No. _____

In The
Supreme Court of the United States

JASON FOWLER and MICAH PERKINS,

Petitioners,

v.

BRITTANY IRISH, Individually and as Personal Representative of the Estate of Kyle Hewitt, and KIMBERLY IRISH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), this Court held that a state actor generally has no duty to protect against private danger. Based on dicta in *DeShaney*, some circuits have recognized an exception and imposed a duty to protect when a state actor takes an affirmative act that creates or exacerbates the private danger. Until now, the First Circuit had never recognized this "state-created danger doctrine" and, in one case, held that "necessary law enforcement tools" did not trigger a duty to protect. Here, the First Circuit recognized the state-created doctrine for the first time and held that it applied when Petitioners, two police detectives, left a voicemail message seeking to interview a sexual assault suspect and then failed to protect Respondents from the suspect.

The question presented is: Did the First Circuit err in denying qualified immunity to Petitioners where neither this Court nor the First Circuit had ever before recognized the state-created danger doctrine, the First Circuit had previously held that use of necessary law enforcement tools could not provide the requisite affirmative act for application of the doctrine, there is a split among the circuits regarding both the existence and necessary elements of the doctrine, and in no identified case did a court apply the state-created danger doctrine in sufficiently analogous factual circumstances to have put Petitioners on notice that they assumed a constitutional duty to protect by leaving a voicemail for a suspect or that such an act was so egregious as to "shock the conscience?"

PARTIES TO THE PROCEEDING

Petitioners Detective Micah Perkins and Detective Jason Fowler of the Maine State Police were the Defendants-Appellees in the court of appeals.

Respondents Brittany Irish, individually and as personal representative of the estate of Kyle Hewitt, and her mother, Kimberly Irish, were the Plaintiffs-Appellants in the court of appeals.

RELATED CASES

- *Irish v. Maine*, No. 1:15-cv-00503-JAW, U.S. District Court for the District of Maine. Judgment entered September 12, 2016.
- *Irish v. Maine*, No. 16-2173, U.S. Court of Appeals for the First Circuit. Judgment entered March 1, 2017.
- *Irish v. Fowler*, No. 1:15-cv-00503-JAW, U.S. District Court for the District of Maine. Judgment entered February 3, 2020.
- *Irish v. Fowler*, No. 20-1208, U.S. Court of Appeals for the First Circuit. Judgment entered November 5, 2020.

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The opinion of the court of appeals (App. 1-31) is reported at 979 F.3d 65. The opinion of the district court granting petitioners' motion for summary judgment (App. 32-182) is reported at 436 F. Supp. 3d 362. The opinion of the court of appeals vacating the district court's order of dismissal (App. 183-198) is reported at 849 F.3d 521. The opinion of the district court granting petitioners' motion to dismiss (App. 199-232) is reported at 2016 WL 4742233.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on November 5, 2020, denying qualified immunity to the Petitioners. App. 1-31. This petition is being filed within 150 days thereafter. *See* Order of Supreme Court dated March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See also Plumhoff v. Rickard*, 572 U.S. 765, 771-72 (2014) (pretrial orders denying qualified immunity are immediately appealable).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents seek damages under 42 U.S.C. § 1983 for an alleged violation of their rights under the Fourteenth Amendment. In relevant part, the Fourteenth Amendment states:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.
>
> Section 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. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Factual Background

In the spring of 2015, Brittany Irish was having romantic relationships with both Kyle Hewitt, with whom she was living in Bangor, Maine, and with Anthony Lord. Mr. Hewitt moved out for a brief time in the early summer, but, by mid-July, he and Ms. Irish were again living together. Ms. Irish was also having regular intimate relations with Mr. Lord. App. 37-39.

On July 14, 2015, Ms. Irish told Mr. Lord she wanted to have a baby with him. App. 39. That evening, she sent Mr. Lord a text message stating that she

would likely come see him later that evening. She then sent Mr. Hewitt a text message stating that she was not seeing Mr. Lord that night. App. 39-40.

At approximately 10:00 p.m. on July 14, Ms. Irish left to go meet Mr. Lord in a grocery store parking lot in Orono, Maine. Upon her arrival, she told Mr. Lord that she had a kidney infection, and he offered to drive her in his car to a hospital emergency room in Lincoln, Maine. Ms. Irish got into Mr. Lord's car. App. 40-41. The next morning, Mr. Lord brought Ms. Irish back to her car in the grocery store parking lot. The two then drove, in separate cars, to a wireless telephone store in Bangor, Maine, where they spent approximately fifteen minutes together. App. 41-42. Later that morning, Ms. Irish sent Mr. Lord a text message stating that she loved him, and she called him four times in the afternoon and early evening. App. 42.

At noon on July 15, 2015, Maine State Police ("MSP") Sergeant Darrin Crane received a telephone call from a Bangor Police Department ("BPD") officer stating that Ms. Irish had reported to the BPD that Mr. Lord had abducted her on the night of July 14, kept her against her will, and raped her several times. App. 42. Sergeant Crane assigned the case to Detectives Perkins and Fowler and informed Detective Perkins that Mr. Lord was a registered sex offender. App. 43. Subsequently, Sergeant Crane received the BPD's report regarding the matter. The report stated that Ms. Irish told a BPD officer that Mr. Lord had threatened to "cut her ear to ear" if Ms. Irish "did not stop lying to him." App. 44.

