because* of two police officers' actions may be able to hold the officers accountable in five circuits, the claim would fail in three circuits. It is unclear what the outcome would be in the remaining four circuits.

In this case, Petitioners were unable to hold police officers accountable in the Fourth Circuit, even though the police officers actively created the opportunity for a husband to murder his wife. The wife had filed for a protective order, and a warrant was issued for the husband's arrest on assault charges. *Knowing* the husband was ac-

cused of a violent crime, two police officers actively released the husband from police custody and helped the husband evade arrest—until the date of the wife's final protective order hearing, when the husband approached his wife as she exited the courthouse and murdered her on the courthouse steps.

The confusing state of current state-created danger jurisprudence is evident from this case alone. The Fourth Circuit originally held that the officers' conduct was sufficient to establish a claim and the officers were not protected by qualified immunity, affirming the denial of a motion to dismiss. *See Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014). After the trial court granted the officers' motions for summary judgment, the Fourth Circuit reversed itself, finding that the conduct was *not* sufficient to meet the exception. *See Graves v. Lioi*, 930 F.3d 307 (4th Cir. 2019). The Chief Judge of the Fourth Circuit dissented, filing a seventeen-page dissent. *See Graves*, 930 F.3d at 333–350 (Gregory, J., dissenting). Further, multiple other circuits, including the Sixth and Seventh Circuits, are currently posed to reverse their own established precedent.

Guidance is desperately required to conform each circuit's approach. Without a clear test, the varied approaches of the circuits will continue to result in claims succeeding or failing not on the merit of the claim, but depending upon which circuit the claim was filed in.

STATEMENT OF THE CASE

I. Factual Background.

On November 13, 2008, Cleaven Williams ("**Williams**") surrendered himself to the custody of the Baltimore City Police Department. Despite his self-surrender,

Deputy Major Daniel Lioi ("**Lioi**") and Major Melvin Russell ("**Russell**," and together with Lioi, "**Respondents**") affirmatively released Williams from a locked and secured portion of the police station without arresting him on two open assault warrants. Respondents agreed to permit Williams to remain unlawfully free for almost five days, helping Williams to evade arrest by writing letters for him on department letterhead and texting advice. As a result, Williams was able to use his ill-begotten freedom to locate his wife and brutally stab her to death on November 17, 2008, killing her and their unborn child.

On Sunday, November 9, 2008, a warrant was issued for the arrest of Williams on charges of second-degree assault. J.A. 763, Case No. 17-1848, ECF No. 26. The charges were filed by his wife, Veronica, in connection with ongoing domestic violence she suffered at Williams' hands.

Williams' immediate response, after becoming aware of the warrant, was to contact Russell, who Williams knew through his community involvement. *Graves*, 930 F.3d at 311; 334. As President of the Greater Greenmount Community Association, Williams had met and befriended both Respondents. J.A. 444. The three men had previously exchanged phone numbers; Russell had also visited Williams' home and met Veronica and their children. J.A. 453. Williams asked Russell if "it was actually true" that a warrant was issued, and quickly followed up the next morning, demanding that Russell call him. *Graves*, 930 F.3d at 334-35.

Officer Jose Arroyo ("**Arroyo**") was dispatched Sunday night to pick up the warrant for Williams. J.A. 585. However, despite knowing standard procedure, Arroyo failed to log the warrant into the police database as required. Arroyo testified that he would only have done so if the suspect was already in custody—which Williams was not—or if he had been ordered not to take the warrant to

central records. J.A. 577. While Arroyo was unwilling or unable to identify the supervisor who ordered him to place the physical warrant on a desk in the police station without logging it into the database, he did confirm that he had been directly ordered to bypass the standard process. *Id*.

Another officer, Officer Adriene Byrd ("**Byrd**"), found the warrant and brought the warrant to Russell's attention. J.A. 445. Byrd testified that someone took the warrant from her that same day and that she never saw the warrant after it was removed from her possession. J.A. 108. She, like Arroyo, was unable—or unwilling—to identify who took the warrant from her. *Id*.

That Wednesday, Williams texted Russell stating that he would like to remain free for almost a week, telling Russell he wanted to self-surrender the following Tuesday as he was "still trying to get capital." *Graves*, 930 F.3d at 335.

Russell then informed Lioi that Williams would self-surrender the following night and ordered Lioi "to make sure the process [goes] well." *Id*.

The following day around 1:00pm, Russell received another text from Williams clearly indicating a pre-arranged meeting, stating "I am running bhind [sic]. I should b there n [sic] 15." *Id*. Russell responded "K." J.A. 480.

That night, Williams self-surrendered at the police station. J.A. 257. Despite advance notice of the surrender, Lioi did not attempt to find the warrant until Williams arrived, and was unable to find the warrant in the police database. J.A. 253; 257-58. He was similarly unable to find the physical copy of the warrant. *Graves*, 930 F.3d at 313. Although Lioi knew the warrant existed, and could have held Williams for up to eight hours while the physical warrant was located, Lioi simply conducted a cursory

search for "a mere 20 to 30 minutes" before releasing Williams. *Id*. at 336.

