No. 20-1392

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

BRIEF OF THE MAINE STATE TROOPERS ASSOCIATION, THE MAINE STATE LAW ENFORCEMENT ASSOCIATION, THE MAINE ASSOCIATION OF POLICE, AND THE NEW YORK CITY DETECTIVE INVESTIGATORS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Claims under 42 U.S.C. § 1983 predicated on the state-created danger doctrine invariably involve horrific facts. This case is no exception. In July 2015, Maine State Police Detectives Micah Perkins and Jason Fowler, Petitioners in this action, were assigned to investigate allegations that Anthony Lord kidnapped and sexually assaulted Brittany Irish. They responded immediately, interviewed the alleged victim, gathered evidence, and later called Lord in an attempt to locate him and take his statement. Approximately thirty hours after Petitioners began their investigation, Lord set fire to the Irishs' barn, his prelude to a violent rampage that included: attacking a man with a hammer and stealing his truck and guns; shooting five people, two of whom died as a result; abducting Brittany Irish; firing on police officers; and fleeing law enforcement in a chase that ultimately ended in Lord's arrest near the Canadian border. Because of the First Circuit's ruling, Petitioners must now stand trial to determine whether their decision to leave a voicemail for Lord and their subsequent inability to prevent his reign of terror makes them liable for the violence he inflicted.

The Maine State Troopers Association ("MSTA"), The Maine State Law Enforcement Association ("MSLEA"), The Maine Association of Police ("MAP"),

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1 Pursuant to Supreme Court Rule 37.6, *amici* and their undersigned counsel represent that counsel for amici authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no entity or person, other than the Maine State Troopers Association, contributed financially towards the preparation and submission of this brief. All parties were timely notified of the submission of the brief and consented to its submission.

and the New York City Detective Investigators Association ("NYCDIA") respectfully submit this brief as *amici curiae* in support of Petitioners. *Amici* are troubled by the First Circuit's decision to adopt a state-created danger theory of liability under § 1983 for the first time in this case, and to deny qualified immunity to Petitioners, who acted reasonably and diligently under dangerous and tragic circumstances. The decision ignores the reality of law enforcement in Maine, with its rural geography and limited resources, and imposes liability on officers who undertake to protect the public in such conditions. It fails to recognize that investigations take place in the context of existing danger and require law enforcement to make many decisions based on incomplete information, any one of which could be second-guessed in hindsight.

MSTA represents approximately 270 members of the Maine State Police ("MSP"). MSP has jurisdictional authority throughout Maine, enforcing criminal and motor vehicle laws in primarily rural areas lacking municipal law enforcement. MSP has a Major Crimes Unit responsible for investigating, among other things, all homicides in Maine except for those in the cities of Bangor and Portland. MSP faces significant logistical challenges responding to calls for service in a geographic area larger than all of the other New England states combined. Often there are fewer than 40 troopers assigned to the rural patrol function across the entire State, and MSP generally does not run an overnight shift within these rural patrol areas. In many areas, radio and cellular communications are substandard or non-existent, and back up is a rare luxury. These factors necessarily influence how MSP conducts investigations.

MAP represents 47 local Maine police associations in their respective municipalities and has a total membership of approximately 950. MLSEA represents approximately 340 officers from eleven state law enforcement groups in Maine. Like Petitioners, members of MAP and MLSEA perform their jobs with limited resources over a large, sparsely populated geographic area, which affects all aspects of how they perform their jobs.

NYCDIA represents 275 detective investigators employed by the five county District Attorneys and the Special Narcotics Prosecutor in New York City. Its members are assigned to complex investigations involving fraud, major narcotics trafficking, and political corruption, as well as allegations of wrongful convictions. Like Petitioners and members of the MSP's Major Crimes Unit, they are called upon to make difficult decisions about when and how to approach suspects and witnesses in evolving and often dangerous situations.

