No. _____

In the Supreme Court of the United States

VICKIE COOK, INDIVIDUALLY AND AS NATURAL MOTHER TO DEANNA COOK; N. W., A MINOR, BY AND THROUGH HER GRANDPARENT AND GUARDIAN VICKIE COOK; A. W., A MINOR, BY AND THROUGH HER GRANDPARENT AND GUARDIAN VICKIE COOK,
Petitioners,

v.

TONYITA HOPKINS; KIMBERLEY COLE; JOHNNYE WAKEFIELD; YAMINAH SHANI MITCHELL; JULIE MENCHACA, OFFICER; AMY WILBURN, OFFICER; ANGELIA HEROD-GRAHAM; CITY OF DALLAS,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 5, 2020

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QUESTIONS PRESENTED

After making dozens of 911 calls concerning her abusive ex-husband during 2009-2012, and being promised assistance by police, in August 2012, Deanna Cook made one final 911 call, along with bloodcurdling screams to the operator, as her perpetrator slowly murdered her. Fifty minutes and one stop to a 7-Eleven store later, officers finally arrive to Deanna's house but never enter. Petitioners brought suit for violations of their Fourteenth Amendment rights to due process and equal protection with respect to two 911 calls. Despite concluding that Plaintiffs "produce[d] evidence sufficient to [raise a material-fact dispute] that the City, at the time of the incident at hand, had a custom of providing less protection in 911 call taking on the bases of …[gender] and status as a domestic violence victim," the Fifth Circuit adopted a new "deemed credible" approach to viewing a movant's credibility. The Fifth Circuit also arbitrarily excluded admissions of discrimination as "outlier" evidence.

Further, regarding her due process claims, the Fifth Circuit's acknowledgment that "Deanna might have a viable claim for violation of her due process rights if this circuit recognized the state-created danger theory," and refusal to allow it, illuminates an irreconcilable conflict with virtually every other circuit court of appeals that allow this due process claim.

Thus, the questions presented are:

I. Whether the requirements that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge" can be evaded by the simple expedient of the Fifth Circuit concluding, without evidence disputing the veracity of that employee's statement, that confessed discrimination testimony from one of the City's 911 employees is "outlier" evidence or that a movant's testimony can now be "deemed credible," thereby now imposing an insurmountable burden on the nonmovant.

II. Whether the district court's and Fifth Circuit's clear disregard of some of Petitioners' evidence creates a new and heightened standard for Plaintiffs to clear in summary judgment proceedings by which courts need not draw all justifiable inferences in favor of nonmovants, and nonmovants must now present sufficient evidence that is decidedly "more credible" than defendants' facial denials.

III. Whether the Fifth Circuit Court of Appeals erred in diverging from this Court's ruling in *DeShaney v. Winnebago Cty. Dep't. of Soc. Serv.*, 489 U.S. 189 (1989) and holding that the acknowledged violation of Deanna Cook's Fourteenth Amendment due process rights is not actionable simply because the Fifth Circuit has now stated that it does not recognize state-created danger due process claims, although virtually every other circuit court of appeals would recognize these due process claims.

LIST OF PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are Vickie Cook, Individually and as Natural Mother to Deanna Cook; N. W., a Minor, by and through her Grandparent and Guardian Vickie Cook; A. W., a Minor, by and through her Grandparent and Guardian Vickie Cook; Karletha Cook-Gundy, Individually and as Representative of the Estate of Deanna Cook, Deceased.

Respondents are the City of Dallas, Tonyita Hopkins, Kimberley Cole, Johnnye Wakefield, Yaminah Shani Mitchell, Julie Menchaca, Amy Wilburn, and Angelia Herod-Graham.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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To enhance predictability in summary judgment rulings and ensure that a nonmovant is provided with the ability to present material evidence with which to survive summary judgment, this Court, through a trilogy of cases,[1] established standards to be applied in ruling on summary judgment motions.

Although Petitioners acknowledge, as Justice Alito noted in *Tolan*'s concurring opinion, that "a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment,"[2] the present case does not fall into that routine category. While the Fifth Circuit's opinion refers to this Court's summary judgment standards, it makes a dramatic and total departure from those standards to give the district courts the ability to classify evidence as "outlier evidence" and ignore it entirely.

In fact, the Fifth Circuit's opinion highlights two significant departures from this Court's precedent that have so far departed from the accepted and usual course of judicial proceedings that it compels review by this Court. The Fifth Circuit Panel's adoption of an "outlier" analysis and a "deemed credible" approach to

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[1] *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[2] *Tolan v. Cotton*, 572 U.S. 650, 661 (2014).

evaluating evidence is antithetical to this Court's summary judgment precedent.

In addition, the Fifth Circuit's refusal to recognize the due process cause of action under a state-created danger theory for the acknowledged violation of Deanna's due process rights directly conflicts with other circuit courts of appeal that would allow Deanna's claims to proceed. Indeed, the Fifth Circuit's ruling crystallizes the problem with an "absence of consistency", which "potentially allows for behavior in one circuit to be actionable while being acceptable in another circuit." Christopher M. Eisenhauer, Police Action and The State-Created Danger Doctrine: A Proposed Uniform Test, 120 Penn St. L. Rev. 893, 909 (2016).

Review is therefore necessary to (i) resolve the undeniable conflict between the Fifth Circuit's opinion and other circuits as to due process violations under the state-created danger theory; (ii) preclude courts from adopting the Fifth Circuit's new "outlier evidence" approach; (iii) prevent courts from adopting the Fifth Circuit's "deemed credible" application to a movant's credibility; and (iv) prevent the decision from eviscerating the axioms that in ruling on summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" and "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."