After releasing Williams, Lioi spoke with Russell and was told the warrant had been pulled and to search Byrd's patrol car. *Id*. Lioi ultimately found the warrant stashed in the window visor of Byrd's car. *Id*. at 336-37. Despite locating the warrant, Russell directed that no further attempts be made to arrest Williams, authorizing Williams' release through the following Tuesday. J.A. 277; 469.

Lioi helped Williams to evade being arrested again by writing two letters on department letterhead. One letter stated that the first warrant could not be found and the second stated that the second warrant should not be considered to be for Williams despite the fact that it was, in fact, for Williams. *Graves*, 930 at 338.

After the murder, Lioi and Russell admitted to Internal Affairs that he could have easily been arrested at any point. J.A. 563. Instead, Lioi and Russell chose to stick to their agreement and refuse to arrest Williams. Even after Williams sent erratic text messages to Lioi, the officers still assisted Williams in evading arrest. Williams told Lioi, "[t]here is a method to my madness:-/." *Graves*, 930 F.3d at 337. Lioi responded: "[t]hat's what I'm afraid of." *Id*.

Two hours before the murder, Williams contacted Lioi from his attorney's office and Lioi *still* made no attempt to arrest him despite Lioi's admission that "he knew where [Williams] was." J.A. 305-06.

Williams used his illicit period of freedom to locate his wife. Veronica had fled to her cousin's house after she filed charges against Williams, and the only date and time he knew where she would be was during the final protective order hearing on November 17, 2008. As Veronica left the courthouse, Williams brutally stabbed her to

death on the courthouse steps. Veronica and the couple's unborn child both died.

As both Respondents admit, had Williams been arrested, Williams' wife and his unborn child would have survived. J.A. 305-06; 462.

II. Procedural Background.

Veronica's cousin, Carlin Robinson, as Guardian and Personal Representative ("**Petitioners**") filed suit against the Baltimore City Police Department ("**BCPD**") and Lioi in the Circuit Court for Baltimore City. The case was removed to the District Court for the District of Maryland on January 19, 2012.

Both defendants filed motions to dismiss; the trial court granted BCPD's motion and denied Lioi's motion. Lioi appealed to the Fourth Circuit, which affirmed the denial of Lioi's motion to dismiss. Lioi filed a petition for a writ of certiorari to this Court, which was denied.

Subsequently, Petitioners moved to amend their Complaint to add Russell as an additional defendant. Both Respondents filed motions for summary judgment at the end of November 2016, which were granted by the trial court on June 30, 2017. Petitioners appealed the decision to the Fourth Circuit, which affirmed the trial court's decision on July 16, 2019. Petitioners requested a rehearing *en banc*, which was denied on September 18, 2019.

Petitioners timely filed this petition within 90 days of the denial of a rehearing.

REASONS FOR GRANTING THE WRIT

I. The Twelve Circuit Courts Have Developed Widely Divergent Approaches to Applying the State-Created Danger Doctrine.

Every Circuit Court has considered the state-created danger doctrine referred to in *DeShaney*, and each Circuit has formulated its own approach to the doctrine. As a result, the doctrine has been interpreted in at least *nine* different ways.

Three circuits do not apply any form of the state-created danger doctrine, each under a different rationale. The Fifth Circuit does not interpret *DeShaney* as creating an exception to the general no-liability rule. The Eleventh Circuit interprets this Court's subsequent holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992), as a derogation of the exception. The First Circuit has yet to decide whether the exception exists.

Of the nine remaining circuits, the Second Circuit, Fourth Circuit, and D.C. Circuit have acknowledged the existence of the doctrine without specificity. The final six circuits have created six different multiple-factor tests involving a panoply of elements. No two circuits have adopted the same test.

A. Two Circuits Do Not Apply the State-Created Danger Doctrine.

Two circuits have held that the state-created danger doctrine does not exist.

i. The Fifth Circuit.

The Fifth Circuit is the only circuit that has explicitly declined to adopt the doctrine. Rather, the Fifth Circuit interpreted *DeShaney* to establish solely the "special relationship" exception, as "it could be argued that

[*DeShaney*] was meant only to describe the kind of circumstances giving rise to a 'special relationship' between state and individual." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994). Subsequent cases emphasized the circuit's interpretation of *DeShaney* as "simply placing in context its broader ruling that the state had no affirmative duty to the young client of its welfare department." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994).

While the Fifth Circuit has passed on each opportunity to adopt the doctrine, it has considered the elements of the cause of action, determining that the analysis is twofold: a plaintiff must demonstrate (1) that "the defendants used their authority to create a dangerous environment for the plaintiff," and (2) "that the defendants acted with deliberate indifference to the plight of the plaintiff." *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 537–38 (5th Cir. 2003) (citing *Johnson*, 38 F.3d at 201). But in each subsequent case, the circuit has clarified that it has not adopted the doctrine.[1]

Petitioners would have been unable to bring their claim in the Fifth Circuit.

ii. The Eleventh Circuit.