Amici's members can see themselves in Petitioners' position. Even with the benefit of hindsight, it is impossible to know what course of action might have averted the tragic events of July 2015. The First Circuit's decision sheds no light. If allowed to stand, this decision expands how the state-created danger doctrine applies to the most fundamental tool of law enforcement: talking to witnesses and suspects. From a personal liability perspective, the safest thing for an officer to do in the face of a dangerous situation is nothing. *Amici* did not join law enforcement to stand by and do nothing, which is why they support Petitioners in urging the Court to grant certiorari to examine this troubling doctrine.

SUMMARY OF ARGUMENT

The state-created danger doctrine, which this Court has never recognized and which the First Circuit adopted for the first time in this case, is an exception to the general rule that the State's failure to protect people from private violence does not violate the Due Process Clause. *See DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989). Based on a few lines of dicta in *DeShaney*, most circuits have adopted some version of a state-created danger test which imposes a duty on officers to protect individuals from privately inflicted harm if officers engage in affirmative acts a court concludes created or enhanced a danger to those individuals, and if the officers' conduct shocks the conscience of the court. Petitioners argue in support of certiorari that the First Circuit erred in denying them qualified immunity because there was no settled law in the First Circuit as of July 2015 that would have put them on notice that the voicemail they left for Lord could constitute a state-created danger, nor was there a consensus of law in other circuits on this point. Pet. at 20-28. *Amici* agree and will not repeat these arguments.

Amici contend that the state-created danger tests articulated by the First Circuit and other lower courts are fundamentally flawed. They are inconsistent with this Court's substantive due process precedent and fail to provide law enforcement with clear guideposts for their conduct. The First Circuit's formulation of the state-created danger test strays even further from this Court's precedents, particularly in its application of the "shocks the conscience" standard to conduct "viewed in total," App. at 20. Conspicuously missing from nearly every

formulation of these tests is any element assessing an officer's effort to protect the plaintiff. This is a striking omission for a doctrine that purports to describe when the State's failure to protect becomes a constitutional tort.

This Court should grant certiorari to clarify whether the state-created danger doctrine is a valid exception to the rule in *DeShaney*, and if so, how it defines the scope of an officer's duty to protect once triggered. It should reject any standard of culpability, such as the one the First Circuit articulated, which evaluates whether conduct "viewed in total" shocks the conscience. This formulation fails to identify what conduct triggers a constitutional duty to protect, and what conduct breaches that duty. As applied by the First Circuit, it predicates liability on conduct unrelated to any harm, and over which officers had no knowledge or control.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE RESPONDENTS' SUBSTANTIVE DUE PROCESS RIGHTS.

The state-created danger doctrine is one of two exceptions to the rule that state actors have no affirmative duty to protect individuals from harm inflicted by third parties. The first exception, and the only one recognized by this Court, is 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." *DeShaney*, 489 U.S. at 199-200. For purposes of the substantive due process analysis, "it is the State's affirmative act of

restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney*, 489 U.S. at 200.

The state-created danger doctrine purports to be a second exception to *DeShaney*. It apparently derives from the Court's observation in *DeShaney* that the State "played no role" in creating the danger the plaintiff faced. *See DeShaney*, 489 U.S. at 201. The First Circuit has joined the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits in adopting a version of the state-created danger doctrine, pursuant to which officers can be personally liable for private violence when the State or one of its officials engages in an affirmative act creating or enhancing the danger of such violence. For courts to apply this exception consistently, and for officers to be on notice of its contours, at a minimum the doctrine must articulate what will trigger the exception and define the scope of an officer's duty to protect when the exception applies. The First Circuit's test fails on both fronts.

To make out a state-created danger claim in the First Circuit, a 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.

This test, both as articulated in the abstract and as applied to the facts of this case, fails to clearly identify when the state-created danger exception applies and what conduct violates a plaintiff's constitutional rights. This brief examines the elements of the First Circuit's test to demonstrate these shortcomings. It addresses similar elements in the state-created danger tests of other circuits to show that courts apply these elements inconsistently and unpredictably. *Amici* urge this Court to grant certiorari to examine this problematic doctrine.

A. Contacting a Suspect Cannot Constitute the Affirmative Act Under the State-Created Danger Doctrine Because it Is a Necessary Part of Every Investigation.

