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 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court suggested in its analysis in *DeShaney v. Winnebago*, 489 U.S. 189 (1989), that state actors who create or increase danger to an individual may be held liable for violation of the Fourteenth Amendment. Thereafter, a robust consensus of the circuit courts has recognized the "state-created danger" doctrine. The Respondents restate the question presented as follows:

Whether the First Circuit properly denied qualified immunity to law enforcement officers who engaged in affirmative acts that created or enhanced the danger to a crime victim, whose conduct was deliberately indifferent to the degree of shocking the conscience, and the law of the First Circuit and nine other circuits clearly established that such conduct violated the Due Process Clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

A. Factual Background.

On July 7, 2015, Brittany Irish ("Irish") called the Bangor Police Department ("BPD") "to report being harassed and threatened by her ex-boyfriend Anthony Lord ("Lord"). On that same day, a BPD officer called Lord and advised him that he "was to stop attempting to contact her." App. 38.

On July 14, 2015, Irish arrived at her friend Amber Adams's house at approximately 5:00 p.m. At approximately 10:00 p.m., Irish left Ms. Adams's house and drove to the IGA store in Orono, Maine, to meet Lord to exchange personal items. Upon meeting Lord, Irish told him that she had a kidney infection, and he offered to drive her in his car to a hospital emergency room located in Lincoln, Maine. Irish left her car in the parking lot at the IGA and got into Lord's car. Irish later reported to Maine State Police ("MSP") Detectives Micah Perkins and Jason Fowler ("Petitioners") that Lord did not take her to the emergency room, but rather drove her to a gravel road in Benedicta, Maine, where he choked her with a seatbelt and sexually assaulted her. He then drove her to a cabin where he bound her hands behind her back with window blind cords and sexually assaulted her, and then drove her to a second cabin where he again sexually assaulted her. That same day, Ms. Adams drove Irish to St. Joseph's Hospital to complete a rape kit. App. 39.

At just before 2:00 p.m. on July 15, MSP Sergeant Darrin Crane ("Crane") received an email from the

BPD containing an officer's report of Irish's complaint of Lord's sexual assault. The report contained a statement by Irish, as recorded by the BPD officer, that Lord would "cut her ear to ear" if she "did not stop lying to him." App. 44.

At 3:05 p.m. on July 15, the Petitioners arrived at St. Joseph's Hospital and met with the sexual assault advocate and Irish. Irish told the detectives that she was scared of Lord and that he would be angry and do "terrible violence" to her and her children if he found out she had gone to the police. App. 46, 51.

The Petitioners told Irish that because of Lord's repeated threats, they recommended not letting Lord know reports had been made to the police. They instructed her to continue talking to Lord as if nothing had happened until the detectives could get Lord's statement. Irish also told the Petitioners that she had moved her children to her boyfriend's (Kyle Hewitt) mother's house in Caribou, Maine, for their safety. App. 5.

Her written statement in hand, the Petitioners interviewed Irish again. At 4:34 p.m. on July 15, the detectives met with Irish for a second time at St. Joseph's Hospital. Irish told the Petitioners that she and Lord had been dating for two or three months but that their relationship had ended recently. She described having met with Lord the previous evening in the parking lot in Orono to exchange some personal items. She told them about the drive to the hospital and that after she asked Lord to drive her back home, he choked her with

a seatbelt. She told them that after that, Lord took her to a camp in Benedicta, Maine, where he tied her wrists behind her back with window blind cord, bound her feet, and tied her feet to a bed, before leaving for a while, returning, and unbinding her. She also told them that Lord kidnapped her, took her multiple places, and sexually assaulted her multiple times. App. 46, 48.

On July 16, Irish made a second written statement to the detectives which said that Lord had threatened to "cut [her] from ear to ear," to abduct Irish's children, to abduct and "torture" Hewitt to find out "the truth" about what was happening between Irish and Hewitt, to kill Hewitt if Hewitt was romantically involved with Irish, and to weigh down and throw Irish into a lake. App. 5.

At 4:24 p.m. on July 16, the Petitioners began a recorded interview of Irish. Irish told Detective Perkins that if someone would accompany her, she could get Lord to meet her somewhere, but Detective Perkins rejected this offer. Irish provided Detective Perkins with Lord's cellphone number at his request and the interview concluded at 5:00 p.m. App. 64.

Despite Lord's repeated death and other violent threats and their knowledge that Lord was a registered sex offender, the Petitioners did not, as was customary, check the sex offender registry to find Lord's address or run a criminal background check. Such searches would have revealed that Lord was on probation and had an extensive record of sexual and

domestic violence. The Petitioners also did not contact Lord's probation officer at this time or request a probation hold, which could have been used to detain Lord and is simpler to obtain than an arrest warrant. App. 5.

At 6:17 p.m., Detective Perkins placed a recorded telephone call to Lord's cellphone and left a voicemail message. App. 6. At 6:30 p.m., Irish returned to the MSP to give the detectives the clothes she had been wearing at the time Lord sexually assaulted her. Irish met Detective Fowler in the MSP parking lot and reiterated that she was afraid Lord would hurt her if he knew she had gone to the police. The Petitioners did not take further action to protect Irish despite Lord's explicit threat of retaliation. App. 74.