Originally, prior to *DeShaney*, the Eleventh Circuit recognized that a plaintiff may be able to sustain a 42 U.S.C. § 1983 action if the plain-

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[1] *See Scanlan*, 343 F.3d at 537 ("this Court has never explicitly adopted the state-created danger theory."); *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 864-65 (5th Cir. 2012) (finding that the court had not adopted the doctrine in *Scanlan* and holding that "[w]e decline to use this en banc opportunity to adopt the state-created danger theory in this case."); *Whitley v. Hanna*, 726 F.3d 631, 639 fn. 5 (5th Cir. 2013) ("this court has not adopted the state-created-danger theory.").

tiff, "as distinguished from the public at large, faced a special danger." *Jones v. Phyfer*, 761 F.2d 642, 645 (11th Cir. 1985); *see also Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 354 (11th Cir. 1989). The Eleventh Circuit never appeared to consider its "special danger" doctrine in the context of *DeShaney*, instead questioning whether its doctrine had been undermined by this Court's decision in *Collins*. *See Mitchell v. Duval Cty. Sch. Bd.*, 107 F.3d 837, 839 fn. 3 (11th Cir. 1997) ("*Cornelius* may not have survived *Collins*.").

When the issue first arose, the Eleventh Circuit assumed "*arguendo* that *Cornelius* has not been undermined," and proceeded to consider a formulation of the doctrine. *Id*. at 839. The *Mitchell* court adopted portions of the Fifth Circuit's original interpretation of the state-created danger doctrine in *Johnson*, concluding that a plaintiff must prove that the state action (1) created a dangerous environment, (2) that the state actors knew was dangerous, (3) created an opportunity that would not have otherwise existed. *Id*. at 839 (quoting *Johnson*, 38 F.3d at 201).

Barely two years later, the Eleventh Circuit reconsidered, this time expressly overruling *Cornelius* after finding that "[t]he 'special danger' doctrine employed in *Cornelius* has been supplanted" by *Collins*. *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999). The *White* court rationalized that "[a]fter *Collins*, it appears the only relationships that automatically give rise to a governmental duty to protect individuals from harm by third parties under the substantive due process clause are custodial relationships," determining—without expressly considering—that this Court's holding in *Collins* eradicated both the special relationship doctrine and state-created danger doctrine referenced in *DeShaney*. *Id*. at 1257. *See also Waddell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300,

1305 (11th Cir. 2003) (finding that the *White* court "concluded … that the 'special relationship' and 'special danger' doctrines were superceded [sic] by the standard employed by the Supreme Court in *Collins*.").

The Eleventh Circuit has not readopted any formulation of the state-created danger doctrine since *White*. If the Petitioners had brought their claim in the Eleventh Circuit, Petitioners would not have succeeded.

B. One Circuit Has Not Determined Whether the Doctrine Exists.

i. The First Circuit.

The First Circuit is the only circuit that has continuously declined to consider whether the doctrine exists. The circuit has referenced the *possibility*, noting that affirmative state action may "give rise to a constitutional duty to protect," *Souza v. Pina*, 53 F.3d 423, 427 (1st Cir. 1995), but the circuit has never taken the next step to find that a cause of action does, *in fact*, exist.

If the cause of action exists, *then* it may be applicable where a "government employee, in the rare and exceptional case, affirmatively acts to increase the threat of harm to the claimant or affirmatively prevents the individual from receiving assistance." *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 77 (1st Cir. 2007) (quoting *Frances–Colon v. Ramirez*, 107 F.3d 62, 64 (1st Cir.1997)). The state action must also sufficiently "shock the conscience of the court." *Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005). But, the circuit notes, it has "never found [the cause of action] actionable on the facts alleged." *Id*.

Recently, the First Circuit reaffirmed that it has "discussed the possible existence of the state-created danger theory, [but] have never found it applicable to any specific set of facts," even though "[a]t least eight sister circuits

have recognized the existence of the state-created danger theory." *Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017) (citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 fn. 1 (9th Cir. 2006)). The *Irish* court ultimately concluded, as the First Circuit had in each preceding case, that the facts were insufficient to constitute a state-created danger cause of action, *if* such an action existed. However, the court noted several additional facts that could strengthen plaintiff's argument, without clarifying whether such factors would be *required* for a state-created danger cause of action:

> If discovery reveals that the officers' actions violated accepted norms of police procedure or that they acted despite foreseeing the harm to Irish, it may strengthen the plaintiffs' argument that the officers exacerbated the danger that Lord posed. It may also directly speak to whether the officers acted in deliberate indifference to Irish's safety, so much so that their conduct shocks the conscience.

Id. at 528.

It is possible that the First Circuit may fully adopt the doctrine if a case arises with sufficient facts. After all, unlike the Fifth and Eleventh Circuits, the First Circuit has at least noted that *DeShaney* "suggest[ed]," although "not explicitly [held], that there can be a state-created danger doctrine." *Lockhart-Bembery*, 498 F.3d at 77. But it is unclear how the First Circuit may apply the doctrine—and the First Circuit's current precedent, exemplified in *Irish*, indicates that the First Circuit may simply formulate *yet another* approach departing from the *nine* currently existing approaches discussed *infra* that equates "affirmative action" with a violation of standard procedures.

If Petitioners had brought their claims in the First Circuit, it is unclear whether Petitioners would have succeeded.

C. Six Circuits Have Created Explicit Tests.

Half of the circuits have formulated explicit tests for a state-created danger cause of action. While several of the circuits include similar factors, no circuit's test is identical to another circuit's, resulting in *six separate* approaches.

i. The Third Circuit.

