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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents contend that when Petitioners, two police detectives, left a voicemail message for a sexual assault suspect asking to speak with him, they assumed a constitutional duty to protect Respondents from the suspect pursuant to the so-called state-created danger doctrine, an exception to the general rule that state actors are under no duty to protect individuals from private harms. Some version of this doctrine has been adopted by the majority of courts of appeals based on dicta in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). But in the more than 30 years since *DeShaney*, this Court has never recognized the doctrine. The First Circuit has discussed the doctrine but never applied it, despite numerous opportunities to do so. One of those opportunities was a case analogous to this one. In *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005), defendants, in the course of investigating a murder, identified a girl as a witness and took her statement, despite knowing that she had been threatened with death if she testified. The girl was later killed. The First Circuit held that because the defendants' actions were "necessary law enforcement tools," they could not form the basis for a state-created danger claim. *Id.* at 37. As the district court concluded in initially dismissing Respondents' complaint for failure to state a claim, seeking to interview a sexual assault suspect is also a necessary law enforcement tool and, under *Rivera*, cannot form the basis for a state-created danger claim. App. 227. Alternatively, the district court held that Petitioners

were entitled to qualified immunity because "any reasonable state police officer reading *Rivera* would determine that contacting and interviewing a person accused of sexual assault would not violate the accuser's substantive due process rights, even if doing so could increase the risk to the accuser." App. 230.

The First Circuit erred in reversing the district court and denying qualified immunity to Petitioners. Petitioners were entitled to qualified immunity given that neither this Court nor the First Circuit had ever before recognized the state-created danger doctrine and there was a split among circuits regarding the existence and elements of the doctrine. And while the First Circuit claimed that *Rivera* was a "warning bell" to Petitioners that leaving a voicemail message for a suspect would trigger a constitutional duty to protect, *Rivera* was precisely the opposite. As the district court recognized, *Rivera* assured law enforcement officers that the use of necessary law enforcement tools, such as attempting to interview a suspect, would not subject them to constitutional liability.

Because officers cannot be expected to be familiar with caselaw from other jurisdictions, the First Circuit erred in considering out-of-circuit authority. But even if a "robust consensus" of such authority is sufficient to put state actors on notice, there is no consensus here, robust or otherwise. Some circuits do not recognize the doctrine, and in those circuits that do recognize it, the tests for its application vary. Further, even if Petitioners were expected to somehow predict that the First Circuit would adopt the state-created danger doctrine

in a general sense, they could not have predicted that the court would apply it to the conduct at issue here. No out-of-circuit precedent, if even relevant, is sufficiently similar to the circumstances here. Rather, the most analogous precedent is *Rivera*, where the First Circuit declined to apply the state-created danger doctrine.

Because of the importance of qualified immunity, and because that immunity is effectively lost if a case is erroneously allowed to go to trial, this Court, as it has done many times before, should grant certiorari and reverse the First Circuit's denial of qualified immunity.

ARGUMENT

I. The State-Created Danger Doctrine Was Not Clearly Established in the First Circuit.

A. Petitioners claim that "clearly articulated" First Circuit precedent "provided a sufficient roadmap to guide officers' conduct." Br. in Opp. 18. This precedent, though, consists entirely of cases in which the First Circuit discussed, but declined to apply, the state-created danger doctrine. Rather than being a roadmap, this precedent signaled the questionable viability of the doctrine in the First Circuit. *See McClendon v. City of Columbia*, 305 F.3d 314, 332 n.12 (5th Cir. 2002) ("The reluctance of this court . . . to embrace some version of the state-created danger theory despite

numerous opportunities to do so suggests that, regardless of the status of this doctrine in other circuits, a reasonable officer in this circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.' ").