At 8:05 p.m. on July 16—about an hour and forty-five minutes after he had left the voicemail—Detective Perkins received notice of a suspicious fire in Benedicta, the town where the detectives had found evidence that Lord had raped Irish at a vacant camp. Believing that Lord may have set the fire, the Petitioners drove together to the site of the fire. App. 6.

At 9:24 p.m., Irish called the detectives and told them it was her parents' barn, roughly fifteen feet from their home, which was on fire. Irish also told the detectives that someone had heard Lord say "I am going to kill a fucker" as he left his uncle's house in Crystal, Maine earlier that evening. Irish told the detectives that she was afraid for her children's safety, planned to

stay at her mother's home in Benedicta, and would meet the detectives there. App. 79.

At 10:05 p.m., Detective Perkins contacted the Houlton Regional Communications Center, provided information regarding the vehicle Lord was likely driving, requested that they issue a state-wide teletype for a "stop and hold" of Lord, and instructed them to contact him if Lord was located. Not long after, Detective Perkins added a "use caution" warning to this teletype. App. 84.

The Petitioners arrived at the scene of the barn fire around 10:36 p.m. Shortly thereafter, Irish received a phone call from her brother, who told her that Lord, upon receiving the voicemail, was irate and said that "someone's gonna die tonight." Irish immediately told the Petitioners about this death threat and asked for protection. The Petitioners left the scene and no officer remained to protect her and the others. App. 7.

At 11:38 p.m., thirty-six (36) hours into the investigation, Detective Perkins called the MSP's Regional Command Center in Houlton and asked for a "Triple I SBI" of Lord, which is a full criminal history check; from this he learned for the first time that Lord was on probation for domestic violence and was a convicted felon, as well as the name of Lord's probation officer. At 11:49 p.m., Detective Perkins spoke by phone with Lord's probation officer. On this phone call, the decision was made to arrest Lord. App. 7-8.

At approximately midnight, Irish called Detective Perkins and again asked that an MSP officer provide

security at her parents' residence, where she was staying. Detective Perkins understood that she wished for an officer to protect her and her family in the event that Lord returned to her mother's house. Detective Perkins did not relay the request to his superior at this time. App. 8.

Around 2:00 a.m., Irish again called Detective Perkins requesting protection. Detective Perkins, for the first time, told her that his supervisor had denied the request an hour earlier. He said the police would continue looking for Lord. App. 9.

Also around 2:00 a.m., Petitioners met Detective Jonah O'Rourke and Trooper Corey Hafford at a gas station in Sherman, Maine, about ten miles from the Irish home, to search the dumpster for evidence of the original rape. Not one of these four officers protected Irish at her mother's home. App. 9.

One or more times during the evening of July 16 and early morning of July 17, Kimberly Irish asked members of the MSP whether an officer could stay at her house or a police car could be left outside; in response, she was told that the MSP did not have the manpower to provide an officer and was unable to leave a car. While Kimberly Irish did not dare take her eyes off the road in front of her house the entire night, she never saw a police cruiser go by. App. 10.

At 2:30 a.m., Sergeant Crane went home. At 3:00 a.m., the Petitioners went home. Also around 3:00 a.m., Detective O'Rourke and Trooper Hafford left the gas station dumpster to return home. No one told Irish or

her family that the Petitioners, let alone all police units, had all left the area. App. 9.

Between 4:00 and 4:40 a.m., an individual named Kary Mayo reported to MSP that he had been assaulted by Lord at his residence in Silver Ridge, Maine—six miles and twelve minutes away from the Irish home in Benedicta—and that Lord had beaten him with a hammer and stolen his truck and two guns. App. 10.

In the early morning of July 17, shortly after the Mayo assault and theft occurred, Lord drove to the Irish home. With Mayo's shotgun, Lord fired one round at the front door to break in, which hit Irish in the arm. When the door remained locked, Lord kicked the door down. Lord entered the home, saw Hewitt on the coach, and shot him nine times. Lord fired twice as Irish was escaping and wounded Kimberly Irish, who was trying to help her daughter climb out the bathroom window. Irish ran to the road and was able to jump into the truck of Carlton Eddy, a passing motorist, who was shot three times in the neck when Lord jumped into the bed of the truck. Lord then forced Irish into the pickup truck Lord had stolen from Mayo. After Lord finished his shootings and abducted Irish for a second time, the MSP called several off-duty officers to work. The police did not free Irish or arrest Lord until 2:00 p.m. on July 17 after a nine-hour manhunt. App. 10-11.

After July 17, once Lord was in custody, an MSP K9 officer and dog were placed at the Irish house twenty-four hours a day for two days to protect the

crime scene, and Lord's other girlfriend was given safe house protection, even though Lord was already in custody. App. 12. At his guilty plea for murder, Lord admitted that he knew Irish had reported his July 14 and July 15 crimes to MSP. App. 104.

MSP has a general order, referred to as M-4, that sets forth the policy governing MSP's response to complaints of domestic violence, including the handling of investigations; it applies to road troopers, detectives, and all other members of the MSP. M-4 provides that "one of the means to prevent further abuse is by remaining at the scene of a [domestic violence] incident for as long as the officer reasonably believes that there would be imminent danger to the safety and well-being of any person if the officer [left the scene.]" App. 109, 111-12.

