No. _____

In the

Supreme Court of the United States

JANE DOE AND JOHN DOE, Individually and as the natural parents and next of kin of Minor Doe,

Petitioners,

vs.

JACKSON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, TAMARA NEFF, MICHELLE KRIEG, JIMMIE SINGLETON, SUSANNE WALTMAN, and HARLEY NEFTZER,

Respondents,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.* created the exception of the State Created Danger Test?

2) What are the elements and factors for the State Created Danger Test for all Circuits to follow?

3) Whether the State Created Danger Test requires a prerequisite knowledge of the specific act in order to find deliberate indifference and culpability?

LIST OF PARTIES TO THE PROCEEDING

1) Minor Doe, Plaintiff and Petitioner

2) Jane Doe, Plaintiff and Petitioner

3) John Doe, Plaintiff and Petitioner

4) Jackson Local School District Board of Education, Defendant

5) Tamera Neff, Individually and as the Guidance Counselor of Jackson Local School District, Defendant

6) Michelle Krieg, Individually and as the Dean Students for Jackson Local School District, Defendant

7) Jimmie Singleton, Individually and as an employee of the Jackson Local School District, Defendant

8) Susanne Waltman, Individually and as the Principal in the Jackson Local School District, Defendant

9) Harley Neftzer, Individually and as the Manager of the Bus Garage of the Jackson Local School District, Defendant

STATEMENT OF DIRECTLY RELATED PROCEEDINGS

I. *Jane Doe, et al v. Jackson Local School District Board of Education, et al,* Case No. 2017CV01662, Stark County, Ohio Court of Common Pleas, Date of Removal September 13, 2017;

II. *Jane Doe, et al v. Jackson Local School District Board of Education, et al,* Case No. 5:17-CV-01931-SL, US District Court for the Northern District of Ohio, Judgment Entry December 14, 2018;

III. *Jane Doe, et al v. Jackson Local School District Board of Education, et,* Case No. 19-3019, Sixth Circuit Court of Appeals, Opinion April 1, 2020

IV. *Jane Doe, et al v. Jackson Local School District Board of Education, et,* The United States Supreme Court, Petition for Writ of Certiorari.

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STATEMENT OF THE BASIS FOR JURISDICTION

The United States Sixth Circuit Court of Appeals entered the opinion submitted for review on April 1, 2020. This Court's jurisdiction to review this opinion arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case.

Bus Driver Defendant Jimmy Singleton ("Singleton") admitted that the seat directly behind him is the worst seat on the bus to monitor children.

> Q: "So I would take it [the seat directly behind the bus driver] is the worst seat on the bus?"
> A: "Yes."

In November of 2014, Perpetrator transferred mid-year of his third grade from Tennessee to Strausser Elementary School in Jackson Township, Ohio ("Strausser"). Within a few weeks, he began exhibiting unacceptable behavior, including stealing from other students, lying about the theft of the items, and failing to follow his teacher's instructions. Defendants-Appellees, Jackson Local School District ("JLSD") implemented a "success plan" to correct Perpetrator's deceitful behavior. Defendant Tamara Neff ("Neff"), Strausser's School Counselor and a licensed social worker and school counselor, met privately with the Perpetrator for at least ten sessions. Amazingly, Neff chose to never document any of her counseling sessions with the Perpetrator or tell his Parents that she was counseling him.

Singleton's first job as a bus rider was for MRDD in 2004 With no additional training provided by JLSD, Singleton began driving JLSD buses as a substitute driver in 2009. JLSD never reviewed Singleton's job description with him. Although he always had a bus monitor at MRDD Rehabilitation, JLSD did not provide bus monitors. Singleton, however, testified that he needed a bus monitor. Throughout his

entire bus driving experience, Singleton never received any training relative to sexual harassment or sexual abuse.

After three years Singleton received no higher rating than a "satisfactory" for pupil management on his performance review. He received no discipline or training for improvement but did receive a raise.

As a precursor to the sexual assault of Minor Doe, parents of children who rode Singleton's bus complained on numerous occasions about Singleton's inability to control the students. These parents complained to Defendant Susanne Waltman ("Waltman"), Principal at Strausser. She admittedly never documented any complaints or bothered to investigate the complaints to protect the students. Rather, Waltman casually restated the complaints to Defendant Neftzer ("Neftzer"), the Transportation Supervisor, who also failed to document the complaints, review any surveillance videos from the bus, or discipline Singleton in any fashion for past performance. Shockingly, Neftzer testified it was not his practice to document problems relative to the bus drivers because he just assumed all future bus supervisors could call him if there was a question or problem with a JLSD driver.