OPINIONS AND ORDERS BELOW

The Fifth Circuit's decision, reported at 2019 WL 5866683, is reproduced at App.1. The district court's Final Judgment is reproduced at App. 29. The grant of the City of Dallas's Motion for Summary Judgment is reported at 2019 WL 459649 and reproduced at App.31. The grant of the Individual Defendants' Motions for Summary Judgment based on qualified immunity is reported at 2015 WL 7352543 and reproduced at App.38 and App. 50. The district court's grant of the individual defendants' motion to dismiss is reported at 2013 WL 12350006 and reproduced at App.70.

BASIS FOR JURISDICTION

The Fifth Circuit entered its decision on November 8, 2019. App.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> 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 ….

Rule 56 of the Federal Rules of Civil Procedure provides:

> A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law….

The relevant provisions of the Fourteenth Amendment, 42 U.S.C. § 1983 and Fed. R. Civ. P. 56 are set out in App. 89-93, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. Prior to The Final 911 Call, Defendants Were Aware of Deanna's Background, Call History, And Domestic Violence Victim Status.

The origins of this suit date back prior to 2012, when Deanna called police on dozens of occasions to report domestic violence, including soon after her divorce. ROA.5274. In one 911 call, she told police that she has called "a hundred thousand times" and moved three (3) times to avoid abuse. ROA.5278. Multiple court and police records in 2009-2012 document many of Deanna's calls. See, ROA.5464; ROA.5332-37. Deanna also reported to police that her ex-husband stole a key and entered her home without permission. ROA.5278. On July 28, 2012, at 10:57 a.m., Deanna called 911 to report that her ex-husband "poked her in the face with his finger and threatened to burn the house down and refused to leave." The police report notes that the suspect is a "Black male." ROA.5445-48. Once police arrived, they did not arrest the ex-husband. Instead police merely took him to a nearby Shell gas station. Menchaca Depo at 34:14 – 35:12. ROA.5333-34; ROA.5445-48.

Later at 9:17 p.m., also on July 28, 2012, Deanna called 911 again to report that the ex-husband had come right back to her home (after police just took him around the corner) to harass her. (ROA.5449-52). True to form, police still did not arrest him. Instead, police gave the domestic violence perpetrator another free car ride in their police cruiser to another neighborhood

nearby. Menchaca Depo at 35:15–37:25. ROA.5334-36; ROA.5449-52.

On August 16, 2012 (one day before Deanna's final 911 call) Deanna called Police to report that her ex-husband was again stalking her. Police did not arrest him, despite knowing his identity and whereabouts. Menchaca Depo at 33:16 – 34:11. ROA.5332; ROA.5438-41. Thus, prior to her final call, as the summary judgment record established, police routinely paid lip service to Deanna by promising that during their patrols they would keep watch for the perpetrator, but oftentimes they would barely shoo him away, or give him a ride home, without taking him into custody, even when Deanna had a protective order.

B. Deanna's Final 911 Call.

On Friday, August 17, 2012 at 10:54 a.m., while being attacked inside her home, Deanna managed to dial 911. ROA.5434. The call was taken by Tonyita Hopkins, an employee in the City's 911 call center. ROA.5434. At the call's outset, Deanna is heard screaming for assistance from 911 at the top of her lungs in fear. ROA.5303. Five minutes into the call, Deanna is heard asking her attacker why he is attacking her and begging "please, please stop it." ROA.5300. Seven minutes into the call, Deanna is heard uttering "please, please, please…..why are you doing this to me." ROA.5300. Her attacker asks if she called the police (ROA.5300) and threatened multiple times that he was going to "kill" her. ROA.5301. From the tone of Deanna's voice and his statements, it was obvious there was a physical disturbance and that her life was being threatened. ROA.5301; ROA.4405. The

defendants never upgraded Deanna's domestic violence call to urgent. ROA.5347; ROA.5385; ROA.5434. According to City records, nearly 50 minutes after Deanna's call was placed, Responding Officers finally arrived at Deanna's home (ROA.5434) after first stopping at a 7-Eleven store for bottled water. ROA.3546; ROA.3552. App. 4. Upon arriving at Deanna's home, the officers briefly looked around and left without ever entering the home or attempting to locate Deanna or her attacker. ROA.5337-38.

C. Vickie Cook's 911 Call.

Two days later, on August 19, 2012, after Deanna did not show up for church, her minor daughters, mother, and sister went to Deanna's residence, during which time Deanna's mother called the same 911 department to obtain assistance in locating her daughter or entering the residence. App. 53-54. Despite the 911 operator knowing that Deanna had called screaming two days earlier, the operator refused to send police or EMT to Deanna's residence despite pleas from Deanna's mother. Accordingly, Deanna's family was left with no option other than to kick the door in themselves. Upon entering the residence, they found Deanna dead in her bathtub, the victim of a crime. App. 53-54.

D. The District Court Received Evidence of Actual Discrimination and Defendants' Contemporaneous Access to Petitioners' Status.

During the summary judgment proceedings, Petitioners presented evidence of actual discrimination

taking place in the 911 section in the form of an admission from April Sims, a 911 operator, that the 911 department had practiced providing less protection in 911 call taking on the bases of race, gender, and the caller's status as a domestic violence victim. ROA.5470-74. Additionally, although the district court allowed only limited discovery, Petitioners presented evidence that, at the time, the City had a custom of providing less protection in 911 call taking on the bases of race, gender, and status as a domestic violence victim. Petitioners also presented evidence that at the time of their conduct, Defendants had access to information indicating Petitioners' race, gender, and the domestic violence nature of the 911 calls.