It is undisputed that the optimal time to contact an offender is at the end of the investigation, once all the facts are in order. The Director of Training at the Maine Criminal Justice Academy, which trains all MSP officers, opined that the reasonableness of an officer's response to a report of sexual assault depends on the severity of the assault, whether the suspect has issued threats of future harm, whether the suspect is a felon, and whether the suspect has a violent history. The Respondents' expert, D.P. Van Blaricom, explained that the safety of the victim is "the first priority" and "if you're trying to safeguard the victim, you don't tip off the suspect when she's already said he'd threatened her." App. 13.

The Petitioners' actions were reviewed by the MSP Incident Review Team (IRT), comprised of an MSP lieutenant, an MSP sergeant, a local police chief, and a civilian stakeholder. The IRT concluded that one of the possible deficiencies in the Petitioners' actions was lack of compliance with the requirement that an officer having reason to believe that an incident of domestic violence has occurred must immediately use all reasonable means to prevent further abuse and assist the victim. App. 114.

B. Initial District Court Proceedings.

On December 10, 2015, Irish, individually and as personal representative of the Estate of Kyle 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 MSP. Respondents were initially unaware of the names of the detectives who had been involved in the matter, so they named "John and/or Jane Does State Police Officers." Respondents alleged that said defendants violated their substantive due process rights by affirmative acts that created or enhanced their risk of being harmed and by subsequently failing to protect them from the very harm they had created. Respondents' claims tracked the language of previously reported First Circuit "state-created danger" case law.

The District Court granted the defendants' motion to dismiss. App. 199-32. 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 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 on the ground that they did not violate a clearly established constitutional right of which a reasonable officer would have been aware. App. 229-30.

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 the voicemail message for Lord in the setting of a domestic violence and sexual assault case was contrary to police protocol and training. App. 193-98.

On remand, the Respondents amended their complaint to add the Petitioners as defendants. Following discovery, the Petitioners moved for summary judgment, which the District Court granted. App. 32-182.

The District Court held that there were triable issues of fact on each of the elements of the state-created danger claims against the Petitioners, with the voicemail constituting the requisite affirmative act. App. 147-51. Because there was nothing to suggest that Crane had engaged in an affirmative act, the District Court held that Respondents failed to make out a state-created danger claim against him. App. 169. On the element of conscience-shocking conduct, the District Court observed that "the bar for finding that action shocks the conscience is high but not insurmountable." App. 165. The District Court concluded, moreover, that discovery had revealed facts upon which a reasonable jury could find that the Petitioners' actions were "deliberately indifferent" to the point of being "shocking" in light of the actions they took before and after leaving the voicemail for Lord. App. 156. The District Court further described the Petitioners' conduct as "reckless, callous, or both." App. 164.

The District Court ultimately concluded, however, that Petitioners were entitled to qualified immunity. App. 169-81. In doing so, the court expressed disquiet with the summary disposition of the case, observing that such a result "will deprive the Plaintiffs of their day in court and runs counter to a fundamental and ancient precept of our legal system: '[W]here there is a

legal right, there is also a legal remedy.'" App. 180 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

The Respondents appealed the entry of summary judgment in favor of the Petitioners. The Respondents did not appeal the grant of summary judgment in favor of Crane on the logical basis that only Detectives Perkins and Fowler committed affirmative acts that created or enhanced the danger posed by Lord.

The First Circuit vacated the award of summary judgment to Petitioners. 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." App. 2. The First Circuit then re-stated the elements of the state-created danger doctrine that it had previously discussed in prior cases, noting that the doctrine applies when: (1) a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff; (2) the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public; (3) the act or acts caused the plaintiff's harm; and (4) the state actor's conduct, when viewed in total, shocks the conscience. App. 17-18.

In particular, the First Circuit noted that "[w]here 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." App. 20. "Where state actors must act in a matter of seconds or minutes, a higher level of culpability is required." *Id*.

The First Circuit concluded that Petitioners were not entitled to qualified immunity. App. 22-31. In so holding, the First Circuit reasoned that "[a] defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis." App. 24. As the First Circuit explained, "[a] lack of compliance with state law or procedure does not, in and of itself, establish a constitutional violation, but when an officer disregards police procedure, it bolsters the plaintiffs' argument both that an officer's conduct shocks the conscience and that a reasonable officer in the officers' circumstances would have believed that his conduct violated the Constitution." *Id*.

In sum, the First Circuit reversed the grant of summary judgment to Petitioners on the ground that it was clearly established in July 2015 that Petitioners' actions were unconstitutional and that accordingly they are not shielded by the doctrine of qualified immunity. App. 31.

REASONS TO DENY THE PETITION

The First Circuit Did Not Err In Denying The Petitioners Qualified Immunity.

1. It would be improvident to grant certiorari in this case at this juncture.

At the time of this writing, H.R. 1280, the George Floyd Justice in Policing Act of 2021, has passed in the United States House of Representatives and awaits action in the United States Senate. The bill seeks to amend 42 U.S.C. § 1983 by eradicating the affirmative defense of qualified immunity in actions against both federal and local law enforcement officers. H.R. 1280 provides in pertinent part that "[i]t shall not be a defense or immunity in any action brought under this section against a local law enforcement officer . . . that . . . the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful." H.R. 1280, § 102. Simply put, this legislation seeks to fundamentally change the legal landscape in § 1983 actions by restricting an officer's ability to employ the doctrine of qualified immunity to avoid accountability.