In the Third Circuit, a plaintiff must plead four elements to establish a state-created danger:

> 1. the harm ultimately caused was foreseeable and fairly direct;
>
> 2. a state actor acted with a degree of culpability that shocks the conscience;
>
> 3. a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> 4. a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

L.R. v. Sch. Dist. of Philadelphia, 836 F.3d 235, 242 (3d Cir. 2016); *see Bright v. Westmoreland Cty.*, 443 F.3d 276, 281 (3d Cir. 2006); *Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 170 (3d Cir. 2017).

Acknowledging that the fourth factor—affirmative action—is "typically the most contested," the Third Circuit has tried to define an "affirmative action" as the "misuse of state authority, rather than a failure to use it." *L.R.*, 836 F.3d at 242 (quoting *Bright*, 443 F.3d at 282). In many cases, however, "there is no clear line to draw," as "virtually any action may be characterized as a failure to take some alternative action," *L.R.*, 836 F.3d at 242, so the court may then "ask whether the state actor's exercise of authority resulted in a departure from that status quo," rendering the victim more vulnerable than "had the state not acted at all." *Id*. at 243 (quoting *Bright*, 443 F.3d at 281).

If Petitioners had brought their claim in the Third Circuit, their claim would likely have succeeded. Both the victim and the harm were foreseeable: it was likely that Williams, a man accused of domestic violence, would seriously injure Veronica, his accuser, given the opportunity. The officers' actions assisting a violent man to evade the law shocks the conscience; and action was "affirmative" as the officers' actions disrupted the status quo—as the warrant would have been served and Williams would have been arrested had the officers not intervened—rendering Veronica more vulnerable to Williams' assault.

ii. The Sixth Circuit.

The Sixth Circuit has formulated a three-factor test:

> 1. an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party;
>
> 2. a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and

> 3. the state knew or should have known that its actions specifically endangered the plaintiff.

Engler v. Arnold, 862 F.3d 571, 575 (6th Cir. 2017) (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003)). Rather than the Third Circuit's focus on foreseeability and the outrageous nature of the conduct, the Sixth Circuit has focused on the nature of the danger and the knowledge of the state actors. Some of the Sixth Circuit's cases—but not all—recognize "an 'additional element'—that the government's conduct shocks the conscience." *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019).

The Sixth Circuit acknowledges, as the Third Circuit does, that determining what constitutes an "affirmative act" is "at times a difficult question." *Engler*, 862 F.3d at 575. The Sixth Circuit, however, applies a different standard than the Third Circuit, requiring a plaintiff to demonstrate "not only that he would have been saved" if the act had not occurred, but also "that he was 'safer *before* the state action than he was *after* it.'" *Id*. (quoting *Cartwright*, 336 F.3d at 493) (emphasis in original).

It is unclear whether Petitioners would have succeeded had their claim been brought in the Sixth Circuit. Veronica was exposed to a special danger unique and distinguished from a public danger. The officers knew or should have known that interfering in the arrest of an alleged violent offender endangers the victims. The officers' action in purposefully assisting a violent offender to avoid the law shocks the conscience.

However, although *Engler* makes clear that a failure to investigate or report allegations of child abuse is insufficient to constitute an affirmative act, 862 F.3d at 576, it is unclear how the Sixth Circuit might analyze an act that

interrupts a process otherwise in motion. Without considering standard police process, it could be argued that Veronica was in the same position *before* and *after* the state action—Williams had been free and remained free. However, the state action interrupted the standard process which would have ensured Williams' arrest; such that before the state action Williams was free, but in the absence of the state action he would have been incarcerated. Thus, Veronica would have been safer *had the state action not occurred*.

Currently, the Sixth Circuit is posed to change its own precedent. In *Estate of Romain*, a member of the panel delivered an alternate majority opinion. This alternate majority casts significant doubt on the Sixth Circuit's test:

> I am not sure *DeShaney* supports our test. In many respects, *DeShaney* is a surprising source for this right. … Whether or not our test can be defended based on the one sentence in *DeShaney*, it surely runs counter to the opinion's general thrust—that the Due Process Clause is ill-suited for claims seeking state protection from private violence.

935 F.3d at 493-94. The alternate majority concludes that the issue may be better considered under Equal Protection rather than Due Process; indicating that the Sixth Circuit's approach may drastically change. *Id*. at 495-96.

iii. The Seventh Circuit.

The three-part test formulated by the Seventh Circuit requires a plaintiff to prove that:

> (1) the government, by its affirmative acts, created or increased a danger to the plaintiff;

> (2) the government's failure to protect against the danger caused the plaintiff's injury; and
>
> (3) the conduct in question "shocks the conscience."

Estate of Her v. Hoeppner, 939 F.3d 872, 876 (7th Cir. 2019) (citing *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015)). The shock to the conscience element requires either deliberate indifference, *see King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007), or criminal recklessness. *See Slade v. Bd. of Sch. Dirs. of Milwaukee*, 702 F.3d 1027, 1033 (7th Cir. 2012).