Later that afternoon, Detectives Perkins and Fowler arrived at a hospital in Bangor where Ms. Irish was completing a rape kit exam. App. 45-46. They had a brief discussion with Ms. Irish, and then met with Ms. Irish a second time later in the day. App. 46-47. Ms. Irish told the detectives that she had been dating Mr. Lord for two to three months but that the relationship had ended recently. She said that on the evening of July 14, she had met Mr. Lord in the grocery store parking lot to exchange some personal items and that Mr. Lord kidnapped her. She told the detectives that Mr. Lord choked her with a seatbelt, took her to two camps, at one of which Mr. Lord bound her wrists and feet with window blind cord and sexually assaulted her multiple times. She stated that Mr. Lord dropped her off at her car in the grocery store parking lot between 11:00 and 11:15 a.m. on July 15 and that she then drove to her apartment in Bangor. App. 47-49. She did not disclose to the detectives that she and Mr. Lord drove in separate cars to the wireless telephone store, arriving there at approximately 10:30 a.m. During this meeting, Detective Fowler could see both of Ms. Irish's wrists and did not observe any marks on them consistent with being bound, although he conceded that marks would not necessarily be visible. App. 49.

Ms. Irish claims that she told the detectives at the hospital that she was scared of Mr. Lord and that he would be angry and do "terrible violence" to her and her children if he found out she went to the police. App. 51. While Petitioners dispute that Ms. Irish ever made such a statement, it was taken as true for purposes of

summary judgment. Ms. Irish declined to complete a written statement or give the detectives her clothing, stating that they would not find any evidence on it. App. 49-50. Detectives Perkins and Fowler asked Ms. Irish to come to the police barracks the following day with a written statement and the clothes she had been wearing during the alleged assaults. App. 53-54.

That evening, after leaving the hospital, the detectives drove toward Benedicta, Maine to locate the two camps at which Ms. Irish claimed Mr. Lord sexually assaulted her. App. 54. The detectives located the first camp Ms. Irish had described and found tire tracks and two fingerprints on a window. A fingerprint analysis would later show that they were Mr. Lord's fingerprints. App. 55-56. At 10:20 p.m., the detectives located a road that they suspected led to the second camp Ms. Irish had described, but, because it was dark, they were not able to locate the camp. App. 58.

On the morning of July 16, 2015, Ms. Irish called Mr. Lord three times. App. 59. At 1:00 p.m., Ms. Irish arrived at the offices of the MSP's Major Crimes Units in Bangor, and her friend, Amber Adams, met her there. When Ms. Irish arrived, she had not completed her written statement, as Detectives Perkins and Fowler had requested the day before. The detectives gave Ms. Irish time to work on her statement and, in the meantime, they conducted a recorded interview of Ms. Adams. App. 59-60. Ms. Adams told the detectives that Ms. Irish was a "pathological liar" and that she believed Ms. Irish had fabricated the sexual assault allegations out of fear that Mr. Hewitt would leave her if

he learned that she had consensual sex with Mr. Lord. Ms. Adams noted that earlier that day, Ms. Irish had both called Mr. Lord and sent him a text message saying that she loved him. She also showed the detectives text messages she had received from Mr. Hewitt the previous day in which Mr. Hewitt expressed doubts both about Ms. Irish's allegations that Mr. Lord had sexually assaulted her and her credibility in general. App. 60-61.

At 4:00 p.m., Detective Perkins was on his way to check on Ms. Irish's progress with her written statement when Ms. Adams intercepted him and told him that the statement Ms. Irish was writing was different than what Ms. Irish had told the detectives, Ms. Adams, and the hospital nurse the day before. App. 62. Ms. Irish finished her statement shortly thereafter, and Detectives Perkins and Fowler reviewed it. Nowhere in her ten-page written statement did Ms. Irish make any reference to Mr. Lord having threatened to hurt her or her children if she reported him to the police. App. 62-63.

After reviewing the statement, Detectives Perkins and Fowler began a recorded interview of Ms. Irish. During the first three minutes of the interview, Detective Perkins told Ms. Irish that he needed to obtain a statement from Mr. Lord and was planning on calling him on his cellphone. Ms. Irish stated that Mr. Lord might not answer the phone, but she otherwise expressed no concern about the plan. App. 64-65. The interview concluded at 5:00 p.m., and Ms. Irish left the MSP offices shortly afterwards. When she left, she

understood that Detective Perkins would be calling Mr. Lord on his cellphone later that evening. At no time while at the MSP offices did Ms. Irish express any concern about the detectives calling Mr. Lord, nor did she claim that Mr. Lord had threatened to hurt her or her children if she reported him to the police. App. 65-66.

At 6:17 p.m. on July 16, 2015, Detective Perkins placed a recorded call to Mr. Lord's cellphone, using the number that Ms. Irish had provided him. When Mr. Lord did not answer, Detective Perkins left the following voicemail message:

> Hello, Anthony. This is Detective Perkins. I'm giving you a call here from the Maine State Police. I'm looking to see if there's a time that we could speak with you. Phone number you can call us back—the dispatch—is 973-3700. 973-3700. I'll be right here. Just let them know Detective Perkins if you don't mind calling back and I will try you back in a few moments. Thank you. Goodbye.

App. 67-68.