H.R. 1280 is the culmination of a rising clamor for reform. *See*, *e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 9-10, 26, 76 (2017); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219,

1222 (2015). As the Fourth Circuit recently enunciated with respect to the unmoored reliance of law enforcement on the defense of qualified immunity: "This has to stop." *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020).

As noted, by its passage of H.R. 1280, the U.S. House of Representatives has expressed its intention to curtail the operation of the defense of qualified immunity in § 1983 cases. If enacted, its provisions could arguably be applied retroactively. The Court ought to let the legislative process percolate and deny certiorari.

Similarly, three state legislatures have recently passed legislation expressly foreclosing or limiting the defense of qualified immunity in actions against law enforcement officers. In 2020, Colorado passed the "Colorado Law Enforcement Integrity and Accountability Act," which expressly provides that "[q]ualified immunity is not a defense to liability. . . ." C.R.S. 13-21-131(2)(b). Also in 2020, Connecticut passed "An Act Concerning Police Accountability," Conn. P.A. 20-1 § 41(c)-(d) (2020 Spec. Sess.), which eliminates governmental immunity as a defense in actions requesting equitable relief and sharply curtails qualified immunity in damages cases. Likewise, on April 7, 2021, New Mexico enacted a "Civil Rights Act," which expressly precludes the defense of qualified immunity. N.M. HB 4 (2021 Reg. Sess.).

Where a debatable policy consideration is at issue, "legislative resolution is not only sufficient, but greatly

superior to one devised by the courts." Stephen M. Shapiro, et al., *Supreme Court Practice* 507 (10th ed. 2013) (discussing reasons for the Court to deny certiorari). Accordingly, because the operation of qualified immunity in § 1983 actions is currently the subject of legislative inquiry by state legislatures and the U.S. Congress, it would be improvident for the Court to entertain that very issue at this time by granting certiorari in this case.

2. The cases cited by Petitioners as favoring a grant of certiorari are inapposite.

Since *DeShaney v. Winnebago*, 489 U.S. 189 (1989), this Court has never granted a petition for a writ of certiorari in any case involving a circuit court's adoption, recognition, or application of the "state-created danger" theory. The cases that the Petitioners rely upon for the proposition that certiorari has "regularly" been granted when lower courts have denied officers the shield of qualified immunity are inapposite.

The cases cited by the Petitioners principally address unreasonable search and seizure and the use of excessive force. *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (search and seizure); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (excessive force); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam) (same); *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) (search and seizure); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (excessive force); *Reichle v. Howards*, 566 U.S. 658 (2012) (arrest); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam) (search and seizure); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam) (same). "[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Moreover, the cases cited by Petitioners are distinguishable because they involve fact patterns in which law enforcement officers' split-second decisions, made with no time to deliberate, were second-guessed. *See also Saucier v. Katz*, 533 U.S. 194, 205 (2001) (cautioning against the "20/20 vision of hindsight" given that "police officers are often forced to make split-second judgments") (citations omitted). Here, the First Circuit properly recognized this Court's concern regarding hindsight bias, and drew a sharp distinction between cases where "state actors must act in a matter of seconds or minutes" and cases "where officials have the opportunity to make unhurried judgments." App. 20. In the former, "a higher level of culpability is required." In the latter, "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." App. 20.

By emphasizing that the Petitioners had time to deliberate, the First Circuit's decision is in accord with Supreme Court precedent.

3. The core elements of the state-created danger doctrine were clearly established in the First Circuit prior to July 2015.

The First Circuit properly denied qualified immunity in this case because its clearly articulated precedent provided a sufficient roadmap to guide officers' conduct.

Long before July 2015, the First Circuit discussed the state-created danger doctrine, noting that to be constitutionally liable under the doctrine, a state actor must "affirmatively act[] to increase the threat to an individual of third-party private harm. . . ." *Coyne v. Cronin*, 386 F.3d 280, 287 (1st Cir. 2004); *see also Ramos-Pinero v. Puerto Rico*, 453 F.3d 48, 55 n.9 (1st Cir. 2006); *Rivera v. Rhode Island*, 402 F.3d 27, 37 (1st Cir. 2005). The state actor, moreover, must have actually created or escalated the danger to the plaintiff without the plaintiff "voluntarily assum[ing] those risks." *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 81 (1st Cir. 2005). The state-created danger must be "specific" to a particular claimant and cannot simply apply "to the general public." *Ramos-Pinero*, 453 F.3d at 54. The danger must be connected in a "meaningful sense" to the particular plaintiffs. *Id*. The affirmative acts of the state actor must "cause" the plaintiff's injury, and must "shock the conscience." *Rivera*, 402 F.3d at 37-38.

Where the state actor had the "opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.'" *Id*. at 36. Finally, the First Circuit put law enforcement officers on notice that their violation of state law or proper police procedures and training would be relevant in evaluating whether their actions shocked the conscience. *Marrero-Rodriguez v. Municipality of San Juan*, 677 F.3d 497, 500-02 (1st Cir. 2012). Every case noted above pre-dates the actions of the Petitioners by years and, in some instances, by a decade or more.