Neftzer recalled only a single conversation with Singleton about pupil management. Singleton denied having any conversation with Neftzer regarding pupil management. A review of the bus footage occurred during the timeframe described herein demonstrates multiple safety violations and substantiates the parents' complaints and concerns about Singleton and his lack of student control on his bus.

Singleton was responsible to assign seats on his bus at the beginning of each school year, but he did not have authority to assign a bus seat to a child subjected to discipline on the bus. Singleton assigned original seats on the bus as follows: younger kids in the front and older kids in the back, brothers and sisters together, boys with boys, and girls with girls. Singleton was not held to any policy for assigning seats and did not receive any training in this regard.

During the 2016-2017 school year, Perpetrator was a fifth-grade student assigned to ride Singleton's Bus #35. Perpetrator's behavioral issues were never reported to Singleton.

On September 14, 2016, Perpetrator lit three matches on the bus and threw at least one lit match over the head of a fifth-grade female and out the window of the bus. Perpetrator was also seen burning cardboard and grass at the bus stop that morning. Singleton never saw any matches thrown out the window or was informed about the incident that day. After Perpetrator left the bus, he lit more matches in the boy's bathroom and disposed of the matches in the boy's bathroom garbage can. One of the children on the bus told a teacher about Perpetrator lighting matches and an investigation followed.

Waltman was not available to handle the initial investigation so Neff and Defendant Krieg ("Krieg"), Dean of Students, did so. Neff believed the incident to be so serious and severe that the situation could not wait for Waltman. However, neither Neff nor Krieg documented their interviews with the students or their investigation.

A fifth-grade female who threatened to tell Singleton about the matches on the bus that day was blocked by Perpetrator and prevented from leaving her seat. Perpetrator told another student that if he did not tell anyone about the matches, he would stop harassing/bothering him for the rest of the school year. Both of these students reported the above intimidation and bullying activities to Neff. JLSD identified Neff as a "problem solver" for harassment, threats, and bullying and she admits that is part of her job description. Despite the fact that it was part of her job, Neff never conducted any follow up on the students' reports of Perpetrator's intimidation and bullying activities. In fact, Neff testified that this event did not rise to the level of bullying.

The Perpetrator was brought to the office by Neff after interviewing four other students. The Perpetrator initially lied and denied the allegations of lighting matches. Ultimately, Perpetrator was suspended for his conduct on September 15, 2016. The Perpetrator was cited for violating the JLSD Code of Conduct #10 (Obstructing justice by not cooperating with school officials, including failing to tell the truth), #13 (Behavior which causes or reasonably could cause physical harm to students or adults, and #22 (Possession of or igniting of any explosive, incendiary, pyrotechnic, or gaseous device which produces an explosion, smoke, fire, gas, or odor). JLSD ignored Perpetrator's harassment, intimidation, and bullying of other students by failing to investigate or address it at all.

Singleton learned from other students that the Perpetrator was suspended from riding the bus for one a week and not from the JLSD administration.

JLSD went from creating a "Success Plan" to creating a "Safety Plan" for Perpetrator. This was distributed among his teachers and office administrators. Neff admitted that it was the most severe plan ever before implemented. She testified:

> Q: …But prior to *Perpetrator*, you don't recall ever seeing a Safety Plan to this degree?
> A: No, not off the top of my head.

The Safety Plan required an adult to escort the Perpetrator off the bus each morning and take him to the office; one of three office administrators had to search his back pack; an adult escorted him from the office to class; he was not permitted in the hallway or bathroom alone; he could only play on the blacktop of the playground; and he had an assigned seat in gym, music, library, and the cafeteria; and last but not least, his designated bus seat was to be in the front to the right of the bus driver. The Perpetrator's mother and father specifically requested that he be required to ride ALONE and in the front bus seat and were, in fact, assured by Waltman that this would be implemented.

However, no one provided or informed Singleton of the "Safety Plan", as he was left off the email chain to fourteen other JLSD recipients. No one informed him of the severity of Perpetrator's actions or told him about the assurances provided to Perpetrator's parents. Singleton was told by Waltman to place the Perpetrator in the front row to his right for the remainder of the school year, beside a male kindergarten student. JLSD never followed-up with Defendant Singleton regarding Perpetrator's behavior or his adherence to the "Safety Plan" on the bus.