At 6:30 p.m., Ms. Irish returned to the MSP offices to provide the detectives with the clothes she had been wearing during the alleged sexual assaults. It is disputed, but was taken as true for purposes of summary judgment, that Ms. Irish met Detective Fowler in the parking lot and told him that she was afraid that Mr. Lord would hurt her if he learned she had gone to the police. App. 73-74.

Later that night, Detective Perkins received a phone call from another MSP detective advising him that a barn was on fire in Benedicta, Maine. Detective Perkins was concerned that Mr. Lord might have set the fire, and he and Detective Fowler began driving from Bangor to Benedicta. App. 77-78. While en route, Detectives Perkins and Fowler received a call from Ms. Irish advising them that it was her parents' barn that was on fire and that someone had heard Mr. Lord say earlier that evening that he was "going to kill a fucker." Ms. Irish also told the detectives that she was going to stay at her parents' house that night (along with Mr. Hewitt) and that she was concerned about her children's safety (who were staying elsewhere). App. 79.

Sergeant Crane instructed two MSP troopers to go to the residence of Mr. Lord's mother in Houlton, Maine, but the troopers reported that no one answered the door. At 10:05 p.m., Detective Perkins directed that a state-wide teletype be issued to "stop and hold" Mr. Lord and to contact Detective Perkins if Mr. Lord was located. Subsequently, Detective Perkins added a "use caution" warning to the teletype. App. 83-84.

When Detectives Perkins and Fowler arrived at the scene of the barn fire, Detective Perkins immediately requested that a K9 unit be dispatched to search for a track. Detectives Perkins and Fowler were advised that the fire had a "suspicious human element," and Detective Perkins concluded that Mr. Lord was most likely responsible. App. 86-87. Detective Perkins called the MSP's Regional Command Center in Houlton, Maine and asked that a full criminal history check be

run on Mr. Lord. From this, Detective Perkins learned that Mr. Lord was on probation for domestic violence and was a convicted felon. Shortly before midnight, Detective Perkins called Mr. Lord's probation officer, and the probation officer, after unsuccessfully trying to contact Mr. Lord, gave Mr. Lord's last known address to Detective Perkins. App. 87-88.

At midnight, Ms. Irish called Detective Perkins and asked that the MSP post an officer at her parents' house, where she and Mr. Hewitt would be staying for the night. One or more times during the night of July 16 and early morning of July 17, Ms. Irish's mother, Kimberly Irish, asked unidentified members of the MSP whether an officer could stay at her house or a police car could be left outside. She was told that the MSP did not have the manpower to post an officer and was not able to leave a car. App. 88-90. At some point during the early morning of July 17, Kimberly Irish called the "800 number" for the MSP and told either the person who picked up the phone or the person to whom she was transferred that she was going to bring her family down to the police station and park in the parking lot. The unidentified person with whom Kimberly Irish spoke (who was not Sergeant Crane, Detective Perkins, or Detective Fowler) said that she could not do this as "that would be a very dangerous thing to do" and "leav[ing] the house . . . would be a dangerous mistake," and promised that if Kimberly Irish had any problems, she should call the MSP who had "officers in the vicinity" and would "take care of it." App. 90-91.

At 12:30 a.m. on July 17, Detectives Perkins and Fowler, Sergeant Crane, and an MSP trooper went to the house of Mr. Lord's uncle, which was the address listed for Mr. Lord on the sex offender registry and the address provided by Mr. Lord's probation officer. The uncle told the officers that Mr. Lord had not been there for at least two weeks. App. 92.

Later, Detectives Perkins and Fowler met with Sergeant Crane, and Detective Perkins told him about Ms. Irish's request for overnight security. Sergeant Crane advised Detective Perkins that the MSP did not have the manpower to provide security. App. 93. At approximately 2:00 a.m., Ms. Irish called Detective Perkins to again request protection. Detective Perkins told her that he had discussed her request with his supervisor (Sergeant Crane) and that no security detail would be posted at her parents' house. App. 94-95. Detectives Perkins and Fowler remained in the area until 3:00 a.m. App. 97.

In the early morning of July 17, Mr. Lord entered the Irish home, shot and killed Mr. Hewitt, shot and wounded Kimberly Irish, and abducted Ms. Irish.[1] Mr. Lord was arrested on the afternoon of July 17. App. 99.

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[1] Although the court of appeals stated that Mr. Lord sexually assaulted Ms. Irish after abducting her, App. 2, this is not supported by the record.

B. Initial District Court Proceedings

On December 10, 2015, Ms. Irish, individually and as personal representative of the estate of Mr. Hewitt, along with Kimberly Irish (Respondents), filed a lawsuit in the United States District Court for the District of Maine alleging claims under 42 U.S.C. § 1983 against the State of Maine and the Maine State Police. Respondents, apparently unaware of the identities of the officers who had been involved in the matter, also named ten "John and/or Jane Does State Police Officers." Respondents alleged that defendants violated the plaintiffs' substantive due process rights by failing to protect them from Mr. Lord. Their claim was predicated on the state-created danger doctrine. The state created the danger, they maintained, by leaving the voicemail message for Mr. Lord.