E. City Leaders Effectively Acknowledge that Discrimination Existed Through Selective Enforcement.

On August 25, 2012, the Police Chief conceded that the 911 center caused Deanna's death, "[the 911 operator] obviously failed at that, and it cost the life of Deanna." ROA.5479. As an acknowledgment of gender discrimination against women, Dallas's Mayor, in a public announcement, called on the male citizens of Dallas to stop tolerating abuse against women by other men. The Mayor stated, "[w]e as men must collectively have a zero tolerance of that attitude of ambivalent acceptance of any despicable behavior by our male neighbors." ROA.5458. When asked what led to Deanna's death, the Mayor responded, "[w]e all failed her. The system failed her, the neighbors next door failed her, the media failed her, the mayor failed her." ROA.5461. Other statements confirm the City's

classification of domestic violence victims by gender. While appearing on local news, Dallas's Mayor reiterated who failed Deanna, "Well, I think we all did. First of all, as a society, second as a gender of males - have failed her, and then our safety net wasn't there for her."[3] ROA.872.

F. The District Court Accepted Defendants' Self-Interested Contentions That They Had No Discriminatory Motive, Despite Material Fact Disputes.

During the summary judgment proceedings, the Individual Defendants argued that, at the time of their conduct, they were unaware of Petitioners' race, socioeconomic status and/or the call's domestic violence nature. But, the only evidence offered to support this contention was the Individual Defendants' testimony as to their knowledge and intent. Petitioners offered substantial evidence that contradicted these statements.

As to the initial call taker, Hopkins, the district court concluded, "[her] omissions may have resulted in dispatch or the responding officers not appropriately grasping the urgency of the situation later in the process. Therefore, a reasonable jury could find that

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[3] Other statements made in the interview are "[t]hese **men** are terrorists….We have a war against terror, we worry about everybody overseas. Right here in our own backyard, these men are terrorizing people and we don't call them terrorists. If we looked at them that way, I think this whole perspective would change." ROA.5463.

Hopkins acted unreasonably."[4] App. 61. But, the district court later accepted Hopkins' testimony that she was allegedly unaware of Deanna's status at the time. App. 62. Deanna's call itself provided detail regarding her status, a material fact the district court ignored. Indeed, the Individual Defendants, including Hopkins, were able to ascertain Petitioners' race, gender, status as a domestic violence caller, and socioeconomic background from the 911 call, as other listeners emphatically concluded and as shown in a summary judgment affidavit. Further, there were material fact disputes as to whether the Individual Defendants looked at information reflecting Petitioners' race and status. Defendants clearly had access to the information at their fingertips, and evidence supports that each viewed this evidence. Finally, whether the Individual Defendants acted, as others in the 911 department, to discriminate against Petitioners because of their race, gender, status as a domestic violence victim, and socioeconomic background is a dispute that should have been resolved by a jury.

Likewise, based principally on the Responding Officers' representations, the district court concluded that there was no evidence that the Officers acted with discriminatory intent. App. 68. But there was supporting evidence that the Responding Officers were aware of, and acted on, Deanna's race, gender and status as a domestic violence victim yet discriminated against her by, *inter alia*, (1) not responding to the call with the appropriate urgency dues to the nature of the

[4] See *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 (5th Cir.1996)(under one prong, defendant is entitled to qualified immunity only if defendant's conduct was objectively reasonable).

call, (2) stopping at 7–Eleven for personal purchases on the way to the call, (3) refusing to investigate the rear of Deanna's residence, (4) refusing to forcibly enter the residence, (5) providing less protection to female victims, (6) giving lower priority to 911 domestic violence calls, and (7) not driving fast with lights and sirens on, as would be required by Deanna's status.

In fact, none of the defendants provided evidence as to "why" they acted as they did, other than because of Deanna's status, which is consistent with the actual discrimination Ms. Sims described as taking place in the 911 section. At the very least, these facts were undisputed. But after weighing the Defendants' facial denials, and deeming them all credible, the district court granted defendants' motions for summary judgment.

G. The Fifth Circuit Concludes That Certain Evidence Is "Outlier"; That Movants' Testimony Is "Deemed Credible;" And Declines To Credit Other Evidence.

Petitioners appealed to the Fifth Circuit, again explaining that Deanna's due process rights were violated as were her equal protection rights as a result of the Defendants' intentional discrimination on the basis of race, gender, and/or status as a female victim of domestic violence. See Appellants' Br. (docketed by 5th Cir. July 9, 2019). The Fifth Circuit summarily affirmed dismissal of Petitioners' due process claims on the basis that the Fifth Circuit does not recognize the state-created danger theory. As to Petitioners' equal protection claims, the Fifth Circuit assessed the

credibility of the evidence and classified evidence of discrimination from April Sims as "outlier" evidence. The Fifth Circuit also held that the movants' denials were "deemed credible" and ignored the multiple admissions of discrimination by the City in its handling of 911 calls on the basis of race, gender and/or nature of the calls. The Fifth Circuit also summarily rejected substantial evidence of discriminatory acts by other 911 employees circa the time of the discrimination alleged in the underlying suit and disregarded other material fact disputes.

If the district court had allowed a jury to view this evidence, reasonable jurors could have found that the discrimination against Deanna, Vickie, and other similarly situated individuals was intentional and so severe and pervasive that it illuminated a pattern and practice of discrimination.

REASONS FOR GRANTING THE PEITITON

The Fifth Circuit's new "outlier" test in discarding summary judgment evidence it believes to be abhorrent and its newly minted "deemed credible" standard in viewing a movant's testimony violate Fed.R.Civ.P. 56's summary judgment requirements and are in express conflict with precedent in this Court and all other circuits. In applying these new principles for evaluating summary judgment evidence, the Fifth Circuit dismissed evidence that clearly establishes discrimination in the department where most of the defendants were employed. April Sims's testimony was deemed "outlier" not because there was unequivocal evidence proving it was outlying, but because that was the only way the Fifth Circuit could evade the

realization that discrimination existed in the 911 department and these defendants acted consistent with those patterns and customs.

The decision below is not only irreconcilable with the principle that material evidence cannot be summarily dismissed, it is contrary to Rule 56 and its progeny, which mandate that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" and "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." In other words, the Fifth Circuit took material evidence that would easily defeat summary judgment and labeled it as outlying. The Fifth Circuit also accepted, wholesale, the self-interested defendants' disputed testimony. This decision cannot be understood as an effort to believe Petitioners' evidence or draw inferences in their favor. Instead, the decision can only be understood as a direct assault on the principles that this Court has established.