Even if Petitioners could have predicted that the First Circuit might someday apply the state-created danger doctrine to some set of facts, *Rivera* made clear that the doctrine would not apply to routine law enforcement methods. In *Rivera*, law enforcement officers investigating a murder identified a witness, despite knowing that the witness had been threatened with death if she testified. The First Circuit refused to apply the state-created danger doctrine to the use of "necessary law enforcement tools." *Rivera*, 402 F.3d at 37. A fair reading of *Rivera* is that an officer's use of law enforcement tools will not trigger a constitutional duty to protect, even if it results in tipping off a violent suspect to the existence of an investigation and the identity of cooperating individuals. Neither the Petitioners nor the district court could have anticipated the gloss that the First Circuit would put on *Rivera* – that necessary law enforcement tools may be the basis for a state-created danger claim when they are used unreasonably. *Rivera* itself does not draw such a distinction, and it is not reasonable to expect Petitioners to have somehow gleaned that.

B. Given that law enforcement officers should not be expected to be familiar with decisions from the twelve courts of appeals beyond their own, the First Circuit should not have considered out-of-circuit

precedent. *See Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020). But assuming for the sake of argument that a "robust consensus" from other circuits is relevant to determining what is clearly established in the First Circuit, there is no such consensus regarding the existence or elements of the state-created danger doctrine. The doctrine is not recognized in the Fifth or Eleventh Circuits, *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020); *Waddell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003),[1] applies in the Second Circuit only if the government actor affirmatively encouraged or condoned the private violence, *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 428-29 (2d Cir. 2009), and is applied narrowly in the Fourth Circuit (and in only one unpublished case). *Turner v. Thomas*, 930 F.3d 640, 646 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 905 (2020). Other circuits that recognize the doctrine apply different tests. Pet. 26-28. From this mishmash, Petitioners could not reasonably have predicted that the First Circuit would adopt the doctrine (especially in light of its 30-year history of declining to do so) or what test it would apply.

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[1] Respondents cite *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020) for the proposition that a district court within the Eleventh Circuit has recognized the state-created danger doctrine. Br. in Opp. 30. That case, though, involved immigrant detainees, and there is no dispute 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 v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

C. Even if there were a consensus as to the existence of the state-created danger doctrine, that, by itself, would not be sufficient. This is because the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also McClendon*, 305 F.3d at 332 ("The fact that the state-created danger theory was recognized at a general level in these precedents did not necessarily provide [the officer] with notice that his specific actions created such a danger."). The First Circuit identified only two out-of-circuit cases it claimed were factually similar – *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) and *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998). Both cases, though, are readily distinguishable, Pet. 31-33, and neither case is as factually similar as *Rivera*, where the First Circuit declined to apply the state-created danger doctrine.

Presumably after a thorough search, Respondents identify only one additional case they claim is similar – *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). That case, though, is even further afield than the two cited by the First Circuit. In *Kallstrom*, a city released personal information about undercover police officers to a gang known to have a "propensity for violence and intimidation." *Id*. at 1059. It does not appear that any of the officers suffered harm, but the Sixth Circuit nevertheless held that because the release of information "placed the officers and their families at substantial risk of serious bodily harm, the prior release of this information encroached upon their

fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment." *Id*. at 1069-70. An out-of-circuit case holding that a city cannot disclose personal information about undercover officers to a violent gang could not possibly have informed Petitioners regarding the lawfulness of their attempt to interview a sexual assault suspect.

D. Respondents contend that factually similar cases are not necessary, and it is sufficient that a majority of circuits have recognized some version of the state-created danger doctrine. Br. in Opp. 23-24. In support, they cite *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), where the Court noted that "general statements of the law" can sometimes be sufficient to overcome qualified immunity and without a showing that "'the very action in question has previously been held unlawful.'" In *Hope*, a prisoner was disciplined by being tied to a hitching post, shirtless, for seven hours – the sun burned his skin, his muscles were strained by being forced to stand with his arms outstretched, and he was given water only once or twice, was taunted about his thirst, and was given no bathroom breaks. *Id*. at 734-35; *see also id*. at 745 ("[The prisoner] was treated in a way antithetical to human dignity – he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."). The "general statement of the law" was that the "unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Id*. at 737 (cleaned up). Under this standard,

use of the hitching post "was a clear violation of the Eighth Amendment." *Id*. at 741.