Circuits that have adopted a state-created danger doctrine uniformly require that the official engage in "affirmative action" with respect to the danger to the plaintiff. *See, e.g., Okin v. Village of Cornwall-On-Hudson Police Dept.,* 577 F.3d 415, 428 (2d Cir. 2009) (requiring that state actors affirmatively create or enhance the danger of private violence); *Sanford v. Stiles*, 456 F.3d 298, 304-05 (3d Cir. 2006) (requiring that "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"); *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012) (requiring that "affirmative actions of the official placed the individual in danger he otherwise would not have faced"). This is an essential element. It is the affirmative, danger-creating conduct that purportedly makes these cases an exception to the *DeShaney* rule that failing to protect individuals from private violence does not violate the Due Process Clause.

The First Circuit's decision that leaving a voicemail for a suspect too early in an investigation can satisfy this element expands the state-created danger exception to such a degree that it threatens to swallow the rule. Taking Irish's allegations as true, *any* attempt to contact Lord would have increased the danger to Irish and her family. Yet to investigate her allegations, Petitioners had to contact Lord at some point. In nearly every investigation, officers must make difficult decisions about when and how to contact suspects and witnesses. There are no entirely

safe decisions, and any approach can be criticized in hindsight. If these decisions can trigger the state-created danger exception, then almost any steps officers take in an investigation may subject them to personal liability.

Though Petitioners' voicemail was the only affirmative danger-enhancing act the district court found, the First Circuit found a jury could conclude Petitioners enhanced the danger to Respondents by providing false assurances of protection. App. 30. Putting aside the fact that the record does not reflect Petitioners made any false assurances, the First Circuit ignored the weight of authority holding that false assurances of protection are not affirmative acts that can trigger the state-created danger exception. *See, e.g., Pinder v. Johnson,* 54 F.3d 1169, 1177 (4th Cir. 1995) (holding a state actor's promise to take specific action to protect a plaintiff, where the plaintiff detrimentally relied on that promise, was not the type of conduct that creates a duty to protect under the Due Process Clause); *Wallace v. Adkins*, 115 F.3d 427 (7th Cir. 1997) (ordering a prison guard to remain at his post with an inmate who threatened to kill him and providing false assurances of protection, while affirmative acts, did not place plaintiff in a danger he otherwise would not have faced therefore did not satisfy the affirmative act element); *Sandage v. Board of Com'rs of Vanderburgh County*, 548 F.3d 595 (2008) (based on this Court's holding in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), a promise to protect is not enforceable under the Fourteenth Amendment); *but see Kennedy v. City of Ridgefield*, 439 F.3d 1057, 1063 (9th Cir. 2005) (notifying suspect of plaintiff's allegation in violation of a promise to warn her before doing so,

and false assurance of protection constituted affirmative acts).

Disturbingly, the First Circuit went one step further, suggesting that false assurances about police protection from other officials, about which Petitioners had no knowledge, could support liability under the state-created danger doctrine. App. 10. Several hours before Lord arrived at the Irish residence, Brittany Irish's mother contacted an 800 number for the Maine State Police and proposed that Respondents drive to the police station and remain in the parking lot overnight. *Id.* An unnamed official purportedly advised Ms. Irish to remain at home and assured her there were officers in the vicinity. *Id.* It is unknown who made these statements and there is no evidence Petitioners knew of this phone call. *Id.* Nonetheless, the court stated "[a] jury could find that these statements were not true, and that each piece of that advice was relied on by the plaintiffs and increased the risk to them." *Id.* The First Circuit's statement that a jury could rely on such evidence to find Petitioners liable in this case is plainly inconsistent with the Court's holding in *DeShaney*.

B. The Circuit Courts' Tests Are Flawed Because They Are Inconsistent About What Conduct Must Shock the Conscience, and Petitioners Conduct Was Not Conscience Shocking.

The majority of circuits that have adopted the state-created danger doctrine require that an officer's conduct "shock the conscience" in order to violate the Due Process Clause. *See, e.g., Matthews v. Bergdorf,* 889 F.3d 1136, 1150 (10th Cir. 2018) (official must act recklessly, in conscious disregard of a known or obvious risk, and such conduct, when viewed in total,

must be conscience shocking); *McDowell v. Village of Lansing,* 763 F.3d 762, 766 (7th Cir. 2014) (the failure to protect must shock the conscience); *Sanford*, 456 F.3d at 304-05 (requiring a degree of culpability that shocks the conscience); *cf Henry A.,* 678 F.3d at 1002 (requiring that officer act with deliberate indifference to a known or obvious danger).