This Court's review thus is crucial to rejecting the Fifth Circuit's new summary judgment standards and thwarting the Fifth Circuit's dramatic expansion of the ability of courts in the Fifth Circuit to classify material evidence as "outlier" evidence and weigh evidence according to the court's concept of a witness's credibility. If allowed to stand, the Fifth Circuit's "outlier" test and "deemed credible" standards will expose summary judgment non-movants to exactly the sort of insurmountable burden this Court intended to prevent with its summary judgment trilogy. Indeed,

the underlying decision amply demonstrates the danger. The Fifth Circuit upheld the district court's grant of summary judgment even though Petitioners submitted substantial evidence of fact disputes—the precise result the summary judgment principles sought to avoid. The Fifth Circuit made no pretense that it refused to consider clearly contradicting evidence. Instead, it flouts this Court's directions by making an end run around this Court's summary judgment principles.

Finally, the Fifth Circuit's decision endangers all summary judgment proceedings. Any material evidence that would be fatal to a motion for summary judgment now becomes fodder for an argument that the evidence should be dismissed as an outlier, or that determining the veracity of a self-interested movant's testimony is now presumptively true. If allowed to stand, the Fifth Circuit's decision will chill summary judgment proceedings for nonmovants and produce that precise uncertainty this Court sought to eliminate with its summary judgment trilogy. Thus, review by this Court will help restore "predictability and certainty" to summary judgment proceedings.

Additionally, the ruling on Petitioners' due process claims merits the Court's attention. Fundamental due process claims should not result in drastically divergent outcomes depending on the circuit in which the victim lives, yet that is precisely what happened here. According to the Fifth Circuit, the violation of Deanna's due process rights, which the Fifth Circuit acknowledges happened, is not actionable since the Fifth Circuit stated below that it does not recognize the

state created danger liability theory. In the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and DC Circuits, however, these Petitioners could sue for Deanna's death had the conduct happened in those jurisdictions. The Fifth Circuit should not be allowed to provide a favorable forum for violators of due process rights.

I. The Fifth Circuit's New "Outlier" Approach Directly Conflicts with Other Circuits And Eviscerates This Court's Summary judgment Principles.

Since this Court's trio of opinions, appellate courts have been called upon to engage in line-drawing exercises to determine whether a nonmoving party has adduced sufficient evidence to defeat a motion for summary judgment. This Court has sanctioned the principles that should be applied. Notably, a court may grant summary judgment only if, after construing the record evidence, and the reasonable inferences which may be drawn therefrom, most favorably for the party opposing the motion, the proof could not support a judgment in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). *See also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992).

But here, the errors of which Plaintiffs complain are not simply whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party (although it was not). Instead, the error here is that the Fifth Circuit ignored this Court's summary judgment principles, opting instead to create new standards for evaluation, consideration, and now rejection, of material evidence.

For instance, public statements made by April Sims, the former 911 call taker, demonstrate that many 911 call takers deduce a person's race by listening to the calls, and center employees are known to discriminate against callers according to race, location and the domestic violence nature of the calls:

> "I'm a very easygoing person and I will give the shirt off my back to help others, **but when call after call are black people fighting and screaming** and hitting each other and they want to yell at me and treat me like [expletive] when I'm trying to help, is not cool," the poster writes.
>
> "**Black people are outrageous**!" it says. "They are more like animals; they never know how to act … Always causing problems."
>
> On the page, the person identified as Sims repeatedly writes about her job as a 911 operator and states that about 5 percent of the calls she answers are "real emergencies" while the rest are calls to "baby sit" grown men and women.

> "**You want to call 911 cause your boyfriend put his hand on you** and you want to press charges when you don't even know his real name?"' Sims wrote. "**Sure, let's a make a police report for Dino, that is his street name**."

ROA.5470-74. These statements from Sims, who worked in the same room as the Individual Defendants speak volumes of system-wide discrimination in the call center, and especially when those statements are taken together with those of the Police Chief and Mayor, who acknowledge the discrimination and its impact. Ms. Sims had first-hand knowledge of what was taking place in the 911 center circa the August 17, 2012, call. Another City policymaker virtually concedes that there has been a discrimination problem in the call center:

> Dallas City Council member Dwaine Caraway told WFAA-TV that the commentary "embarrasses not just the department, it embarrasses the city."
>
> "Number one, I am shocked and it saddens me to know that this is going on and **still taking place in today's time, especially here in 911**," Caraway said.

ROA.5471. At the very least, these facts demonstrated a material fact dispute as to discrimination in the 911 center and in Defendants' responses to domestic violence complaints, and exposes fact disputes: (i) of racism against African-American women that exists in the City's call center; (ii) that call-takers do listen to

the callers' voices and complaints to determine whether they are minority callers, and then treat them differently if they are believed to be African-American; and (iii) the deficiency in the City's training procedures that leads to constitutional violations.

However, the Fifth Circuit was dismissive of this evidence, concluding "Sims was an outlier, who was deservedly fired from her position." App. 20. First, Sims wasn't fired for these admitted acts of discrimination and selective provision of services. No, she was fired for posting comments on Facebook. Second, there was nothing in the record that proved that Sims was an outlier or that her acts were inconsistent with those of her coworkers and superiors. Nevertheless, regardless of how repugnant Sims' testimony may have sounded to the Fifth Circuit, it cannot be disregarded in the determination of the existence of material fact disputes.