The NFOP states in its amicus brief that *Irish v. Fowler*, 979 F.3d 65 (1st Cir 2020) is "a matter of first impression." Amicus Brief pp. 3, 12. That is simply incorrect. The First Circuit identified that "[b]y July 2015, this court had discussed the state-created danger doctrine at least a dozen times. . . ." App. 26. Indeed, when a case is truly one of first impression, the First Circuit generally announces that fact in the opening paragraph of its decision. *See*, *e.g.*, *Rucker v. Lee Holding Co.*, 471 F.3d 6, 7 (1st Cir. 2006) (describing claim under Family Medical Leave Act as a "case of first impression"); *Romulus v. CVS Pharm., Inc.*, 770 F.3d 67, 69 (1st Cir. 2014) (identifying a certain form of class action as a "case of first impression"); *Photographic Illustrators Corp. v. Orgill, Inc.*, 953 F.3d 56, 58 (1st Cir. 2020) (identifying a copyright sublicensee decision as a "case of first impression").

The First Circuit referred to *Rivera* as a "comprehensive exposition of the state-created danger doctrine

and its elements" and it is. The First Circuit correctly observed that "[a]fter *Rivera*, the Defendants could not reasonably have believed that we would flatly refuse to apply the state-created danger doctrine to an appropriate set of facts." App. 19. Mincing no words about the significance of *Rivera*, the First Circuit stated: "*Rivera* was a critical warning bell that officers could be held liable under the state-created danger doctrine when their affirmative acts enhanced a danger to a witness. . . . *Rivera* outlined the elements of the state-created danger doctrine and performed a nuanced analysis of why each particular action of the defendants was not the type of affirmative act covered by the doctrine." App. 27.

As a "critical warning bell" for officers, *Rivera*, noted the First Circuit, "warned that if an officer performed a non-essential affirmative act which enhanced a danger, a sufficient causal connection existed between that act and the plaintiff's harm, and the officer's actions shocked the conscience, the officer could be held liable for placing a witness or victim in harm's way during an investigation." App. 27 (emphasis in original).

The Petitioners argue, as they did in the First Circuit, that *Rivera* established that the use of basic law enforcement tools can never serve as the affirmative act underlying a state-created danger claim. The First Circuit emphatically rejected this argument, reasoning: "*Rivera* established no such thing; rather it held only that the use of law enforcement tools in that case did not provide an adequate basis for the state-created

danger claim there." App. 21. That was because interviewing and subpoenaing Rivera were both necessary steps that could not be avoided. The First Circuit distinguished the Irishes' plight on the ground that "[h]ere the claim is not that the defendants should not have contacted Lord at all, but that the manner in which the officers did so—despite having been warned about Lord's threats of violence and their own acknowledgement that contacting him would increase the risks to Irish and her family—was wrongful." App. 21.

The District Court likewise was not persuaded by the Petitioners' reliance on *Rivera*:

> The Court disagrees with the [Petitioners'] broad reading of *Rivera* as imposing an absolute bar on imposition of constitutional liability based on law enforcement tools used in the course of an investigation. It is true that, as in *Rivera*, the mere fact that the [Petitioners] wanted to interview Mr. Lord cannot be the basis of liability, but that is not an accurate interpretation of the [Respondents'] argument. The [Respondents] seek to impose liability for the act of choosing to contact Mr. Lord in a particular time, manner and context. In *Rivera*, by contrast, the plaintiff sought to impose liability for "the state's two actions in identifying [the plaintiff] as a witness and taking her witness statement in the course of investigating a murder. . . ." 402 F.3d at 37. There, the plaintiff complained of the use of an investigative tool; here, the [Respondents] complain of the manner in which

> such a tool was used. The two situations are not comparable, particularly in light of the First Circuit's statement in *Irish* that the [Respondents'] similar argument at the motion to dismiss stage "failed to take into account the *manner* in which the officers tried to interview the suspect—at the very onset of the investigation, before any other precautions had been taken, and despite being warned by the complainant about the suspect's violent tendencies."

App. 150-51 (emphasis in original) (quoting *Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017)).

At bottom, by July 2015 law enforcement officers were on notice that they could be liable under the Due Process Clause (1) if, after receiving a report of criminal activity, they effectively alerted the suspect that he was under investigation in a manner that notified the suspect who the reporting individual was, despite knowing that the suspect was about to become violent; and (2) failing to take steps to mitigate the danger they had created. App. 29.

4. The First Circuit properly identified case law that antedates July 2015 as clearly established law.

"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)). A rule is clearly established either when it is "dictated by 'controlling authority' or a 'robust consensus of cases of persuasive authority.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (citations omitted). A "robust consensus" does not require the express agreement of every circuit. Rather, the law of other circuits is sufficient to clearly establish a proposition of law when it would provide notice to a reasonable officer that his/her conduct was unlawful. As the First Circuit identified at the outset, "the salient question is whether the state of the law at the time of the defendants' conduct gave them fair warning that their alleged treatment of the plaintiffs was unconstitutional." App. 23 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

This Court has rejected the notion that the determination of whether or not a constitutional right is "clearly established" requires a finding that the facts before the court are granularly similar to a previous case. The Court has instead explained that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope*, 536 U.S. at 741; *see also Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (vacating Fifth Circuit decision holding that qualified immunity shielded corrections officers' actions). Thus, officers can be on notice that

their conduct violates established law even in novel factual circumstances. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

Here, the District Court unequivocally concluded that Detective Perkins' and Fowler's actions were obviously egregious:

> The deliberate indifference exhibited by Detective Perkins and Fowler in leaving the voicemail is further underscored by their subsequent actions. Once Brittany Irish called to tell them the Irishes' barn was burning down, Detective Perkins and Fowler were on notice that Mr. Lord was following through with his threat of violence and that the Irishes were the object of his wrath. That they did not take even basic steps to protect the Plaintiffs at least suggests that they simply were not concerned about the Plaintiffs' safety—a degree of indifference, that, given the circumstances, was reckless, callous, or both. . . . [E]ven the most generous assessment of Detective Perkins' and Fowler's actions would suggest that, knowing about the threat imposed by Mr. Lord, they would do something—anything—to mitigate that threat. They did not do so, in at least arguable violation of section 4012(6) and M-4's requirement that they take reasonable steps to prevent further abuse.