The district court granted the defendants' motion to dismiss. App. 199-232. The court concluded that the State and the Maine State Police are not "persons" within the meaning of § 1983 and, in any event, sovereign immunity barred the claims. App. 217-20. With respect to the claims against the unidentified officers, the court recognized that state actors generally have no constitutional duty to protect against harm caused by private individuals. The court acknowledged that courts in other circuits "have determined that in limited situations and under particular facts, a state actor may be found to have committed a substantive due process violation where the state actor creates the danger to an individual and fails to protect the individual from the danger." App. 223-24. This "state-created danger

theory applies only if, inter alia, a state actor takes affirmative acts to create or exacerbate the danger posed by third parties." App. 224-25. The court noted that while the First Circuit has discussed the state-created danger theory, it had never adopted it. App. 224.

The district court concluded that even if the state-created danger theory were viable, the First Circuit's decision in *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005), foreclosed it from applying here. There, a girl was murdered after officers and prosecutors identified her as a witness to a fatal shooting and took her statement, and the First Circuit held that these "necessary law enforcement tools" could not form the basis for a state-created danger claim. *Id*., at 37. The district court found that from *Rivera*, "it follows that seeking to interview Mr. Lord, an alleged perpetrator of a sexual assault, was a 'necessary law enforcement tool' and is not a basis to impose constitutional liability on the state police officers." App. 227.

The district court also concluded that even if the Respondents had stated a state-created danger claim, the unidentified officers would be entitled to qualified immunity because they did not violate a clearly established constitutional right of which a reasonable officer would have been aware. App. 229-30. The court stated that "any reasonable state police officer reading *Rivera* would determine that contacting and interviewing a person accused of sexual assault would not violate the accuser's substantive due process rights, even if doing so could increase the risk to the accuser." App. 230.

C. The First Appeal and Remand to the District Court

On appeal, the First Circuit vacated the dismissal as to the unnamed officers. App. 183-98. The court concluded that more facts were necessary to evaluate the state-created danger claim, including whether leaving a voicemail message for Mr. Lord was contrary to police protocol and training. App. 193-98.

On remand, the Respondents amended their complaint to add Sergeant Crane and Petitioners, Detectives Perkins and Fowler. Following discovery, defendants moved for summary judgment, which the district court granted. App. 32-182. The court implicitly recognized the state-created danger doctrine, and, because the First Circuit had not yet adopted the theory and thus never set forth the elements that must be satisfied, the court adopted the Third Circuit's test for evaluating state-created danger claims. App. 147. In that circuit, the elements are:

> (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.

App. 144 (citing *Sanford v. Stiles*, 456 F.3d 298, 304-05 (3d Cir. 2006)). The district court held that there were triable issues of fact on each of these elements with respect to the claims against Detectives Perkins and Fowler, with the voicemail constituting the requisite affirmative act for the fourth element. App. 147-151. Because there was nothing to suggest that Sergeant Crane played any role in the decision to leave the voicemail, though, the district court held that Respondents failed to make out a state-created danger claim against him. App. 169.

The court went on to conclude that Detectives Perkins and Fowler were entitled to qualified immunity. App. 169-81. The court noted that neither this Court nor the First Circuit had ever adopted the state-created danger doctrine and that because there was a "split on the issue" among the courts of appeals that have adopted the doctrine there was no consensus of "persuasive authority." App. 170-75. It noted that while the majority of courts of appeal had adopted the doctrine, the Fifth and Eleventh Circuits had rejected it. App. 173. It further recognized that among the courts of appeals that have adopted it, the doctrine "'can refer to a wide range of disparate fact patterns,'" and circuits have formulated different tests when applying the theory. App. 174. The court stated: "To extrapolate

whether the First Circuit will adopt the majority rule, which among the majority formulations the First Circuit will adopt, and to apply the selected formulation to the facts in this case is a bridge too far." App. 174. The court concluded that because "the state-created danger doctrine was not clearly established at the time of the acts by [Detectives Perkins and Fowler], they are entitled to qualified immunity." App. 175.

D. The Second Appeal

The Respondents appealed the entry of summary judgment in favor of Detectives Perkins and Fowler, but not with respect to the detectives' supervisor, Sergeant Crane. The First Circuit vacated the award of summary judgment to Detectives Perkins and Fowler. App. 1-31. The court stated that "[u]nder the state-created danger substantive due process doctrine, officers may be held liable for failing to protect plaintiffs from danger created or enhanced by their affirmative acts" and that it would now "for the first time join nine other circuits in holding that such a theory of substantive due process liability is viable" in the First Circuit. App. 2. The court further stated that it would "now state the necessary components" for a claim under that doctrine:

> In order to make out a state-created danger claim in the First Circuit, the plaintiff must establish:

> (1) that a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff;
>
> (2) that the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public;
>
> (3) that the act or acts caused the plaintiff's harm; and
>
> (4) that the state actor's conduct, when viewed in total, shocks the conscience.
>
> > (i) Where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger. To show deliberate indifference, the plaintiff must, at a bare minimum, demonstrate that the defendant actually knew of a substantial risk of serious harm and disregarded that risk.
> >
> > (ii) Where state actors must act in a matter of seconds or minutes, a higher level of culpability is required.

App. 20. The court did not address application of these elements, but instead simply stated: "We agree with and do not restate the district court's reasoning that a jury could find the plaintiffs' substantive due process rights were violated." App. 21.