The Seventh Circuit does not provide an additional test for determining whether an action is "affirmative" as the Third and Sixth Circuits have, instead noting simply that its reading of *DeShaney* draws a bright line "between *endangering* and *failing to protect*." *Estate of Her*, 939 F.3d at 877 (quoting *Sandage v. Bd. of Comm'rs of Vanderburgh Cty.*, 548 F.3d 595, 599 (7th Cir. 2008)) (emphasis in original).

If the Petitioners had brought their claims in the Seventh Circuit, they would likely have succeeded. The officers did not simply fail to protect Veronica; their actions in assisting Williams to avoid arrest actively endangered her, and the officers failed to take any action to protect Veronica against that danger. The officers acted with both deliberate indifference and criminal recklessness, assisting Williams without considering—or caring about—the impact their actions could have on Veronica.

Notably, an intra-circuit split also exists, and it is unclear how the doctrine may develop without guidance. The court recently considered the doctrine twice, and while one panel applied the three-factor test without question, the other panel found only one week earlier that

"[n]one of the[] elements [of the test] has its provenance in *DeShaney*." *Weiland v. Loomis*, 938 F.3d 917, 920 (7th Cir. 2019).[2] The *Weiland* panel ultimately concluded that it was unnecessary to determine the merits of the test; but the Seventh Circuit appears posed to do so in the next case.

iv. The Eighth Circuit.

The Eighth Circuit requires a plaintiff to prove five elements:

> 1. that [plaintiff] was a member of "a limited, precisely definable group,"
>
> 2. that the [defendants'] conduct put [plaintiff] at a "significant risk of serious, immediate, and proximate harm,"
>
> 3. that the risk was "obvious or known" to the [defendants],
>
> 4. that the [defendants] "acted recklessly in conscious disregard of the risk," and
>
> 5. that in total, the [defendants'] conduct "shocks the conscience."

Kruger v. Nebraska, 820 F.3d 295, 303 (8th Cir. 2016) (citing *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011)). In addition, the plaintiff must establish the requisite state duty, as the state only "owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Anderson as trustee for next-of-kin of Anderson v. City of Minneapolis*, 934 F.3d 876, 881 (8th Cir. 2019) (quoting *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th

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[2] Remarkably, two of the three judges on the *Weiland* and *Estate of Her* panels were the same. The addition of a single judge to the panel resulted in stunningly different opinions.

Cir. 2005)). The "creation" of the danger requires affirmative state action that "place[s the plaintiff] in a position of danger that he ... would not otherwise have faced." *Anderson*, 934 F.3d at 881 (quoting *S. S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (en banc)).

Had Petitioners' claims been brought in the Eighth Circuit, Petitioners would likely have succeeded. The "limited group," knowledge, and shock to the conscience elements are met in this case, as discussed *supra*. The risk to Veronica was significant, serious, immediate, and proximate. The officers recklessly helped Williams avoid the consequences of his abuse of Veronica with complete disregard of the risk. Further, as discussed *supra*, the officers' disruption of normal police process exposed Veronica to a danger she would have not otherwise faced.

v. The Ninth Circuit.

While the Ninth Circuit has not elucidated its own test, its jurisprudence has highlighted the factors the court considers in evaluating a state-created danger cause of action:

> 1. an affirmative act that creates an actual, particularized danger,
>
> 2. resulting in a foreseeable injury to the plaintiff, and
>
> 3. that the state acted with deliberate indifference to a known or obvious danger.

See generally Hernandez v. City of San Jose, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *Kennedy*, 439 F.3d at 1063). To determine whether a state actor "affirmatively places an individual in danger," the Ninth Circuit considers "whether the officers left the person in a situation that was more dangerous than the one which they found him." *Hernandez*, 897 F.3d at 1133 (quoting *Munger v. City of*

Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000)).

As noted *supra*, Veronica's death was foreseeable and the officers acted with deliberate indifference. The officers' actions also affirmatively created an actual, particularized danger, as assisting a violent perpetrator to remain free with full knowledge of his wife's accusations. The Ninth Circuit has found that the state actor affirmatively placed a plaintiff in actual, particularized danger in circumstances were officers either informed offenders of allegations lodged against them, *see generally Kennedy*, 439 F.3d 1055 (officer informed a dangerous offender that a plaintiff had lodged molestation allegations against him), and where officers directed plaintiffs toward possible danger. *See generally Hernande*z, 897 F.3d 1125 (officers re-routed Trump supporters through a crowd of anti-Trump protestors at a Trump rally).

If Petitioners had brought their claims in the Ninth Circuit, they would likely have succeeded.

vi. The Tenth Circuit.

The Tenth Circuit formulation is significantly similar to the formulation adopted by the Eighth Circuit, including the requirement that the action created the danger to create a six-factor test. *See Matthews v. Bergdorf*, 889 F.3d 1136, 1150 (10th Cir. 2018) (citing *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014)).

If the analysis ended with the six factors, the Petitioners' claims, if brought in the Tenth Circuit, would likely be successful. However, the Tenth Circuit interprets *DeShaney* as requiring a seventh element, folding the special relationship doctrine into the state-created danger doctrine:

> In all of these cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors.

Estate of Reat v. Rodriguez, 824 F.3d 960, 967 (10th Cir. 2016). The Tenth Circuit's interpretation stems from this Court's finding in *DeShaney* that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200; *see Estate of Reat*, 824 F.3d at 967-68.