Petitioners presented other evidence regarding various instances where citizens called to report actual or perceived discrimination by race and gender in the City's responses to 911 calls. Cole Depo at 30:15-21. ROA.5409. Supervisors admit hearing of the discrimination in the City's provision of police services. Wakefield Depo at 30:23 – 31:10. ROA.5348-49. Other City records demonstrated that situations like these 911 calls are not uncommon for minority and socioeconomically deprived callers. ROA.5543-5609. Another telling admission of the City's apathy to domestic violence is the City's concession in its interrogatory response, "the City Council has requested the Dallas Police Department to be **more proactive** in

addressing domestic violence." ROA.5509 (emphasis supplied). In addition, the City produced many citizen complaints when asked, "'[p]lease state whether prior to October 3, 2014, any person contended that the City or Police Department acted according to race, gender, zip code, class, socio-economic levels, location or other demographics in the way it addressed, handled, responded to or investigated calls for 'want to locate' or 'welfare' checks.'" Response to Interrogatory No. 5. ROA.5510. Likewise, the City produced several complaints when asked "[f]or each instance where someone has contended that the City…discriminated (or acted differently) according to race, gender, zip code, class, socio-economic levels, location or other demographics in the way it addressed, handled, responded to or investigated domestic violence claims, identify the date of and party making the contention." Response to Interrogatory No. 4. ROA.5502.

Here, the Fifth Circuit reached its problematic result only by expressly deviating from the approach of other circuit courts of appeal in favor of a new Fifth Circuit "outlier" approach to evidence. By developing the critical "outlier" standard, on its own initiative, the Fifth Circuit robbed Plaintiffs of the opportunity to rebut the Defendants' self-interested statements that they did not intend to discriminate in their handling of Petitioners' 911 domestic violence calls. Plaintiffs would and should have been able to rely on this powerful evidence to establish a material fact dispute regarding what was happening in the 911 center, as it relates to 911 calls from minority domestic violence female victims.

In creating this new approach, the Fifth Circuit indisputably created a direct circuit conflict regarding the court's role in viewing summary judgment evidence and dramatically widened a court's ability to weigh evidence, wholly dismiss detestable evidence, ignore other material evidence, and make credibility determinations.

II. In Ignoring Competing Evidence, The Fifth Circuit Has Created a Presumption of Credibility In A Defendant's Denials.

Prior to the Fifth Circuit's opinion, credibility determinations had been determined to be within the province of the fact-finder. Accordingly, courts in the various circuits have emphasized repeatedly that cases that turn on the moving party's state of mind are not well-suited for summary judgment. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir.2010) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."); *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111, 115 (5th Cir.1972); *Riley–Stabler Constr. Co. v. Westinghouse Elec. Corp.*, 401 F.2d 526, 527 (5th Cir.1968); accord *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir.1990) ("general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Wilson v. Seiter*, 893 F.2d 861, 866 (6th Cir.1990) ("We are aware that state of mind is typically not a proper issue for resolution on summary judgment."), vacated on other grounds, 501 U.S. 294 (1991); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199 (2d Cir.1989) ("Questions of

intent, we note, are usually inappropriate for disposition on summary judgment"). This is so because it is particularly difficult for the nonmoving party to challenge the "self-serving testimony" of the moving party without the benefit of trial accessories, namely cross-examination. *Young v. Quinlan*, 960 F.2d 351, 360 n.21 (3d Cir. 1992)(a party's state of mind is "typically not a proper issue for resolution on summary judgment"); *see also, 60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432 (6th Cir.1987) (observing that "the likelihood of self-serving testimony and the necessity for the fact-finder's credibility determinations" make summary judgment inappropriate when state of mind is at issue); *United States v. 3234 Washington Ave. N.*, 480 F.3d 841, 845–46 (8th Cir.2007) (denying summary judgment where non-moving party's "evidence put the overall credibility of the [movant's] witnesses squarely at issue."); *Securities & Exch. Comm'n v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978)(the courts have long recognized that summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved); *Strickland v. Norfolk Southern Railway Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012)(where a fact-finder is required to weigh a deponent's credibility, summary judgment is simply improper); *United States v. $17,900 in United States Currency*, 859 F.3d 1085, 1091 (D.C. Cir. 2017) (on a motion for summary judgment, "the court may not make credibility determinations or otherwise weigh the evidence").

And when the circumstances are conducive to lying, well-supported suspicion of dishonesty may serve as a

legitimate basis for the factfinder's reasonable inferences concerning the ultimate facts at issue. See *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir.2009). As discussed above, when others listened to the tapes of the 911 calls, they formed a strong belief that Deanna and Vickie were minorities calling about domestic violence. ROA.5494. Thus, it was erroneous for the district court to have disregarded disputed facts on Defendants' discriminatory intent and knowledge of Petitioners' status in granting summary judgment. "[D]irect evidence of improper motive is usually difficult, if not impossible, to obtain. Requiring direct evidence would effectively insulate from suit public officials who deny an improper motive in cases such as this." *Tompkins v. Vickers*, 26 F.3d 603, 609 (5th Cir.1994) (circumstantial evidence of an illegitimate intent overcomes a public official's claim of qualified immunity).

Moreover, as discussed in *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir.1991) regarding the mandate that credibility determinations be solely the province of the jury,

> Only through live cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility. **A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception**; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: "that he fidgets when answering critical questions, his eyes shift from the floor to the

> ceiling, and he manifests all other indicia traditionally attributed to perjurers."

Id. at 1265 (quoting *Anderson*, 477 U.S. at 279 (Rehnquist, J., joined by Burger, C.J., dissenting).