In October 2016, Minor Doe was a five-year-old kindergarten student attending Strausser, located in the JLSD. Minor Doe rode Singleton's bus to and from school. Minor Doe was thirty-six inches tall and weighed less than forty pounds. Perpetrator was nearly sixty inches tall and weighed almost twice as much as Minor Doe.

Following Perpetrator's return to the bus following his suspension and under the Safety Plan, Singleton was seen and heard on video telling Perpetrator to sit with Minor Doe in the seat directly behind him. Yet, Singleton testified that he was never even aware that Perpetrator had moved seats to sit directly behind him with Minor Doe. Singleton admitted that the seat directly behind him, where he permitted Perpetrator to sit with Minor Doe, is the worst seat on the bus due to Singleton's inability to see anything going on in this seat.

Perpetrator was the only child on Singleton's bus that had any sort of discipline plan from October 31, 2016 to November 11, 2016. Multiple and egregious sexual acts occurred to Minor Doe in the worst seat on the bus and in the environment created by Singleton and unmonitored as part of the Safety Plan. Singleton could not observe, monitor, and/or prevent the sexual acts in that seat. Neither Neftzer or Waltman ever followed up with Singleton to determine if the Safety Plan was operating properly, whether he continued to violate school policy, and/or continued to harass/intimidate or bully other students.

Over the course of multiple weeks, Perpetrator performed multiple severe and gross sexual acts on Minor Doe and made Minor Doe perform heinous sexual acts on

him while they were riding together in the front seat on the bus directly behind Singleton. Plaintiffs John and Jane Doe learned of the assaults on Minor Doe, when, at dinner, Minor Doe told them what was happening to her on the bus. Does' immediately went to the police who, in turn, conducted an investigation, which included reviewing the video recordings from the bus during this time frame and the ultimate conviction of Perpetrator of gross sexual imposition.

Neftzer reviewed bus footage following the police report and identified nineteen (19) occasions where Perpetrator exhibited poor behavior on the bus from August 22, 2016 to November 11, 2016, including twelve (12) occasions of sexual assault against Minor Doe. There is also seen the inappropriate touching of another fifth-grade student and Perpetrator repeatedly bullied another kindergartner by telling the male student in the seat across the aisle to look the other way and, on occasion, bribed him to do so. Perpetrator employed similar tactics by giving Minor Doe glitter pens when making her perform oral sex on him.

B. The District Court Proceedings.

On September 13, 2017, this matter was removed to the United States District Court in the Northern District of Ohio. The Complaint identified numerous defendants, and asserted multiple state and federal claims, including violations of 42 U.S.C. § 1983. Following extensive discovery, all parties moved for summary judgment. The JLSD defendants, including asserted arguments to the claims against them with the crux of their reliance on an argument based on immunity.

Relying on precedent from the Supreme Court, the District Court noted that the Due Process Clause does not generally impose an affirmative duty on the State to protect its citizens from the violence of third parties. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

The District Court relied upon precedent from the Sixth Circuit regarding the State-Created Danger exception to *DeShaney*. The District Court found that liability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998)). Accordingly, in *Kallstrom*, the Sixth Circuit recognized three elements a plaintiff must satisfy to establish liability under the state-created danger exception:

> (1) an affirmative act that creates or increases the risk;
>
> (2) a special danger to the victim as distinguished from the public at large; and
>
> (3) the requisite degree of state culpability.
>
> *Id.*; see *McQueen*, 433 F.3d at 464; *Cartright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003).

The District Court found that an affirmative act occurred when Defendant Singleton motioned to C.T. to sit next to Minor Doe, directly behind the bus driver in the most dangerous seat on the bus, thereby satisfying the first element of the Sixth Circuit's test for State-Created Danger. The District Court also found that by moving C.T.'s seat on the bus to the front of the bus, in close proximity to Minor Doe's seat,

substantially increased the risk that C.T. would harm Minor Doe, thereby satisfying the second element of the Sixth Circuit's test for State-Created Danger. However, the District Court ruled in favor of Defendants, concluding that this claim failed because Plaintiffs could not show that the defendants had "acted with the requisite culpability to establish a substantive due process violation. App., p. 5.