The type of cases decided since *Estate of Reat* indicate that this seventh factor, if unstated, remains in the court's consciousness. *See Bergdorf*, 889 F.3d 1136 (plaintiff children sued caseworkers for abuse suffered after placement in adoptive home); *T.D. v. Patton*, 868 F.3d 1209, 1212 (10th Cir. 2017) (minor child sued social worker for abuse suffered after temporary placement in father's home).

Thus, even though Petitioners' claims meet all six elements of the elucidated test, Petitioners would likely fail in the Tenth Circuit, as Veronica was not in custody and her freedom was not otherwise limited at the time of her murder.

D. Three Circuits Have Not Developed a Test.

Three circuits have not formulated any test, relying almost solely on the language in *DeShaney*.

i. The Second Circuit.

Interpreting this Court's holding in *DeShaney*, the Second Circuit concluded that "by negative implication, the state does infringe a victim's due process rights when its

officers assist in creating or increasing the danger that the victim faced at the hands of a third party." *Matican v. City of New York*, 524 F.3d 151, 157 (2d Cir. 2008) (citing *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993)). The court has commented that it "'tread[s] a fine line between conduct that is "passive"' (and therefore outside the exception) 'and that which is "affirmative"' (and therefore covered by the exception)," but has not clarified how it distinguishes "passive" conduct from "affirmative" conduct. *Matican*, 524 F.3d at 157 (quoting *Pena v. DePrisco*, 432 F.3d 98, 109 (2d Cir. 2005)).

The only additional element elucidated by the Second Circuit requires a relationship between the state actor and the wrongdoer. The Second Circuit has distinguished the two exceptions stemming from *DeShaney* on the basis of the nature of the state's relationship with either the *victim* or the *perpetrator*:

> Our distinction between these categories of cases suggests that "special relationship" liability arises from the relationship between the state and a particular victim, whereas "state created danger" liability arises from the relationship between the state and the private assailant.

Pena, 432 F.3d at 109; *see also Lombardi v. Whitman*, 485 F.3d 73, 80 (2d Cir. 2007). For example, the Second Circuit has found a sufficient basis for a state-created danger

> where police officers told skinheads that they would not prevent them from beating up protesters in a park, *Dwares*, 985 F.2d at 99; where police officers gave a handgun to a retired officer who then shot a fleeing robber, *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir. 1998); where a prison guard

> told inmates that it was "open season" on a prisoner, and the inmates beat up the prisoner, *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir. 1999); and where police officials encouraged an off-duty colleague to drink excessively, after which he killed three pedestrians in a car accident, *Pena*, 432 F.3d at 110–11.

Matican, 524 F.3d at 157. But not for cases involving failures to intervene. *See Pitchell v. Callan*, 13 F.3d 545, 549 (2d Cir. 1994).

If the Petitioners had brought their claims in the Second Circuit, they most likely would have succeeded. The officers' actions in assisting Williams established a relationship similar to the officers in *Dwares*, *Hemphill*, and *Snider*; the assistance rendered *encouraged*—and, effectively, *sanctioned*—the murder.

ii. The Fourth Circuit.

The Fourth Circuit originally developed the state-created danger doctrine out of the concept that an affirmative duty may arise "outside the traditional custodial context." *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995). In those cases, the duty arises because "the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party." *Id*. at 1177. To plead a state-created danger cause of action, the plaintiff must establish "that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). The circuit drew a distinction between action and inaction by noting that the state may not "themselves throw others to the lions," but members of the general public who "rely on promises of aid [are

not entitled] to some greater degree of protection from lions at large." *Id*. (quoting *Pinder*, 54 F.3d at 1177).

The question often posed by the circuit is whether the action "created or increased" the danger, suggesting that action becomes affirmative depending upon the *outcome* rather than the *nature* of the action. *See Rosa*, 795 F.3d at 439; *Turner v. Thomas*, 930 F.3d 640, 644 (4th Cir. 2019); *Graves v. Lioi*, 930 F.3d 307, 319 (4th Cir. 2019). One aside buried in *Pinder* suggests that the circuit originally focused on the nature of the relationship between the state actor and the victim, although the circuit has not appeared to rely on this element in any subsequent case.[3]

The Fourth Circuit first considered this case after Respondents appealed the denial of their Motion to Dismiss. *See Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013). The Fourth Circuit found in favor of Petitioners, concluding

> Lioi's affirmative acts, as alleged, were on that "point on the spectrum between action and inaction," *Pinder*, 54 F.3d at 1175, such that his acts created "the dangerous situation that resulted in [Mrs. Williams'] injury." *Id*. at 1177.

Robinson, 536 F. App'x at 345–46.

Five years later, the Fourth Circuit considered this case for a second time after Petitioners appealed the trial

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[3] The Fourth Circuit opined that "[w]hile it is true that inaction can often be artfully recharacterized as 'action,' courts should resist the temptation to inject this alternate framework into omission cases by stretching the concept of 'affirmative acts' beyond the context of immediate interactions between the officer and the plaintiff." *Pinder*, 54 F.3d at 1176 fn. *. This language was cited again in *Turner*, but the court did not indicate if a relationship between the state and the victim is a prerequisite to "affirmative action." 930 F.3d at 646.

court's grant of summary judgment in favor of Respondents. *Graves*, 930 F.3d 307. The assigned panel included two of the three judges assigned to hear *Robinson*—but the *Graves* majority decision marked a complete departure from *Robinson*, to the point the Chief Judge of the Fourth Circuit, Judge Gregory, felt compelled to submit a lengthy, well-reasoned dissent. *See Graves*, 930 F.3d at 333-350 (Gregory, J., dissenting).