Here, however, both the district court and the Fifth Circuit presumed as true and credible the Individual Defendants testimony regarding whether they knew Petitioners' race, sex and status and intended to discriminate on those bases. Thus, as this case illustrates, the Fifth Circuit has inflexibly applied a new standard –a presumption of credibility or deemed-credible – to a defendant's denials, even where (as here) the record overwhelmingly confirms the incredulousness of defendants' self-interested denials. The panel's affirmation of a new unwarranted "deemed-credible" rule establishes a circuit where—unlike other circuits—courts can ignore conflicting evidence through the truth-distorting lens of a defendant's self-interested denials without requiring a jury's fact-finding. Indeed, this new rule is even in conflict with prior Fifth Circuit holdings. *See, e.g. Thomas v. Great Atl. & Pac. Tea Co*., 233 F.3d 326, 331 (5th Cir. 2000) (reversing summary judgment where circumstantial evidence offered by non-moving party raised genuine issue of fact as to the credibility of moving party's witnesses who had motive to lie, because "when questions about the credibility of key witnesses loom as large as they do here, summary judgment is inappropriate").

Indeed, the problems with the Fifth Circuit opinion run even deeper, thereby greatly augmenting the potential damage that flows from its flawed decision.

The panel commits a further serious error in concluding that "Plaintiffs fail to identify evidence in the record disputing the fact that Individual Defendants were not aware of Deanna's or Vickie's race or socioeconomic background." App. 21. In doing so, the panel not only discounted, but ignored, conflicting evidence establishing material fact disputes. For instance, according to an affidavit, the August 17, 2012, 911 audio tape was played in a room of people of all ages and ethnicities and they were able to form a strong belief that Deanna was a minority female calling about a domestic violence attack. The listeners also understood that Deanna was frightened, begging for help, and knew her domestic attacker. ROA.5494. Anyone listening to the tape (ROA.4405) can determine whether a reasonable inference can be drawn that Deanna was a minority domestic violence victim. The call also evinces that Deanna knew her attacker and this was a domestic violence call. ROA.5299-5301; ROA.4405. Thus, this undisputed evidence confirms what everyone who listened to the recording was able to determine - Deanna was a domestic violence victim whose attack was in progress. Petitioners invited the Fifth Circuit to listen to Deanna's 911 telephone call (ROA.4405) where it could have affirmed that it creates issues of material fact with what the Individual Defendants contend they could not ascertain from listening to the call. Vickie's August 19, 2012, 911 tape was also a part of the record (ROA.5685) and could have confirmed the same thing.

Further, although Hopkins claims she did not know that Deanna lived in a minority neighborhood, evidence confirms this is a minority neighborhood (ROA.5432)

and there was evidence that Deanna's neighborhood was well-known to have mostly minority residents. ROA.5495. Despite this contradictory testimony, the panel erroneously concluded that there was no conflicting evidence. App. 21. Thus, review is necessary to reaffirm the principles announced in the Court's trilogy and disavow the Fifth Circuit's new "deemed credible" rule.

III. The District Court and the Fifth Circuit Acknowledge, But Ignore, The Evidence of City-Wide Discrimination.

Petitioners presented substantial evidence that the City's 911 domestic violence practices at the time were discriminatory. Indeed, the district court acknowledged that the evidence establishes that the City had a custom of selectively denying assistance to domestic violence victims such as Ms. Cook,

> Here, Plaintiffs produce evidence sufficient to show that the City, at the time of the incident at hand, had a custom of providing less protection in 911 call taking on the bases of race, socioeconomic background, or status as a domestic violence victim. Plaintiffs provide this evidence in the form of citizen complaints, statements from the Mayor of Dallas, statements from other former 911 call operators, confirmed incidents of lost files and misplaced paperwork involving family violence, subsequent changes to City policies, and a review of the City's response times to 911 priority calls.

App.46. When applying the analysis in *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000), the Fifth Circuit concluded that Plaintiffs have "produce[d] evidence sufficient to [raise a material-fact dispute] that the City, at the time of the incident at hand, had a custom of providing less protection in 911 call taking on the bases of …[gender] and status as a domestic violence victim." App.17. In doing so, the Fifth Circuit noted,

> Considering the record in the light most favorable to Plaintiffs, we recognize that the City made changes to its policies regarding response procedures for domestic violence complaints in the years following Deanna's death; the fact that public officials acknowledged that the City's policies were not working to protect victims of domestic violence; the evidence of misplaced paperwork and domestic violence cases that went unattended to by law enforcement; and the disciplinary actions against the call-center employees.

App. 17-18.

In other words, the evidence that the City, and its 911 unit, had a longstanding custom of selectively denying protective services to domestic violence victims such as Ms. Cook, certainly entitled Petitioners to a jury trial, where a jury could consider whether Defendants' conduct was consistent with the City's discriminatory practices. But, despite this overwhelming and undisputed evidence, the Fifth Circuit never viewed this evidence in the light most favorable to Plaintiffs, concluding "Plaintiffs have not

shown that these customs or policies were motivated by a desire to discriminate against women." App.18. To reach this result, the Fifth Circuit had to make an "assumption" regarding the City's motivation, opining, "[i]f anything, the actions and statements of the City's officials regarding domestic violence following Deanna's death demonstrate the opposite of intentional discrimination." App. 18.

Such assumption violates this Court's summary judgment principles and should lead to review and remand of this action.

IV. The Fifth Circuit's Blatant Refusal to Recognize The State-Created Danger Theory Under Section 1983 Conflicts With other Circuits, most of which Recognize These Due Process Violations.

The Fifth Circuit remarked "'[i]t's true that Deanna might have a viable claim for violation of her due process rights if this circuit recognized the 'state-created danger theory,' which can make the state liable under § 1983 if 'it created or exacerbated the danger' of private violence against an individual.'" App 13. The district court also acknowledged, "some jurisdictions have endorsed the "state-created danger theory." App.77. Yet the Fifth Circuit wrote, "'this circuit does not recognize the state-created danger theory, and we decline to do so today, despite Plaintiffs' urging that '[t]his is that case.'" App.13.

In choosing not to recognize Deanna's due process rights under this theory, the Fifth Circuit created a direct conflict among the courts of appeals and deprives

federal litigants of constitutional rights that she would have in other circuit courts of appeal. Notably, this is an about-face from the Fifth Circuit's previous practice of avoiding plainly rejecting the "state-created danger" theory. *See Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012); *see also Morin v. Moore*, 309 F.3d 316, 321 (5th Cir. 2002) ("[W]e neither adopted nor rejected the state created danger theory."); *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 313 (5th Cir. 2002) (same).