The shocks the conscience standard derives from *County of Sacramento v. Lewis*, in which this Court noted that to prevent the Constitution from being "demoted to . . . a font of tort law," the action challenged on due process grounds must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 523 U.S. 833, 847 n8. (1998). In *Lewis*, this Court held that where an officer fatally struck a fleeing motorcyclist in a high-speed chase, proof of intent to harm was required to shock the conscience. *Id.* at 854. The Court contrasted pursuit cases with cases involving the failure to provide adequate medical treatment to people in custody, where deliberate indifference suffices to shock the conscience. *Id.* at 853.

In *Lewis*, the Court examined whether the officer's high-speed pursuit, where he struck and killed a motorcyclist, shocked the conscience because the officer's conduct, not that of a third party, deprived the plaintiff of his life. Where the allegation is that an officer failed to protect the plaintiff from harm caused by a third party, an exception to *DeShaney* must apply before a court examines whether the officer's conduct shocks the conscience. In cases involving the custody exception, courts inquire into whether a state actor's failure to protect shocks the conscience only because custody triggers a duty of care under the Due Process Clause.

Yet courts often fail to articulate whether the shocks-the-conscience prong of the state-created danger test applies to the danger-creating conduct or the failure to protect the plaintiff from the third party. As with the custody exception, courts should analyze whether an officer's failure to protect shocks the conscience only if the state-created danger exception creates a constitutional duty to protect. An analysis of whether officers possessed the requisite culpability when failing to provide protection cannot establish whether they had a constitutional duty to protect in the first place. And courts often analyze whether the failure to protect shocks the conscience, without examining whether the danger-creating conduct shocks the conscience. *See, e.g., Nicholas v. Wallenstein*, 266 F.3d 1083, 1088 (9th Cir 2001) (failing to analyze whether the danger-enhancing act of releasing an incident report identifying plaintiffs constituted deliberate indifference, but ultimately concluded that "[n]o deliberate indifference to known or obvious dangers *after the report's release* has been shown") (emphasis added); *McDowell*, 763 F.3d at 766 (articulating the Seventh's Circuit's standard that the *failure to protect* must shock the conscience) (emphasis added).

But applying the shocks-the-conscience standard only to the alleged danger-creating conduct is also problematic. When the victim is harmed by a third party and alleges that officers were deficient in providing protection, those officers should only be subject to liability if their failure to protect shocks the conscience. Yet courts applying the state-created danger exception often omit any analysis of an officer's culpability in failing to protect the plaintiff. *See, e.g., Henry A.*, 678 F.3d at 1002 (finding that plaintiffs stated a valid claim because officials

engaged in danger-creating conduct with deliberate indifference, without the officials' culpability for their failure to protect).

The First Circuit's test, which requires courts to evaluate whether the conduct "viewed in total" shocks the conscience, combines the worst of these approaches. It is possible that neither the danger-enhancing act nor the failure to protect alone shocks the conscience, but that in combination, the conduct is conscience-shocking. Relatively innocuous acts may become conscience-shocking in retrospect, and omissions, ordinarily beyond the scope of the court's threshold analysis, become relevant. Unlike courts reviewing their conduct, officers experience events sequentially, in real time. As events unfold, they cannot go back and change what they have already done or failed to do. Evaluating whether conduct "viewed in total" shocks the conscience easily elides the perspective of the officer.

This case exemplifies the inherent shortcomings of the First Circuit's approach. Petitioners decided to call Lord and leave a voicemail based on the information known to them at the time. Though they had reasons to question Brittany Irish's credibility, they expended significant effort investigating her complaint, including by visiting one of the campsites where she claimed Lord sexually assaulted her, collecting physical evidence, and interviewing Irish and her friends. They informed Irish they intended to call Lord before doing so, and she did not express concern about her safety at that time. Petitioners' voicemail did not inform Lord that he was a suspect, that Irish had made a complaint about him, or provide him with any information aside from a name and a call back number. No reasonable jury could find this conduct conscience shocking.