The vague distinction between "action" and "inaction" permitted the majority to conveniently slide the bar higher to achieve the opposite outcome in *Graves* while rationalizing the sudden reversal on the different standard of review. *Id*. at 318. The dissent, however, clearly highlighted the distinguishing feature between the two opinions that resulted in stunningly different outcomes—the panel in *Robinson* analyzed the actions taken by the officers in this case as affirmative action, whereas the majority in *Graves* performed "an about-face," now asserting that the same facts "amount[ed] to nothing more than omissions." *Id*. at 340 (J. Gregory, dissenting). Such an about-face effectively rescinded the *Robinson* holding, against "the law-of-the-case doctrine," solely "with the defense that we are now at the summary judgment stage." *Id*.

As the dissent noted, the basic facts are undisputed. *Id*. at 342. What changed was the court's *interpretation* of the facts. The sudden reversal in *Graves* was not premised, as the majority attempted to rationalize, on insufficient evidence—the reversal resulted from the majority suddenly determining that facts the court considered to be "affirmative action" only five years before *actually* described inaction.

The stunning contradiction between *Robinson* and *Graves* perfectly highlights the flawed formulation of the state-created danger doctrine adopted by the Fourth Circuit; in failing to provide any guidance as to the distinc-

tion between "action" and "inaction" the circuit is free to move the bar to manufacture the outcome it desires in each individual case. If Petitioners brought substantially similar claims in the Fourth Circuit unrelated to *Graves* and *Robinson* today, it is unclear whether Petitioners' claims would succeed—the outcome would depend upon where the bar lay for the particular panel on that particular day.

iii. The D.C. Circuit.

The D.C. Circuit interpreted *DeShaney* as establishing a "[s]tate endangerment concept" which allows "an individual [to] assert a substantive due process right to protection … from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." *Butera v. D.C.*, 235 F.3d 637, 651 (D.C. Cir. 2001). The D.C. Circuit fails to either expound on any other elements of a "state endangerment" claim and does not define an "affirmative act." The court adds only that "the plaintiff must also show that the District of Columbia's conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id*. at 651 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)); *see also Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams*, 375 F.3d 1141, 1144 (D.C. Cir. 2004).

The D.C. Circuit has never recognized a valid state endangerment claim. *See Butera*, 235 F.3d at 652; *Williams*, 375 F.3d 1141; *Estate of Phillips v. D.C.*, 455 F.3d 397 (D.C. Cir. 2006). As such, it is unclear what forms of state action the D.C. Circuit would consider "affirmative action" sufficient to state a claim. Had Petitioners brought their claims in the D.C. Circuit, the issues presented would be issues of first impression, and it is unclear how the D.C. Circuit would analyze the claims.

II. The Circuits are Split as to the "Clearly Established" Test for Qualified Immunity.

Qualified immunity shields officers from liability unless their conduct violated a clearly established right. *See D.C. v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018). While this Court has provided guidance to the circuits for how to determine whether qualified immunity bars suit, this Court has yet to definitively inform the circuits how to (1) define the right at issue and (2) determine if such right is settled law.

A. Defining the Right at Issue.

The right must be defined with a "high 'degree of specificity,'" but the circuits have not agreed as to how narrowly the right must be tailored to suffice. *Id*. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255 (2015)).

The Third Circuit has narrowly defined rights to relate specifically to the contexts in which the conduct arises. *See Mann*, 872 F.3d at 174 (refusing to find sufficient precedent where the referenced principles were not applied specifically "to the school athletic context."); *see also Hernandez*, 897 F.3d at 1137.

The Tenth Circuit, by contrast, has focused on the identity of the state actor. *See Estate of Reat*, at 966-67 (finding the state-created danger doctrine was not clearly established as applied to "misconduct by 911 operators," concluding the defendant "is unlike any of the defendants in our state-created danger cases.").

The First Circuit has commented that the question may focus on whether the state actor violated standard procedures, as officers who violated "no or few protocols" would be less likely to know their actions violated a citizen's constitutional rights. *Irish*, 849 F.3d at 528.

The most startling split, however, is the intra-circuit Fourth Circuit split exemplified in the *Robinson* and *Graves* holdings. In *Robinson*, the Fourth Circuit broadly defined the right at issue as a citizen's "right to be free from state-created danger," which the court concluded "has been clearly established in this circuit." 536 F. App'x at 346 (citing *Pinder*, 54 F.3d at 117). The *Robinson* court concluded that Lioi had transgressed "a bright line" by conspiring with Williams to avoid arrest—the "bright line" being, simply, the state-created danger doctrine. *Id*. at 347.