App. 164.

In the Petitioners' view, every § 1983 complaint requires a scavenger hunt for prior decisions with nearly identical facts. Neither the Fourteenth Amendment nor this Court require the sub-atomic level of specificity urged by the Petitioners.

The arguments raised by constitutionally culpable state actors invariably recite some version of "no similar case," "not similar enough," "not in this circuit," "circuit split," or "not enough circuits" in their efforts to avoid accountability. In rejecting the Petitioners' contention that First Circuit law was insufficiently established, the First Circuit pointed to a number of "factually similar" earlier cases. App. 28.

First, the First Circuit identified a case which predates the Petitioners' conduct by nine years. In *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006), Kennedy reported that her adolescent neighbor had molested her nine-year-old daughter. Kennedy told the police that the adolescent was violent and that she was afraid of how he would respond to her allegations. After the police went to the assailant's residence prematurely in the investigation, tipping him off that Kennedy had reported his conduct, the adolescent broke into Kennedy's house and shot both her and her husband while they slept. As in this case, the police invoked the shield of qualified immunity, which the Ninth Circuit rejected on the ground that the officers' demand for "a strict factual similarity to previous cases finding liability" was a "crabbed view" of qualified immunity. *Kennedy*, 439 F.3d at 1066 (citing *Wood v. Ostrander*, 879 F.2d 583, 592 (9th Cir. 1989)).

Additionally, the court iterated that "the responsibility for keeping abreast of constitutional developments rests squarely on the shoulders of law enforcement officials." *Id*. (citations omitted).

Second, the First Circuit identified another factually similar case from 1998, seventeen years prior to the Petitioners' affirmative acts in this case, which also involved the police forewarning a known dangerous assailant that a victim had reported a crime and then taking no steps to protect the victim. In *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998), the plaintiff implored police to keep his report about a workplace burglary secret. Nonetheless, the officers released the recording of his call to police to one of his co-workers who was "known to be violent" and "crazy," "a biker type with nothing to lose," someone who, he had warned, would "take him out." *Id*. at 513-14. The Seventh Circuit held that qualified immunity did not require a new trial and commented that it would be "hard to imagine how the jury could have failed to conclude that [the officer] placed Monfils in a position of heightened danger." *Id*. at 520.

The First Circuit correctly observed that "[t]hese cases gave the defendants notice that they could be held liable for violating the Due Process Clause if, after receiving a report of criminal activity, they effectively alerted the suspect that he was under investigation in a manner that notified the suspect who the reporting individual was, despite knowing that the suspect was likely to become violent toward that person." App. 29 (citing *Monfils*, 165 F.3d at 513-18). Likewise, the

Respondents were "on notice" that "failing to take steps to mitigate the danger they had created" could subject them to liability for a constitutional violation. App. 30. *See also Kennedy*, 493 F.3d at 1063-65.

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) likewise involves the unconstitutional practice of prematurely tipping off dangerous criminals that they are under investigation, although in *Kallstrom*, the state-created danger doctrine was invoked by undercover law enforcement officers seeking to protect their rights under the Fourteenth Amendment. In *Kallstrom*, as part of a discovery request in a criminal case, the municipality released the personnel files of undercover police officers involved in the drug conspiracy investigation of a violent gang. The files contained the officers' names, addresses and biographical information. The Sixth Circuit observed that "[t]he state must have known or clearly should have known that its actions specifically endangered an individual." *Id*. at 1066. The Sixth Circuit also stated that the affirmative act of releasing the information during the investigation "substantially increased the officers' and their families' vulnerability to private acts of vengeance." *Id*. at 1067. The state actors "either knew or clearly should have known" that releasing this information "creates a constitutionally cognizable 'special danger,' giving rise to liability under § 1983." *Id*.

Similarly, the Petitioners either knew or clearly should have known that their actions would substantially increase the risk that Lord would seek vengeance upon Respondents. Indeed, Lord did exactly what

he had threatened to do after learning of Irish's sexual assault report from the voicemail.

Thus, as the First Circuit concluded, "it was clearly established in July 2015 that such conduct on the part of law enforcement officers could give rise to a lawsuit under section 1983." App. 31. The First Circuit properly rejected the Petitioners' contention that they are entitled to summary judgment on the grounds of qualified immunity. This Court should similarly deny their request for the issuance of a writ of certiorari.

5. There is no genuine "circuit split" with respect to the elements of the state-created danger doctrine.

The Petitioners argue that certiorari should be granted on the ground that there is a "split" among the circuits regarding both the existence and the requisite elements of the state-created danger doctrine. (Petition at 25). Their claim of a "circuit split" mischaracterizes the state of the law, as the cases reveal no genuine conflict of authority.