According to the First Circuit, "the claim is not that the defendants should not have contacted Lord at all, but that the manner in which the officers did so [...] was wrongful." App. 21. By "manner," the court appears to mean that Petitioners should have tried to find Lord in person rather than call him or that they should have waited longer before contacting him. But there were no entirely "safe" options for contacting Lord, and the court does not suggest otherwise. In hindsight, Petitioners would likely pursue a different strategy, but even hindsight does not reveal an obvious best approach. It is not clear that even the First Circuit concluded the decision to leave Lord a voicemail, by itself, shocks the conscience. Under the test it articulated, it is impossible to know. Officers reviewing this decision would be justified in concluding that whenever they attempt to contact a suspect, they may be personally liable for the suspect's future actions.

Assuming the voicemail gave rise to a constitutional duty to protect, the First Circuit's decision fails to address the scope of that duty or explain how Petitioners' conduct fell short to a degree that shocks the conscience. Before leaving the voicemail, Petitioners spent the day conducting interviews. They left the voicemail just after 6:00 pm. Upon learning about the fire at the Irishs' barn in Benedicta, Maine that same evening, they became concerned Lord was involved and drove to Benedicta, over an hour north of Bangor. They remained on duty until 3:00 am the next morning, searching for Lord and additional evidence. Among other things, they: requested a K9 unit at the scene of the barn fire to assist the search for Lord; conducted a background check on Lord and contacted his parole officer, who was unable to locate Lord; requested the Caribou,

Maine police department conduct a safety check on Brittany Irish's children; requested a Bangor police officer drive to Acadia Hospital in Bangor to look for Lord; drove to Crystal, Maine, another half hour north of Benedicta, to search for Lord at his uncle's house, Lord's last known residence; and drove to Sherman, Maine, located between Benedicta and Crystal, to search for evidence of the alleged assault. Petitioners drove over 100 miles that night searching for Lord and evidence of his alleged crimes.

The First Circuit impliedly criticized every decision to drive to a location, pointing out that Petitioners did not explain why they or other officers did not call instead. At no point did the First Circuit acknowledge that the significant time and resources involved in searching for a person in rural Maine might have influenced Petitioners' initial decision to try calling Lord. Nor did it acknowledge that Petitioners' decision to pursue Lord in person without calling ahead was likely a reasonable adjustment in strategy after the barn fire. A reasonable officer reading the First Circuit's decision could conclude that the Constitution governs whether an officer should place a phone call or travel to a location in person, yet the decision provides no specific guidance on how to discern what the Constitution requires in any particular scenario.

The First Circuit also observed that Irish called Petitioners that night and requested police protection at her parents' home in Benedicta. Petitioners conveyed this request to their supervisor, who denied it. Though no harm came to Respondents while they awaited Petitioners' response, the First Circuit nonetheless criticized Petitioners for failing to convey Irish's request to their supervisor immediately, and for waiting an hour to inform Irish of the denial.

Petitioners' relatively short delay in conveying their supervisor's decision neither created nor increased the existing danger to Respondents, nor did it constitute a failure to protect within Petitioners' control, yet under the First Circuit's analysis, a jury could consider it in deciding whether Petitioners' conduct shocks the conscience. *See* App. 30.

As discussed in the previous section, the First Circuit holds Petitioners responsible for the acts and omissions of others by suggesting that Respondents might have relied to their detriment on the advice of an unnamed person who answered their call to an 800 number for the Maine State Police. Though Petitioners had no authority to order police protection at the Irish residence, and had no knowledge of Irish's call to the 800 number, the First Circuit found that "[a] jury could also conclude that the defendants played a role in the decision to withdraw all resources from the area without telling the plaintiffs that they had done so, thereby allowing the plaintiffs to believe more protection was available than was actually true."[2] App. 30. It is unclear what "role" Petitioners played in the decisions to allocate resources they did