C. The Appellate Court Proceedings.

On January 4, 2019, Plaintiffs filed an appeal with the Sixth Circuit Court of Appeals challenging the District Court's decision regarding State-Created Danger exception. The Court of Appeals issued its decision affirming the District Court on April 1, 2020.

The Appellate Court only was tasked with determining the District Court's holding that school employees did not act with deliberate indifference. App. p. 6. The Appellate Court looked at the third element of "culpability", the last element of the Sixth Circuit's State-Created Danger exception. The Appellate Court relied upon *Kallstrom* to determine that a public official either "must have known or clearly should have known that [the official's] actions specifically endangered an individual. App. p. 8. *Kallstrom*, at 1066. However, even the Sixth Circuit admitted that their test is not consistent as other times they have stated that a public official must have "acted with the requisite culpability to establish a substantive due process violation[.]" *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). App. p. 8. The Sixth Circuit even begged the question "which test applies?", further

demonstrating a lack of clarity as to how the test for State-Created Danger should be applied.

The Appellate Court applied the deliberate-indifference standard into the state-created danger three-part test, specifically the third element of the test. The Appellate Court determined that Respondent's had the "opportunity for reflection and unhurried judgment" which affords the deliberate-indifference standard. The Sixth Circuit found that nothing in the Safety Plan implemented for C.T. suggests, as their cases require, that the employees perceived the specific risk that materialized—the risk that C.T. would sexually assault another student. App. p. 14. The Sixth Circuit argued that the third element for the State Created Danger in their Circuit requires specific knowledge that a perpetrator would commit a specific act, as the definition of requisite culpability. App. p. 11. As such, the Sixth Circuit affirmed the District Court's decision.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review Is Warranted Because This Court Has Never Determined the Test to be Utilized in Determining Whether the State Created Danger Theory applies.

Justice Brennan, with Justice Marshall and Blackmun dissented in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs* stated:

> My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent. *DeShaney v.*

Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 212, 109 S. Ct. 998, 1012, 103 L. Ed. 2d 249 (1989).

This Honorable Court only addressed the application of a "special relationship" in *DeShaney*, wherein it compared the relationship to restraint in determining whether the Petitioner's Due Process Rights were violated. *Id.* at 200. This Honorable Court only briefly hinted at the concept which Circuit Courts have divisively applied as the "State Created Danger". *Id.* at 201. There are no elements or factors given by this Court in aiding the Federal Courts in determining whether the State Created Danger Test applies. Rather, each Circuit has created, or not created, their own test of a State Created Danger, creating a division and split in the Circuits, rendering this issue ripe for consideration by this Honorable Court.

The Sixth Circuit has stated that it interpreted *DeShaney* and structured its own test for this concept called State-Created Danger. "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. We have used this sentence to adopt a "state-created danger theory" of substantive due process and have gradually molded that theory into a three-part test. S*ee Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491–92 (6th Cir. 2019). An official must initially take an "affirmative act . . . that either create[s] or increase[s] the risk that the plaintiff [will] be exposed to private acts of violence." *Schroder v. City of Fort Thomas*, 412 F.3d 724, 728 (6th Cir. 2005). Next, this risk of private harm must rise to the level of a "special danger" to a specific victim that exceeds the general risk of harm the public faces from the private actor. *Jones v.*

Reynolds, 438 F.3d 685, 696 (6th Cir. 2006). Last, when exacerbating this risk of harm, the official must act with a sufficiently culpable mental state. *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 469 (6th Cir. 2006). App. pp. 7-8.

Had Petitioner's brought their case in different circuits, different results would have occurred based on the different tests that each circuit has created.

Circuit	Test	Petitioner's Likely Outcome
1st	1. Affirmative Act. 2. Shock the Conscience. *Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017)	Prevail
2nd	1. Affirmative Act. 2. Shock the Conscience. *Lombardi v. Whitman*, 485 F.3d 73, 79 (2d Cir. 2007)	Prevail
3rd	1. The harm ultimately caused to the plaintiff was foreseeable and fairly direct. 2. The state-actor acted in willful disregard for the plaintiff's safety. 3. The was some relationship between the state and the plaintiff. 4. The state-actor used his authority to create an opportunity for danger that otherwise would not have existed. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008)	Prevail
4th	1. That the state actor created or increased the risk of private danger. 2. Did so directly through affirmative acts, not merely though inaction or omissions. *Turner v. Thomas*, 313 F. Supp. 3d 704, 712 (W.D. Va. 2018), aff'd, 930 F.3d 640 (4th Cir. 2019), cert. denied, 140 S. Ct. 905, 205 L. Ed. 2d 461 (2020)	Prevail
5th	Does not recognize State Created Danger Theory	Dismissed
7th	1. The government, by its affirmative acts, created or increased a danger to the plaintiff.	Prevail