First, there simply is no split of authority on whether the state-created danger doctrine exists. Prior to July 2015, a significant majority of circuit courts (nine circuits) accepted the premise that a state actor may be constitutionally liable for a substantive due process violation when the state actor affirmatively acts to create or enhance the danger posed by a third party, ultimately resulting in the individual's harm. *See*, *e.g.*, *Dwares v. City of New York*, 985 F.2d 94 (2d

Cir. 1993); *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006); *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984); *Peete v. Metro. Gov't of Nashville and Davidson Cnty.*, 486 F.3d 217 (6th Cir. 2007); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); *Christiansen v. City of Tulsa*, 332 F.3d 1270 (10th Cir. 2003); *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001). This is an impressive list. The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits as well as the D.C. Circuit have all adopted the legal principle that a state actor is constitutionally proscribed from committing an affirmative act that creates or enhances the danger of third-party violence. The oldest case in this list was decided in 1984—thirty-one (31) years prior to the Petitioners' actions. Even the newest circuit joining the majority, the D.C. Circuit, did so fourteen (14) years prior to the time the Petitioners created and enhanced the danger for the Respondents.

As the D.C. Circuit reasoned in recognizing the state-created danger doctrine: "[A]n individual can assert a substantive due process right to protection by [the state] from third-party violence when . . . officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." *See Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (adding that "the circuits' exposition of the concept has mitigated some of the general concerns about lack of guideposts; to that extent the court is hardly 'breaking new ground in this field.' "). *Id*. Given

that the D.C. Circuit properly regarded the existence of the state-created danger doctrine as settled law in 2001, it is incongruous for the Petitioners to argue that the doctrine was not clearly established in July 2015.

Second, the Petitioners repeat their inaccurate claim that the Fifth and Eleventh Circuits have rejected the state-created danger doctrine. The First Circuit emphatically disallowed their argument on this point, stating: "We disagree with the defendants that the Fifth and Eleventh Circuits have rejected the 'state-created danger doctrine.' " App. 26 n.7 (reasoning that "[t]hough the Eleventh Circuit no longer has a discrete 'state created danger doctrine', it also does not bar recovery in cases like this one.") *Id.* (citing *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305-06 (11th Cir. 2003)); *see also Gayle v. Meade*, 2020 U.S. LEXIS 76040 (S.D. Fla. April 30, 2020) (state-created danger doctrine recognized by District Court within the Eleventh Circuit). With respect to the Fifth Circuit, the First Circuit found that, contrary to Petitioners' assertion, "the Fifth Circuit has not explicitly foreclosed the possibility that it might recognize the doctrine in the future." App. 26 n.7 (citing *Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 856-66 (5th Cir. 2012) (*en banc*)).

Third, the Respondents contend that the circuit courts are "split" because they articulate the elements of the state-created danger doctrine somewhat differently. There is, however, an irreducible minimum that the state-created danger cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth,

Tenth and D.C. Circuits all share. These core elements consist of: 1) an affirmative act by the state actor and 2) conscience-shocking behavior. Contrary to the Petitioners' claims of an irreconcilable conflict, these core elements show inter-circuit harmony. *See*, *e.g.*, *Irish*, 849 F.3d at 526 (1st Cir. 2017) (affirmative act/shocks the conscience); *Lombardi v. Whitman*, 485 F.3d 73, 79-81 (2d Cir. 2007) (same); *Sanford v. Stiles*, 456 F.3d 298, 304-05 (3d Cir. 2006) (same); *Doe v. Rosa*, 795 F.3d 429, 439-42 (4th Cir. 2015) (same); *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 468-69 (6th Cir. 2006) (affirmative act/sufficiently culpable mental state); *D.S. v. East Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (affirmative act/shocks the conscience); *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004) (same); *Kennedy*, 439 F.3d at 1061 (9th Cir. 2006) (affirmative act/deliberate indifference); *Ulrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995) (official conduct/shocks the conscience); *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Dist. of Columbia*, 375 F.3d 1141, 1146 (D.C. Cir. 2004) (affirmative act/shocks the conscience).

The First Circuit has properly and repeatedly looked to the case law of sister circuits in determining whether a right was clearly established. *See*, *e.g.*, *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009) (three circuits sufficient for law to be clearly established). In *Maldonado*, the First Circuit reasoned: "We reject the [defendant's] argument that this law was not clearly established because *this* court had not earlier addressed the question of effects and seizure. Against the widespread acceptance of these points in the

federal circuit courts, the [defendant's] argument fails." *Id*. at 271 (emphasis in original); *see also Stamps v. Town of Framingham*, 813 F.3d 27, 41 (1st Cir. 2016) (consulting long-standing precedent from other circuits to hold that the defendant's conduct violated clearly established law). In short, a "robust consensus of cases of persuasive authority . . . does not require the express agreement of every circuit but rather some sister circuit law can suffice." *Lachance v. Town of Charlton*, 2021 U.S. App. LEXIS 6189 (1st Cir. March 3, 2021) (internal quotation marks omitted). In fact, the First Circuit has previously recognized that the consensus of just four circuits was sufficient to give officers "fair warning" that certain categories of conduct were violative of the Constitution. *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016).