The court also concluded that Detectives Perkins and Fowler were not entitled to qualified immunity. App. 22-31. The court stated that "[a] defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis." App. 24. This is because, the court said, when a reasonable officer knows he is violating police procedure, he should also realize that he is violating the Constitution. *Id*. The court found that it did not matter that neither it nor the Supreme Court had ever before recognized the state-created danger doctrine. Rather, it stated that the law can be clearly established when there is a "robust consensus of persuasive authority." App. 25. It then found that there was "widespread acceptance of the state-created danger theory" because nine other circuits had adopted it, such that it was clearly established "that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff." *Id*. The court further concluded that even if two courts of appeals had rejected the state-created danger theory, a "circuit split does not foreclose a holding that the law was clearly established, as long as the defendants could not reasonably believe that we would follow the minority approach." App. 26-27. The court said that it was not necessary to identify "factually similar cases" in order to put Detectives Perkins and Fowler on notice that leaving a voicemail would trigger a constitutional duty to protect, and that instead a "general proposition of law" is sufficient. App. 27-28. The court nevertheless identified two out-of-circuit cases it stated were factually similar but, as will be discussed, involved very different circumstances. App.

28-29. In sum, the First Circuit held that it was clearly established in July 2015 that Petitioners' actions were unconstitutional and that they were thus not entitled to qualified immunity. App. 31.

REASON TO GRANT THE PETITION

THE FIRST CIRCUIT MANIFESTLY ERRED IN ITS APPLICATION OF QUALIFIED IMMUNITY, AND SUMMARY REVERSAL IS APPROPRIATE.

"[T]he Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."). "The Court has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S. Ct. at 551 (cleaned up); *see also City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019) (per curiam) (granting petition for certiorari and reversing lower court's determination that law enforcement officer was not entitled to qualified immunity); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) (same); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam) (same); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam) (same); *Plumhoff*, 572 U.S. at 765 (same); *Wood v. Moss*, 572 U.S. 744 (2014) (same);

Reichle v. Howards, 566 U.S. 658 (2012) (same); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam) (same); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam) (same). Here, the First Circuit clearly erred when it denied qualified immunity to Petitioners, and this Court should grant certiorari and reverse the error.

1. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Put another way, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

An officer should not be subject to liability if the law at the time did not "clearly establish" that the officer's conduct would violate the Constitution. *Brosseau*, 543 U.S. at 198. There need not be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond

debate." *al-Kidd*, 563 U.S. at 741. "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). "[T]he focus is on whether the officer had fair notice that her conduct was unlawful. . . ." *Brosseau*, 543 U.S. at 198. The Court has admonished that to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

This Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. This is because "general statements of the law are not inherently incapable of giving fair and clear warning." *United States v. Lanier*, 520 U.S. 259, 271 (1997). Rather, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

2a. Here, the First Circuit's denial of qualified immunity is flawed for numerous reasons. First, this Court has never recognized the state-created danger doctrine. Rather, the doctrine traces back to a few words of dicta in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). There, the Court held that state officials had no constitutional duty to protect a young boy, Joshua, who they knew was being abused by his father. The Court held that as

a "general matter," "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.*, at 197. The Court recognized that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id*., at 199-200. The court found that Joshua was not in state custody, and noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.*, at 201. "From those simple words—'played no part in their creation' and 'render him any more vulnerable'—sprang a considerable expansion of the law." *Johnson v. City of Philadelphia*, 975 F.3d 394, 398 (3d Cir. 2020). While these words were "seemingly not part of *DeShaney's* holding, lower courts seized on those words to create a new remedy," and "thus was born the 'state-created danger' theory of liability." *Id.*, at 398-99. This Court, though, has never recognized the theory.

Nor, in the more than thirty years since *DeShaney*, had the First Circuit recognized the theory, despite being presented with the opportunity to do so on numerous occasions. *See*, *e.g.*, *Morgan v. Town of Lexington, MA*, 823 F.3d 737 (1st Cir. 2016); *Lockhart-Bembery v. Sauro*, 498 F.3d 69 (1st Cir. 2007); *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71 (1st Cir. 2005); *Rivera*, 402 F.3d at 27; *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997). It certainly would have been reasonable for an officer to

conclude that if the First Circuit had not yet adopted the doctrine, it was not going to. *See McClendon v. City of Columbia*, 305 F.3d 314, 332 n.12 (5th Cir. 2002) ("The reluctance of this court . . . to embrace some version of the state-created danger theory despite numerous opportunities to do so suggests that, regardless of the status of this doctrine in other circuits, a reasonable officer in this circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'").

Moreover, the First Circuit had previously declined to apply the state-created danger doctrine to "necessary law enforcement tools." *Rivera*, 402 F.3d at 27. There, a fifteen-year-old girl witnessed a murder and was threatened with death if she testified. *Id*., at 31. She was murdered after prosecutors and police officers identified her as a witness and took her statement, despite their promise to protect her. *Id*., at 32. The First Circuit concluded that the "necessary law enforcement tools" employed by the prosecutors and officers could not form the basis for a state-created danger claim. *Id*., at 37. Here, the district court, in dismissing Respondents' lawsuit for failure to state a claim upon which relief may be granted, concluded that *Rivera* foreclosed Respondents from premising a state-created danger claim on the voicemail Petitioners left for Mr. Lord. App. 225-27. Alternatively, Petitioners were entitled to qualified immunity because "any reasonable state police officer reading *Rivera* would determine that contacting and interviewing a person accused of sexual assault would not

violate the accuser's substantive due process rights, even if doing so could increase the risk to the accuser." App. 230.