In contrast, the *Graves* court rejected *Robinson*'s conclusion that the state-created danger doctrine itself was a clearly established rule of law, noting that an officer "would have notice that the state-created danger theory existed in the abstract, … [but] its requirements had [not] been met in *any* particular set of circumstances." *Graves*, 930 F.3d at 332–33. As a result, the *Graves* court drastically rewrote Petitioners' allegations to define the right as "the failure to guarantee [Williams'] arrest on a misdemeanor warrant." 930 F.3d at 333.

Under *Robinson*, a plaintiff could defeat a qualified immunity defense by establishing a valid constitutional violation under the state-created danger doctrine—as the state actor is sufficiently on notice that *any* action violating a person's right to be free from state-created danger is a constitutional violation. Under *Graves*, the state-created danger doctrine is simply an abstract concept that cannot place any state actor on notice regardless of the severity of the conduct.

This Court should not allow each circuit to select its own gauge to define the right asserted.

B. Determining if the Rule is Settled Law.

The right, once defined, must be analyzed to determine if the right falls within a settled rule of law with sufficiently clear foundation that is "dictated by controlling authority or a robust consensus of cases of persuasive authority." *Wesby*, 138 S. Ct. at 589-90 (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741-42, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011)) (quotations omitted). The circuits have split on how settled the right must be to meet this requirement—some circuits rigidly require prior precedent while some circuits recognize an exception where the violation is obvious.

Again, the significant departure of the *Graves* court from the *Robinson* court embodies both the intra- and inter-circuit splits. In *Robinson*, the court noted that "[t]he lack of a case directly on point does not alter the court's conclusion" that the state-created danger doctrine, itself, formed a clearly-established rule of law sufficient to overcome qualified immunity. 536 F. App'x at 346–47. The *Robinson* court recognized the desirability of flexibility in cases of first impression involving heinous conduct, citing *United States v. Lanier,* 520 U.S. 259, 117 S. Ct. 1219, 137 L.Ed.2d 432 (1997) to note that sticking rigidly to the rule would potentially allow state actors to escape liability in the clearest of cases. 520 U.S. at 271 ("The easiest cases don't even arise … There has never been … [a] case accusing welfare officials of selling foster children into slavery."

In direct contradiction, *Graves* was unable to see beyond the fact that "no Supreme Court or Fourth Circuit case law would have described when [the doctrine's] requirements had been met in *any* particular set of circumstances," much less in the specific "context of serving an arrest warrant." 930 F.3d at 333 (emphasis in original).

Other circuits have agreed that in certain circumstances an exception must exist—including this Court. The Ninth Circuit, for example, has denied qualified immunity where the violation is "so 'obvious' that we must conclude … qualified immunity is inapplicable, even without a case directly on point." *Hernandez*, 897 F.3d at 1138 (quoting *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013)). This Court has similarly noted that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002).

Rigid adherence to *Graves*' interpretation of the "clearly established" requirement would necessarily result in no state-created danger doctrine cause of action ever succeeding within the Fourth Circuit—unless this Court provides precedent upon which the circuit can rely. Otherwise, as *no* precedent currently exists and the *Graves* court will not permit any case to proceed *unless precedent exists*, the Fourth Circuit will forever remain in a vicious circle.

III. This Case Presents an Ideal Opportunity for this Court to Incrementally Expand the *DeShaney*.

Two other similar petitions are currently pending before this Court. *Turner v. Thomas, et al.*, Case No. 19-529, filed on October 22, 2019, arises from the Fourth Circuit and is set to be considered in conference on January 10, 2020. *Anderson v. City of Minneapolis, et al.*, Case No. 19-656, filed November 21, 2019, arises from the Eighth Circuit and has not been scheduled for conference.

This case presents the ideal vehicle for this Court to consider the impact, breadth and form of the state-created danger doctrine as this case presents the Court with the unique opportunity to focus narrowly on defin-

ing an affirmative act. This case would not require this Court, as either *Turner* or *Anderson* do, to broaden the doctrine to include the failure of a state actor to actively intervene—although this case would present the Court the opportunity to do so if it desires.[4] Reviewing this case would permit this Court to provide the circuits much-needed guidance on the doctrine while incrementally expanding the doctrine to hold state actors accountable for injuries caused as a result of actual, affirmative actions taken by the state actors exposing citizens to new or increased dangers.

This case is directly in the middle of the circuit split. As discussed *supra*, Petitioners would likely have succeeded in five circuits—the Second, Third, Seventh, Eighth, and Ninth Circuits, failed in three circuits—the Fifth, Tenth, and Eleventh Circuits, with an unknown outcome in four circuits—the First, Fourth, Sixth, and D.C. Circuits. Further, in this case, unlike *Anderson* and *Turner*, the Fourth Circuit *itself* split—first after the motions to dismiss, with a complete reversal after the motions for summary judgment.

This case also presents the only complete evidentiary record for this Court's review. Both *Turner* and *Anderson* appeal from a motion to dismiss. This case comes to this Court on a motion for summary judgment.

In sum, compared to *Turner* and *Anderson*, this case presents the perfect vehicle of review of the state-created

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[4] *Anderson* urges this Court to apply the doctrine to first responders who failed to provide emergency aid to a hypothermic individual. *Turner* asks this Court to apply the doctrine to police officers who failed to intervene in violent acts between protestors and counter-protestors at a rally.

danger doctrine. This Court should elect to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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