[2] This conclusion is at odds with the district court's findings, on which the First Circuit relied, that Petitioners had no knowledge of Irish's call to the 800 number and made no false assurances of protection to Respondents. App. 89 n102, 93 n109, 153. While the district court did not find Petitioners were responsible for the decision not to provide overnight protection, it concluded that "there were many other steps they could have taken to assure the Plaintiffs' safety without any expenditure of MSP resources," such as suggesting they spend the night at a motel. App. 165. The court's observation highlights the absurdity of the hindsight analysis the First Circuit has dictated. If the Constitution imposed a duty on Petitioners to protect Respondents, surely that duty required expending MSP resources, not providing directions to a local motel.

not control. What is clear is that, under the First Circuit's analysis, courts and juries can consider a wide range of conduct having nothing to do with an officer in evaluating the shocks-the-conscience element.

Petitioners argued on appeal to the First Circuit that officers' violations of state law or police policy cannot serve as the basis of a state-created danger claim. The First Circuit disclaimed elevating police procedures to constitutional requirements yet found that police procedure "bears on all prongs of the qualified immunity analysis," such that "when an officer disregards police procedure, it bolsters the plaintiff's argument [. . .] that an officer's conduct 'shocks the conscience.'" App. 24. It is a distinction without a difference to say that violating a local police policy does not equate with violating the Constitution, but that a jury may find conduct shocks the conscience because it violates a local police policy. Both the First Circuit and district court decisions point to the Petitioners' purported violations of various police procedures, including failing to conduct a background check on Lord as the first step in the investigation and not making Irish's safety their "first priority." App. 12-14. It is unclear, and neither court explains, how conducting a background check on Lord a day earlier in the investigation would have protected Respondents, or how waiting a day created or enhanced any danger to them. Nor do the courts explain precisely how Petitioners should have or could have made Brittany Irish's safety their first priority. Yet the First Circuit found that "the defendants' apparent utter disregard for police procedure could contribute to a jury's conclusion that the defendants conducted themselves in a manner that was deliberately indifferent to the danger they

knowingly created, and that they thereby acted with the requisite mental state to fall within the ambit of the many cases holding that a violation of the Due Process Clause requires behavior that 'shocks the conscience.'"[3] App. 30.

Under the First Circuit's application of the shocks-the-conscience standard, a jury need not find that either Petitioners' alleged danger-enhancing conduct or their purported failure to protect Respondents, standing alone, shocks the conscience. Indeed, it is hard to imagine how a jury could make either finding. The First Circuit has stretched the shocks-the-conscience standard beyond recognition by applying it to conduct "viewed in total," regardless of whether the conduct has any relation to the harm caused, or whether the officers even engaged in the conduct themselves.

C. Courts Are Inconsistent About What Must Cause a Plaintiff's Harm, and Petitioners' Conduct Did Not Cause the Harm to Respondents.

Most of the circuits that have adopted the state-created danger doctrine incorporate causation elements into their tests. *See, e.g., Sanford,* 456 F.3d at 304-05 (the harm ultimately caused was foreseeable and fairly direct and a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the

[3] The First Circuit went on to note that failing to incorporate violations of police procedure into this analysis "would encourage government officials to short-cut proper procedure and established protocols." *Id.* But if the Constitution is not a "font of tort law," Lewis, 523 U.S. at 847 n8, then neither should courts employ it as a deterrent against police officers' shortcutting departmental procedures.

defendant's acts); *McDowell*, 763 F.3d at 766 ("failure on the part of the state to protect the individual from such a danger must be the proximate cause of his injury").

While the tests in many circuits speak to proximate or foreseeable harm, the First Circuit's formulation asks whether the defendant's affirmative acts caused the harm. App. 20. But in claims alleging a state-created danger theory, the direct cause of the plaintiff's harm is someone or something other than the state official, and the crux of the plaintiff's complaint is that the official failed to protect the plaintiff from that harm. If the state official's danger-enhancing conduct causes the harm directly, there is no need to address the failure to protect at all. In this case, the First Circuit relied on the district court's reasoning regarding the causation elements. The district court applied the Third Circuit's state-created danger test, which looks at the foreseeability of harm, and the foreseeability of the plaintiff as a victim, *Sanford,* 456 F.3d at 304-05, so it remains unclear how the First Circuit's formulation of the causation elements should apply in this case.