Instead, the Fifth Circuit previously stated that it had not yet accepted the theory, while simultaneously analyzing the facts before it and holding that they did not meet the requirements even under the "state-created danger" theory. *Accord Doe*, 675 F.3d at 865 ("Although we have not recognized the theory, we have stated the elements that such a cause of action would require."). Even when sitting en banc, the Fifth Circuit had actively avoided expressly rejecting or accepting the theory. *See id.* ("We decline to use this en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory.").

Nevertheless, following this Court's ruling in *DeShaney*, eight other courts of appeal have agreed that a state actor may be liable for action that creates or increases danger to an individual under *DeShaney*. *See, e.g., Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001) ("We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from

third-party violence when . . . officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066–67 (6th Cir. 1998) ("We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable 'special danger,' giving rise to liability under § 1983."); *Kneipp v. Tedder,* 95 F.3d 1199, 1211 (3d Cir. 1996) ("[W]e hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983."); *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995) ("While state actors are generally only liable under the Due Process Clause for their own acts and not for private violence . . . there are two recognized two exceptions to this rule: (1) the special relationship doctrine; and (2) the 'danger creation' theory."); *Reed v. Gardner,* 986 F.2d 1122, 1127 (7th Cir. 1993) (holding that "officers may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger"); *Dwares v. City of New York,* 985 F.2d 94, 98–99 (2d Cir. 1993) ("We read the *DeShaney* Court's analysis to imply that . . . an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights."), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993); *Freeman v. Ferguson,* 911 F.2d 52, 54–55 (8th Cir. 1990) (recognizing state-created danger claim where officers ignored victim's pleas for help allegedly at the direction of the police chief);

Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989) (recognizing state-created danger claim where officer's conduct "placed the plaintiff in a position of danger").

Notably, the Ninth Circuit Court of Appeals made clear that "the 'state-created danger' doctrine predates *DeShaney*," which is "more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source." *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006). The Eleventh Circuit, after acknowledging the theory in 1989, too has retracted to a position that causes confusion. *Compare Cornelius v. Town of Highland Lake*, 880 F.2d 348, 354–55 (11th Cir. 1989) *with White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999) (the only circuit to hold the "state-created danger" theory was no longer good law after acknowledging it because of this Court's ruling in *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992)). And following the Fifth Circuit's previous practice, the First and Fourth Circuits have also discussed but avoided accepting or rejecting the theory. *See Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005) ("This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged."); *Pinder v. Johnson*, 54 F.3d 1169, 1175–76 (4th Cir. 1995) (en banc).

But here, the Fifth Circuit has finally made a decision on this theory and created a circuit split by refusing to recognize this theory in any form. App. 13. Ignoring the circuit's previous jurisprudence, the panel, referencing *Beltran v. City of El Paso*, 367 F.3d 299,

307 (5th Cir. 2004), stated that the Fifth Circuit has "consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented." App. 13. Instead of analyzing whether Deanna pled sufficient facts for a claim, the panel dismissively held that Deanna "might have a viable" claim were it not for its decision to decline to recognize the state-created danger theory.

The panel stated that "Deanna might have a viable claim for violation of her due process rights if [the Fifth] circuit recognized 'the state-created danger theory.'" App 13. Eight other circuits have expressly accepted the "state-created danger" theory, interpreting *DeShaney* as allowing for claims absent limitations on freedom provided, inter alia, the state actor created or increased the danger to an individual. *See, e.g., Butera,* 235 F.3d at 651; *Kallstrom,* 136 F.3d at 1066–67; *Kneipp,* 95 F.3d at 1211; *Uhlrig,* 64 F.3d at 572; *Reed,* 986 F.2d at 1127; *Dwares,* 985 F.2d at 98–99; *Freeman,* 911 F.2d at 54–55; *Wood,* 879 F.2d at 589–90. Although the Fourth Circuit recognizes the state created danger theory, its danger creation test would require a restraint on liberty that squarely conflicts with other federal court of appeals decisions. *Pinder* 54 F.3d at 1175("Pinder was never incarcerated, arrested, or otherwise restricted in any way").

Nevertheless, the Fifth Circuit panel did not even have to look to the plethora of examples these courts of appeal gave to decipher a standard for this theory of due process violations. The Fifth Circuit had previously plainly "stated the elements that [a "state-created

danger" theory] cause of action would require." *See Doe*, 675 F.3d at 865. According to the Fifth Circuit, sitting en banc, the panel in *Scanlan v. Texas A&M University*, 343 F.3d 533, 537–38 (5th Cir. 2003), "explained that the state-created danger theory requires 'a plaintiff [to] show [1] 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.'" *Doe*, 675 F.3d at 865.

Here, the district court had evidence that Defendants continued the practice of ignoring the severity of domestic violence by snubbing Deanna's repeated pleas to arrest her abuser prior to the day of her death. As shown in the police reports in the summary judgment record, during the rare occasions when police came to Deanna's home, they did not arrest her abuser. Sometimes police simply gave him a ride around the corner or shooed him away. These actions conveyed the unmistakable message to her ex-husband that police would not take actions against him, which gave him license to reoffend and limited Deanna's freedom – becoming a prisoner in her own home. By emboldening the ex-husband with their cavalier attitude towards his violence, the City placed Deanna at a greater risk of domestic violence than she would have faced had they done nothing. Moreover, the egregious delay in dispatching police on August 17, 2012, while leaving the attacker alone in Deanna's house as the 911 operator hung up in Deanna's face, further restrained Deanna's ability to escape the attacker's grasp and her right to life and liberty.