In July 2015, the Petitioners likewise had "fair warning" that their conduct could expose them to § 1983 liability because by that time a clearly established consensus of circuits had expressly recognized that affirmative acts by state actors that created or enhanced the danger of violence from a third-party were constitutionally proscribed. The nearly identical nature of the core elements recognized by the circuits—an affirmative act and conscience-shocking behavior—reveals a clearly established harmony. As noted by Justice Breyer: "[A]ttorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies

among the lower courts because those discrepancies are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). There being no actual divide among the circuits, the officers' petition for certiorari is unfounded and should be denied.

6. The First Circuit did not err when it found that violation of "proper police procedure" was relevant to the issue of whether a right was clearly established.

Petitioners contend that inquiry into whether they violated proper police procedure is not relevant to the legal analysis at issue in this proceeding. The First Circuit has repeatedly rejected the argument that it may not consider police training and procedures in determining whether an officer's conduct violated the Constitution. *See*, *e.g.*, *Stamps*, 813 F.3d at 32 & n.4 (1st Cir. 2016) (considering police rules, training, and general firearms protocol); *Fernandez-Salicrup v. Figueroa-Sancha*, 790 F.3d 312, 327 (1st Cir. 2015) (considering "standard police practice"); *Raiche v. Pietroski*, 623 F.3d 30, 37 (1st Cir. 2010) (considering Massachusetts Use of Force Continuum); *Jennings v. Jones*, 499 F.3d 2, 20 (1st Cir. 2007) (noting that evidence regarding officer training is "relevant both to the prong one question of whether there was a violation at all and to the prong three question of whether a reasonable officer in [the defendant's] circumstances would have believed that his conduct violated the Constitution.").

The Petitioners' present argument is a permutation of their earlier contention that their non-compliance with M-4 and its statutory counterpart, 19-A M.R.S. § 4012, are "mere" violations of agency policy or state law. The Respondents' claims, however, are not predicated on a technical violation of some "mere" administrative rule or agency policy. To the contrary, 19-A M.R.S. § 4012 and M-4 reflect, embody, and further the federal policy set forth in the Violence Against Women Act of 1994 ("VAWA") that was in full force and effect at the time of the Detectives' constitutional violations. 34 U.S.C. § 12291-12512.

VAWA created a number of state-administered grant programs for a range of activities, including programs aimed at: (1) preventing domestic violence and related crimes; (2) encouraging collaboration among law enforcement, judicial personnel, and public/private sector providers with respect to services for victims of domestic violence and related crimes; (3) investigating and prosecuting domestic violence and related crimes; and (4) addressing the needs of individuals in special population groups (e.g., elderly, children, disabled). Congressional Research Service, The Violence Against Women Act: Overview, Legislation and Federal Funding, CRS Report (May 26, 2015), p. 3.

VAWA established funding in the State of Maine for a grant program entitled STOP which is administered by the Maine Department of Public Safety (MDPS) through its Justice Assistance Council (JAC). *See* State of Maine, Department of Public Safety Justice Assistance Council Report, *Implementation Plan*

for STOP (2017-2020), p. 1. Funds allocated under the STOP program may be used for the development of protocols, policies, and evaluation mechanisms to prevent domestic violence. *Id*. at 12. Indeed, the development of policies and practices addressing domestic violence and sexual assault has been a top priority since STOP's inception. *Id*. Since 1994, the State of Maine has received STOP funding from the U.S. Department of Justice, Office of Violence Against Women, and the MDPS is required to file a STOP implementation plan every three years with the U.S. Department of Justice. *Id*. at 1.

In Maine, these federal funds are earmarked for law enforcement agencies (often referred to as subgrantees), including the MSP. *Id*. at 6. As a response to VAWA and its funding requirements, the Maine Legislature has statutorily mandated that "[e]very municipal, county and state law enforcement agency with the duty of investigate, prosecute and arrest offenders of this chapter [protection from abuse cases] and Title 17-A [related domestic violence criminal offenses] shall adopt a written policy on the enforcement of this chapter and the handling of domestic abuse cases in general." 19-A M.R.S. § 4012(7). The MSP responded to this statutory mandate by adopting M-4.

Thus, from 1994 up to and including the events of July 2015, protecting victims of domestic violence and sexual assault from further abuse has not been a "mere" state concern, but, as demonstrated by VAWA, has been expressly recognized as a top priority at the federal, state, and local levels. M-4 was not and is not

a mere administrative regulation; instead, it embodies, exemplifies, and implements a federal policy dedicated to protecting the rights of victims of domestic violence.

The NFOP claims in its amicus brief that the First Circuit's holding in this case creates "a Catch-22," "significant, adverse consequences to rank-and-file police officers," and situations "[w]here there is no reason for a law enforcement officer to know his or her actions run afoul of the Constitution." NFOP Amicus Brief pp. 6, 23, 26. The rejoinder is plain. Any officer who reads M-4 would and should know that their foremost responsibility is to protect a sexual assault victim. The NFOP further states, "in order to protect and serve the public, it is essential the officer be afforded the ability to rely on training and experience." *Id*. at 26. Yet, the mandatory requirements of M-4 are part of that very training and experience that required Petitioners to protect and serve this domestic violence victim.

The First Circuit correctly characterized the Petitioners' argument that their violations of proper police procedure and state law are not relevant to whether a constitutional violation exists as "both incorrect and troubling" and correctly observed that such an argument is "pernicious" because "the driving principal behind it would encourage government officials to shortcut proper procedure and established protocols." App. 24 n.6. Exactly so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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