In *Hope*, the general statement of law that the unnecessary and wanton infliction of pain violates the Eighth Amendment was obviously sufficient to put prison guards on notice that they could not bind a shirtless inmate to a post for seven hours, taunt him, and deprive him of water. Here, though, a general statement of law that state actors may assume a constitutional duty to protect when they take action to create or exacerbate a private danger is far too general to be of any useful guidance. Most significantly, it says nothing about what sorts of actions will suffice and could not have put Petitioners on notice that their phone call to a sexual assault suspect would trigger the doctrine.

II. The First Circuit Erred in Considering Violation of Police Procedures.

The First Circuit erred when it held that a "defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis." App. 24. If an officer is otherwise entitled to qualified immunity, the fact that he may have violated policy or procedure is not relevant. See, *e.g.*, *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015); *Rice v. ReliaStar Life Ins. Co*., 770 F.3d 1122, 1133 (5th Cir. 2014) ("Violating a departmental regulation, on its own, is not sufficient to deprive [the officer] of qualified immunity."). In rebuttal, Respondents

simply note that "[t]he 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." Br. in Opp. 33. That the First Circuit has previously relied upon the violation of policies in its qualified immunity analyses simply bolsters the need for the Court to grant certiorari.

Respondents suggest that the policy at issue here, which requires officers to take certain actions when responding to complaints of domestic violence and is referred to as "M-4," is uniquely relevant to the qualified immunity analysis. Br. in Opp. 34. According to Respondents, the M-4 policy and the related statute "further the federal policy set forth in the Violence Against Women Act of 1994," and the Maine State Police ("MSP") receive funding through a grant program established by that Act. *Id*. at 34-35. Even if these things were true, it would make no difference. There is no suggestion that federal law requires the MSP to have the M-4 policy or that the policy is a condition of federal funding. While the M-4 policy is certainly of the highest priority given its aim of protecting victims of domestic violence, the policy does not establish federal rights, and any failure to follow the policy has no bearing on the qualified immunity analysis.

III. Congressional Abrogation of Qualified Immunity is Speculative and, in Any Event, Would Not Apply Retroactively.

Respondents argue that it would be "improvident" for the Court to grant certiorari because there is a bill pending in Congress which includes a provision denying qualified immunity to law enforcement officers in claims brought pursuant to 42 U.S.C. § 1983. Br. in Opp. 14 (citing George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021)). It is entirely speculative, though, whether Congress will ultimately enact the bill, and, if it does, whether the enacted version will include the provision eliminating qualified immunity. *See* Marty Johnson, *Bass Signals George Floyd Police Reform Bill Won't Meet May 25 Deadline*, The Hill, May 19, 2021, *available at* https://thehill.com/homenews/house/554427-bass-signals-george-floyd-police-reform-bill-wont-meet-may-25-deadline (noting that qualified immunity is one of the "main sticking points in the negotiations" between the parties).

But even if the qualified immunity provision is enacted, it will not apply retroactively to this case. A statute has retroactive effect when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). Here, at the time of Petitioners' conduct, they were immune from liability under § 1983 so long as "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Now depriving the Petitioners of the immunity they had when they acted would have retroactive effect because it would impair their rights, increase their liability, and impose new duties on them. *See Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

"Retroactivity is not favored in the law," and "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Landgraf*, 511 U.S. at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997) ("Accordingly, we apply this time-honored presumption [against retroactive legislation] unless Congress has clearly manifested its intent to the contrary."). There is nothing in H.R. 1280 suggesting that the provision eliminating qualified immunity is to be applied to conduct occurring prior to enactment. Thus, courts must construe it as applying prospectively only. And even if Congress does purport to eliminate qualified immunity retroactively, the Due Process Clause would likely prevent it from doing so. *See Landgraf*, 511 U.S. at 266 ("The Due Process Clause also protects the interests in fair notice and

repose that may be compromised by retroactive legislation. . . ."); *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 16-17 (1976) ("It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."). At the time of their conduct, Petitioners understood that qualified immunity provided them with "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). As Respondents acknowledge, § 102 of H.R. 1280 would "fundamentally change the legal landscape in § 1983 actions." Br. in Opp. 14. While Congress may change the rules going forward, it would violate principles of due process to apply the new rules to earlier conduct.[2]

[2] Respondents state that § 102 "could arguably be applied retroactively," Br. in Opp. 15, but offer no actual argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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