Legal scholars analyzing the doctrine widely reach the conclusion that the Court must step in to resolve this circuit conflict. Chemerinsky has commented that, "[o]ne would think, given the large volume of litigation in this area and the splits among the circuits that the Supreme Court would have stepped in." Erwin Chemerinsky, The State-Created Danger Doctrine, 23 TOURO L. REV 1, 26 (2007). Others have observed that the circuit splits are particularly troublesome for public school officials. Jeff Sanford, The Constitutional Hall Pass: Rethinking the Gap in §1983 Liability That Schools Have Enjoyed Since DeShaney, 91 Wash. U. L. Rev. 1633, 1640 (2014) ("But besides these broad themes, and despite over two decades of case law, there still exists nontrivial inconsistencies in the ways circuit courts analyze state created dangers."); see also Laura Oren, Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same, 16 Temple Pol. & Civ. Rts. L. Rev. 47, 63 (2006) ("As the inconsistencies and irrationalities in the special danger cases become more and more troublesome, they create dialectical contradictions . . .").

But here the Fifth Circuit has blatantly disregarded *DeShaney*' s recognition of this due process violation and other circuit courts of appeal that apply this doctrine. By reviewing this case, this Court can provide predictability and uniformity among the courts in recognizing and applying the state-created danger theory of due process violations.

V. The Fifth Circuit's Opinion So Departs from the Accepted and Usual Course of Judicial Proceedings to Warrant this Court's Exercise of its Supervisory Powers.

Further, this case presents the Court with an appropriate opportunity to determine that, pursuant to U.S. Supreme Court Rule 10(a), the Fifth Circuit "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory powers." *See e.g., Nguyen v. United States*, 539 U.S. 69, 73-74 (2003). Indeed, it is difficult to fathom a case where a circuit court abdicated its sanctified and sacred role as "neutral arbiter" more blatantly and egregiously - and contrary to well-settled summary judgment principles - than the Fifth Circuit did in this case.

As discussed herein, the manifest injustice of the Fifth Circuit's opinion is obvious and transparent. Indeed, the Fifth Circuit eviscerated, rather than merely violated, summary judgment principles this Court meticulously established. The Fifth Circuit, to achieve that goal, had to advance a new approach to classifying the strength of evidence, place undue weight on testimony from interested witnesses, and ignore material conflicting evidence. The Fifth Circuit, in affirming the district court's rulings acted more like Defendants' advocates than an impartial arbiter determining a summary judgment motion. By dismissing material evidence as outlier, and presuming the credibility of Defendants' testimony, the Fifth Circuit engaged in judicial overreach and acted in direct opposition to the extremely important principles

this Court established in evaluating summary judgment motions. This Court can and should recognize this misuse of judicial authority and remedy the wrong committed in this case. See *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) ("This Court … has a significant interest in supervising the administration of the judicial system" particularly in matters "relate[d] to the integrity of judicial processes.").

VI. The Fifth Circuit's Decision is Simply Erroneous.

Finally, the Fifth Circuit erred in affirming summary judgment. In resolving qualified immunity claims, although the burden of proof may shift to a plaintiff once an official pleads qualified immunity, at the summary judgment stage, the courts must view facts in the light most favorable to the nonmoving party. *Wilkie v. Robbins*, 551 U.S. 537, 543 n. 2 (2007)). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby* 477 U.S. at 255. Here, neither the district court nor the Fifth Circuit applied these principles.

The district court's determination that defendants were entitled to qualified immunity rested entirely on its characterization of each of the Individual Defendants' testimony that each did not have "discriminatory intent." App. 64-68. This characterization was based on the district court's inaccurate conclusion that defendants allegedly "did not even know about the socioeconomic status of Deanna's residence, Deanna's race, or Deanna's status as a domestic violence victim." App. 62. However, these

conclusions were plainly disputed by Plaintiffs' submission discussed *supra*. Further, the only way the district court could conclude that Defendants had no "discriminatory intent" was to weigh the defendants' credibility regarding their statements as to their alleged lack of discriminatory intent and ignore disputed facts that Defendants were aware of Deanna's status and the City's discriminatory customs at the time of the alleged discrimination.

As the record established, the parties dispute key facts relating to whether the Individual Defendants were aware of Petitioners' race, gender, status as a domestic violence victim, and socioeconomic background. These include evidence whether the Individual Defendants were unable to ascertain Petitioner's race, gender, status as a domestic violence victim, and socioeconomic background from the 911 call as Hopkins testified, but that other listeners emphatically disputed; whether the Individual Defendants had access to information reflecting Petitioners' race and status, when the record demonstrated they did; and whether the Individual Defendants acted, as others in the 911 department, to discriminate against Petitioners because of their race, gender, status as a domestic violence victim, and socioeconomic background.

If the evidence had been construed in Petitioners' favor, as it should have been, a jury could listen to the 911 tape and easily find that it was obvious that Deanna was a minority victim of a domestic crime and that Vickie was calling regarding the same. It could find that the Individual Defendants had information in

front of them establishing Petitioners' race, gender, status as a domestic violence victim, and socioeconomic background. It could find that the Defendants' acts and omissions were "because of" Petitioners' race, gender, status as a domestic violence victim, and socioeconomic background, as had been demonstrated by the City's customs. Above all, a jury could decide that the Individual Defendants acted as they did, as April Sims stated regarding the 911 department, because of Petitioners' race, gender, status as a domestic violence victim, and socioeconomic background.

The Fifth Circuit's failure even to consider the competing evidence and material fact disputes is itself grounds for reversal.

CONCLUSION

By granting this writ, this Court can instruct the lower courts to recognize the state-created danger theory of due process violations, as other circuit courts of appeal have done. In addition, given the Fifth Circuit's establishment of new and prejudicial summary judgment principles, clear violation of this Court's summary judgment principles and this Court's unquestioned authority to maintain the integrity of judicial proceedings in the lower federal courts, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to correct the material errors made.

Respectfully submitted,

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