The First Circuit found that *Rivera* was distinguishable because there, the law enforcement tools were performed "appropriately," while here, Respondents claimed that the manner in which Petitioners went about contacting Mr. Lord was "wrongful." App. 19, 21. *Rivera* itself, though, did not draw this distinction, and the district court read *Rivera* as flatly foreclosing Respondents' state-created danger claim premised on the voicemail. The district court did not predict that the First Circuit would someday distinguish between the reasonable and unreasonable use of law enforcement tools, and it is more than a little unfair to expect two law enforcement officers to have predicted this.

Not only did the First Circuit expect Petitioners to recognize *Rivera's* unstated nuance, it also concluded that they should have understood that *Rivera* was a "critical warning bell" that they "could be held liable under the state-created danger doctrine when their affirmative acts enhanced a danger to a witness." App. 27. In *Rivera*, though, the First Circuit referred to the "supposed" state-created danger theory, 402 F.2d at 35, and it declined to apply it where affirmative acts by officers and prosecutors resulted in the murder of a witness. It is impossible to see how Petitioners should have understood from *Rivera* that leaving a voicemail for a suspect, even if the complainant expressed fear of

retaliation, would expose them to constitutional liability.

b. Given that neither this Court nor the First Circuit had ever before recognized the state-created danger doctrine, and the First Circuit's refusal to apply the doctrine in *Rivera*, the First Circuit should have stopped there and concluded that Detectives Perkins and Fowler were entitled to qualified immunity. Instead, though, the court looked at whether decisions from other circuits clearly established that Petitioners' actions were unconstitutional. It is true that this Court has stated that in the absence of controlling authority, a "robust 'consensus of persuasive authority'" can suffice to put an officer on notice that his actions were unlawful. *al-Kidd*, 563 U.S. at 741-42 (quoting *Wilson*, 526 U.S. at 617). It is questionable, though, whether cases from other circuits are relevant to determining whether such a "robust consensus" exists. *See Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) (stating the "general rule" that precedents from other circuits "are usually irrelevant to the 'clearly established' inquiry" and that this rule "makes perfect sense" because while officers should be expected to know the law in their own circuits, "we can't expect officers to keep track of persuasive authority from every one of our sister circuits"); *Garcia v. Does*, 779 F.3d 84, 95 n.12 (2d Cir. 2015) ("We have not been altogether unequivocal as to the relevance of out-of-circuit cases in our assessment of whether a right is clearly established for the purposes of qualified immunity."). The Court, by granting certiorari, could clarify the extent to

which out-of-circuit precedent is relevant to the clearly established inquiry.

Assuming for the sake of argument that it was appropriate for the First Circuit to look to other courts of appeals, there is hardly a "robust consensus" regarding the existence of the state-created danger doctrine, much less the elements necessary for its application. The Fifth Circuit has rejected the doctrine. *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020); *see also Estate of Lance v. Lewisville Indep. Sch. Dist*., 743 F.3d 982, 1002 (5th Cir. 2014) (stating that the Fifth Circuit has "repeatedly noted" the "unavailability" of the state-created danger doctrine "or recognized that it is not viable but dismissed the claim assuming its validity"). The Eleventh Circuit initially recognized the state-created doctrine but later found that the doctrine was "superseded by the standard" in *Collins v. City of Harker Heights*, *Texas*, 503 U.S. 115 (1992). *Waddell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003). The Second Circuit recognizes the doctrine, but it applies only if the government actor affirmatively encouraged or condoned the private violence. *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 428-29 (2d Cir. 2009); *see also Sanchez v. City of New York*, 736 F. App'x 288, 290 (2d Cir. 2018). The Fourth Circuit seems to have recognized the state-created danger doctrine in *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995). But the court emphasized the narrowness of the doctrine and found that it did not apply in that case. *Id*., at 1175 ("It cannot be that the state 'commits an affirmative act' or 'creates a

danger' every time it does anything that makes injury at the hands of a third party more likely."). Since *Pinder*, the Fourth Circuit has "never issued a published opinion recognizing a successful state-created danger claim," and its precedent has instead "emphasized the doctrine's limited reach and the exactingness of the affirmative-conduct standard." *Turner v. Thomas*, 930 F.3d 640, 646 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 905 (2020).[2] So, under controlling law in the Second, Fifth, and Eleventh Circuits, Petitioners' act of leaving a voicemail would not have imposed on them an affirmative duty to protect Respondents, and it is questionable whether it would have done so in the Fourth Circuit.

The Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have recognized some version of the state-created danger doctrine, but they apply different tests. *See Bright v. Westmoreland Cty.*, 443 F.3d 276, 281 (3d Cir. 2006); *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003); *First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago*, 988 F.3d 978, 988-89 (7th Cir. 2021); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005); *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012); *Matthews v. Bergdorf*, 889 F.3d 1136, 1150 (10th Cir. 2018);

[2] The Fourth Circuit applied it in only one unpublished decision, and there a police officer purposely prevented an arrest warrant from being served on a perpetrator of domestic violence, sent the perpetrator text messages with tips on how he could avoid capture, and refused to arrest the perpetrator when he arrived at police headquarters, falsely claiming that the warrant could not be found. *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013).

Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001). Courts and legal scholars have recognized the split in the circuits regarding the existence of the state-created danger doctrine and the confusing and contradictory application of the doctrine in the circuits that have recognized it. *See*, *e.g.*, *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 n.3 (7th Cir. 2007) ("[T]here is considerable variation among the circuits in their application of the state-created danger doctrine."); *McClendon*, 305 F.3d at 324-25 (5th Cir. 2002) ("Those courts accepting some version of this 'state-created danger' theory have applied the exception in a variety of factual contexts, and have adopted a variety of tests in expounding the theory."); *Butera*, 235 F.3d at 653-54 (noting that there is a "lack of clarity in the law" and that while tests developed by courts of appeals share the "key element" of "affirmative conduct by State actors," "they are inconsistent in their elaborations of the concept"); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) ("It is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect."); Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1, 15, 26 (2007) (noting that it is "striking" that "circuits really do have different tests," with a "radical difference" between Fifth Circuit and Ninth Circuit law, and a "real difference" between the tests used by the Sixth Circuit and Eighth Circuit, and that "one must wonder" what the test is for application of the state-created danger doctrine). As one jurist aptly observed, "twenty-three years of circuit

(and intra-circuit) disharmony" regarding the state-created danger doctrine gives "uncertain guidance" to public officials. *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 871 (5th Cir. 2012) (Higginson, J., concurring).

In sum, there is no "broad consensus" in other circuits as to the existence and elements of the state-created danger doctrine, and "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; *see also Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (a public official "cannot be expected to predict the future course of constitutional law").

c. But even if there were a broad consensus as to the state-created danger doctrine generally, this would not suffice to defeat qualified immunity. It is not enough that a broad principle of law was clearly established. The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Defining the right at too general a level "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, 572 U.S. at 779; *see also Anderson*, 483 U.S. at 639-40 (stating that if the "clearly established" test is applied at too general a level, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."). Thus,

as the Seventh Circuit recognized, the fact that courts have recognized the state-created danger doctrine "starts and ends with a high level of generality" and does not mean that it is clearly established that any act by a state official that increases a private danger is unconstitutional. *Weiland v. Loomis*, 938 F.3d 917, 919 (7th Cir. 2019); *see also Graves v. Lioi*, 930 F.3d 307, 332-33 (4th Cir. 2019) ("[W]hile a reasonable officer in 2008 would have notice that the state-created danger theory existed in the abstract, no Supreme Court or Fourth Circuit case law would have described when its requirements had been met in *any* particular set of circumstances."), *cert. denied sub nom. Robinson v. Lioi*, 140 S. Ct. 1118 (2020); *McClendon*, 305 F.3d at 332 ("The fact that the state-created danger theory was recognized at a general level in these precedents did not necessarily provide [the officer] with notice that his specific actions created such a danger.").

Here, the cases cited by the First Circuit in support of its conclusion that Detectives Perkins and Fowler violated a clearly-established constitutional right not only bear little factual resemblance to the circumstances here, but in many of them, the courts did not even apply the state-created danger doctrine to the facts presented. *See Okin*, 577 F.3d at 415 (2d Cir. 2009) (holding that state-created danger doctrine could apply if officers affirmatively sanctioned private violence); *Sanford*, 456 F.3d at 298 (holding that state-created danger doctrine did not apply to claim against guidance counselor arising out of suicide of student); *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (holding that

state-created danger doctrine did not apply to claim against college president arising out of sexual abuse of children at summer camp held at college); *Jane Doe v. Jackson Local Sch. Dist. Bd. of Educ.*, 954 F.3d 925 (6th Cir. 2020) (holding that state-created danger doctrine did not apply to claim against school employees arising out of sexual assault of child on school bus), *cert. denied sub nom. Doe v. Jackson Local Sch. Dist., No. 20-320*, 141 S. Ct. 895 (2020); *D.S. v. E. Porter Cty. Sch. Corp.*, 799 F.3d 793 (7th Cir. 2015) (holding that state-created danger doctrine did not apply to claim against school arising out of bullying of student by classmates); *Fields v. Abbott*, 652 F.3d 886 (8th Cir. 2011) (holding that county employees did not violate jail employee's substantive due process rights with respect to state-created danger claim arising out of assault on her by inmates); *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1171 (10th Cir. 2013) (reversing award of qualified immunity to child protective worker arising out of murder of child where district court had considered only one element of a state-created danger claim and remanded for district court to consider remaining elements); *Butera*, 235 F.3d at 637 (holding that the state-created danger doctrine applied to claim against police officers arising out of the beating death of an undercover operative but awarding qualified immunity because neither this Court nor the D.C. Circuit had previously recognized the doctrine). It is impossible to see how any of these cases could have put Detectives Perkins and Fowler on notice that they were violating Ms. Irish's substantive due process rights by leaving a voicemail message asking Mr. Lord to call them.

The remaining two cases cited by the First Circuit might bear superficial resemblances to the case here, but a close reading demonstrates that they are materially different, and, in any event, two out-circuits cases do not constitute a "robust consensus." In *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006), Kimberly Kennedy reported to police that a thirteen-year-old boy had molested her nine-year-old daughter. When interviewed by a police officer, Ms. Kennedy described the boy's violent tendencies, and the officer assured her that she would be given notice before the police contacted the boy. *Id*., at 1057-58. The officer, though, informed the boy's family of the allegation without giving notice to Ms. Kennedy. *Id*., at 1058. When the officer told Ms. Kennedy what he had done, Ms. Kennedy became upset and expressed fear for her safety. *Id*. The officer promised Ms. Kennedy that he would patrol the area throughout the night to keep an eye on the boy. *Id*. Early the next morning, the boy broke into the Kennedy house and shot both Ms. Kennedy and her husband. *Id*. The Ninth Circuit concluded that the state-created danger doctrine applied not simply because the officer had informed the boy's family of the allegations, but because he did so without first warning Ms. Kennedy, as he had promised to do, and thus did not give Ms. Kennedy "a reasonable opportunity to protect her family." *Id*., at 1063. The court also found it significant that the officer had misrepresented that the police would patrol the area. *Id*.