Similar to the shocks-the-conscience element, courts are inconsistent about what must cause the plaintiff's harm in cases involving third party violence: the danger created by the state actor, or the state actor's failure to protect the plaintiff from that danger. This distinction has practical importance to law enforcement officers attempting to discern the scope of their constitutional duty to protect under a state-created danger theory. If the harm need only be a foreseeable outcome of the danger-creating affirmative act, then an officer's subsequent failure to protect the plaintiff is irrelevant. If state-created danger cases do not depend on a duty to protect at all,

an officer's failure to protect should not be relevant to other elements of the analysis. But if the officer's failure to protect must be the proximate cause of the plaintiff's harm, as articulated in the Seventh Circuit's formulation of the test, *McDowell*, 763 F.3d at 766, then understanding the scope of the duty to protect is essential to the analysis, and it is fair to evaluate what, if any, protection the officer provided.

The First Circuit's decision in this case underscores how this ambiguity can distort the overall analysis. The First Circuit seems to require only that harm to the plaintiff was foreseeable in light of the danger-creating affirmative act. This is the analysis the district court applied, applying the Third Circuit's test. Yet after finding that Lord's rampage was a foreseeable outcome of Petitioner's voicemail (a dubious proposition at best), both the district court and the First Circuit went on to analyze Petitioners' subsequent conduct, with a particular focus on whether it comported with proper police procedure. Neither court seemed to assert that the myriad shortcomings in police procedure they noted had a causal relationship to the harm. The result is that a series of alleged failures after leaving the voicemail, that caused no harm to Respondents, could nonetheless contribute to the conclusion that the Petitioners are liable because the court found that conduct conscience-shocking.

The First Circuit's test, consistent with most other Circuits, requires that the affirmative acts create or enhance a danger specific to the plaintiff, distinct from the general public. This element is broadly consistent with the notion that the harm should be a foreseeable outcome of the officer's conduct, and with the concept that a duty to protect should identify who needs protection. This element, however, does not

seem to have been a limiting factor in either the district court's or the First Circuit's decision. The district court applied the Third Circuit's foreseeability test, and it found the harm to Respondents foreseeable because Lord had threatened Brittany Irish and her boyfriend specifically. The district court provides a lengthy, detailed recitation of the facts, yet it fails to mention that Lord attacked seven people in his rampage, not including the police officers he fired on. Four of them were strangers to Irish and outside any protection under the state-created danger doctrine. Looking at the full scope of Lord's violence, it does not appear to be a remotely foreseeable outcome of Petitioners' voicemail, nor related in any way to their failure to follow proper procedures.

Lord burned Brittany Irish's parents' barn to the ground. App. 6, 87. He attacked a man with a hammer and stole his truck and two guns. App. 10. He then shot and kicked his way into the Irish residence, shot and killed Irish's boyfriend, chased Irish into the bathroom, and fired at her as she escaped out the window, striking her mother's arm in the process. App. 10-11. When Irish attempted to escape in a passing truck, Lord shot the driver three times and abducted but Irish. App. 11. Miraculously, the driver survived. Lord then shot two additional men he encountered on a woodlot in Lee, Maine after borrowing one of their cellphones. App. 11 n2. One of the men died. The First Circuit's opinion mentions these victims, and the fact that Lord fired on police as they pursued him and stole two additional trucks and an ATV, only in a footnote. *Id.*

Comparing the actual outcome with the danger that was foreseeably enhanced is instructive on both the causation elements and the affirmative act

element. Here, petitioners left a voicemail for Lord asking for a return call. The voicemail did not name Irish or refer to any specific case. In fact, the evidence in the record suggests Lord did not immediately connect the voicemail to Irish. App. 68. The sheer magnitude and scope of Lord's violence demonstrates that it was not a foreseeable outcome of a voicemail requesting a return call. Or, put another way, Lord was clearly more volatile and dangerous than anyone understood, and whatever role the voicemail played, it could not have meaningfully enhanced the significant danger he already posed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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