Here, on the other hand, it is undisputed that Detectives Perkins and Fowler advised Ms. Irish that

they would be contacting Mr. Lord, and the only concern she expressed at that time was that he might not answer the phone. App. 64-65. It is undisputed that in the voicemail message Detective Perkins left for Mr. Lord, he did not disclose why he wanted to speak with Mr. Lord or otherwise suggest that Ms. Irish was making accusations against him. App. 67-68. It is undisputed that Detective Perkins told Ms. Irish that the police would not be providing overnight security at her parents' house and said only that officers were still looking for Mr. Lord in the area. App. 95. Finally, it is undisputed that whoever allegedly told Kimberly Irish that she should not bring her family down to the police station and that there would be "officers in the vicinity," it was not Detectives Perkins or Fowler. App. 90-91.

The only other "factually similar" case the First Circuit cited to was *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998). There, an informant called the police to alert them that his co-worker was going to steal company property. *Id*., at 513. Fearful of retribution, he pleaded with the police to keep the recording of his call secret. *Id*., at 514. The Deputy Chief of Detectives, James Taylor, assured the informant that the tape would not be released. *Id*. An Assistant District Attorney told Taylor that he should not release the tape, and Taylor assured the ADA that he would make sure the tape was not released. *Id*., at 515. Taylor did nothing, though, and the tape was released to the informant's co-worker, who later murdered the informant. *Id*.

Here, though, Detectives Perkins and Fowler never assured Ms. Irish that her identity would be kept secret, nor would it have been reasonable for Ms. Irish to have expected that Mr. Lord would never learn the identity of his accuser. And, again, when Detective Perkins left the voicemail message for Mr. Lord, he made no mention of Ms. Irish. Further, in *Monfils*, release of the tape served no law enforcement purpose and the officer was expressly instructed to not release it. In contrast, Detectives Perkins and Fowler sought to interview Mr. Lord as part of their investigation into Ms. Irish's allegations. As the district court noted when it granted the defendants' motion to dismiss, "for the police officers not to investigate these accusations would be a dereliction of their duties as law enforcement." App. 227.

That no factually similar cases were identified is particularly significant given that the First Circuit and other courts concluded that only conduct that "shocks the conscience" can give rise to a state-created danger claim. As this Court has noted, to prevent the Constitution from being "demoted to . . . a font of tort law," action being challenged on due process grounds must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). Even if Ms. Irish had expressed a fear of retaliation when interviewed in the hospital, she did not do so in her written statement or in the recorded interview. Moreover, Detective Perkins told Ms. Irish that he planned to call Mr. Lord, and she expressed no concern.

There was nothing inherently wrongful about leaving a voicemail for Mr. Lord, and no case, in the First Circuit or elsewhere, put Petitioners on notice that their conduct was so egregious and outrageous as to shock the conscience.

d. The First Circuit also erred when it found that the violation of "proper police procedure" bears on the issue of whether a right was clearly established. According to the First Circuit, "when an officer disregards police procedure, it bolsters the plaintiff's argument" that a reasonable officer would have believed that his conduct was unconstitutional. This is wrong as a matter of law. *See Sheehan*, 135 S. Ct. at 1777 ("Even if an officer acts contrary to her training, however, . . . that does not itself negate qualified immunity where it would otherwise be warranted."); *Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *see also Elder v. Holloway*, 510 U.S. 510, 515 (1994) ("The Court held in *Davis* that an official's clear violation of a state administrative regulation does not allow a § 1983 plaintiff to overcome the official's qualified immunity.").

And it is impossible to see how the violation of procedures could be relevant to the clearly established inquiry. Police procedures might dictate all manner of actions that are not constitutionally required, so the fact that an officer knows he is violating procedure says nothing about whether he should have known that he was also violating the Constitution. Here, it

was alleged that Detectives Perkins and Fowler failed to follow standard police procedures by 1) not waiting until the end of the investigation before contacting Mr. Lord; 2) not making Ms. Irish's safety their "first priority"; and 3) not immediately determining Mr. Lord's criminal history. It was also alleged that the detectives violated MSP policy and state law dictating actions officers must take when responding to domestic violence complaints. App. 12-14. All of these procedures, policies and laws, though, go far beyond what the Constitution requires, and the violation of them would not put officers on notice that they are committing constitutional violations.

* * * * *

The Court should grant certiorari and reverse the court of appeals' holding that Petitioners are not entitled to qualified immunity. At least in the First Circuit, no officer could possibly have understood that calling a suspect to arrange for an interview, even when the complainant had expressed concern about retaliation, could form the basis for a substantive due process claim exposing them to unlimited personal liability. Officers Perkins and Fowler acted reasonably under the circumstances, and they could no more have predicted the First Circuit's adoption and application of the state-created danger doctrine than did the district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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