	2. The government's failure to protect against the danger caused the plaintiff's injury. 3. The conduct in question "shocks the conscience," which requires a culpable state of mind equivalent to deliberate indifference. *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019), cert. denied, 140 S. Ct. 1121, 206 L. Ed. 2d 187 (2020); *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (quotation marks omitted(; *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007).	
8th	1. They were members of a limited, precisely definable group. 2. The conduct put the plaintiff at significant risk of serious, immediate, and proximate harm. 3. The risk was obvious or known to the defendant. 4. The defendant acted recklessly in conscious disregard of the risk. 5. The conduct shocks the conscience. *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004)	Failed
9th	1. Affirmative conduct on the part of the state in placing the plaintiff in a situation that was more dangerous than when they found him. 2. State acts with deliberate indifference to a known or obvious dangerous. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).	Prevail
10th	1. They were members of a limited, precisely definable group. 2. The conduct put the plaintiff at significant risk of serious, immediate, and proximate harm. 3. The risk was obvious or known to the defendant. 4. The defendant acted recklessly in conscious disregard of the risk. 5. The conduct shocks the conscience. *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995)	Failed
11th	1. The harm ultimately caused to the plaintiff was foreseeable and fairly direct.	Prevail

	2. The state-actor acted in willful disregard for the plaintiff's safety. 3. The was some relationship between the state and the plaintiff. 4. The state-actor used his authority to create an opportunity for danger that otherwise would not have existed. *Gayle v. Meade*, No. 20-21553, 2020 WL 1949737, at *28 (S.D. Fla. Apr. 22, 2020), report and recommendation adopted in part, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), order clarified, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020).	
D.C.	1. An affirmative act by defendant to create or increase the danger that resulted in harm to plaintiff. 2. Shock 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)	Prevail

II. Review Is Warranted Because the Sixth Circuit's Decision Conflicts with the First, Second and the District of Columbia Circuits.

Had Petitioner brought their case in the First, Second or District of Columbia Circuits a different outcome would have been likely based upon the different versions and interpretations of the State-Created Danger Theory. Important to note, is the First Circuit has never found the State-Created Danger Test applicable to any specific set of facts. *Irish v. Maine*, 849 F.3d 521, 525–26 (1st Cir. 2017); *Abdisamad v. City of Lewiston*, 960 F.3d 56, 60 (1st Cir. 2020).

For the "state-created danger" exception to apply, actions by state officials must have created or greatly increased the risk of danger an individual faced. *See Coyne v. Cronin*, 386 F.3d 280, 287 (1st Cir. 2004) (government must "affirmatively act to increase the threat to an individual of third-party private

harm"); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999) (government must "create or markedly increase a risk"); *Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005) (government must "create or greatly enhance the danger faced by the plaintiff from third parties") (citing *Soto v. Flores*, 103 F.3d 1056, 1063–64 (1st Cir. 1997)); *Frances-Colon v. Ramirez*, 107 F.3d 62, 64 (1st Cir. 1997) (government must "affirmatively act to increase the threat of harm to the claimant or affirmatively prevent the individual from receiving assistance"). The "state-created danger" exception also contains the "further and onerous requirement" that the state officials' actions "shock the conscience of the court." *Irish*, 849 F.3d at 526 (quoting *Rivera*, 402 F.3d at 35). *Johnson v. City of Biddeford*, No. 2:17-CV-00264-JDL, 2020 WL 1877964, at *5 (D. Me. Apr. 15, 2020).

The First Circuit has never official recognized the State-Created Danger exception, in fact stating that "the Supreme Court also suggested, but never expressly recognized, the possibility that when the state creates the danger to an individual, an affirmative duty to protect might arise ...." *Rivera v. Rhode Island.* at 34-35. *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2020 WL 535961, at *40 (D. Me. Feb. 3, 2020).

However, the First Circuit's test, if ever applied, would be two parts:

1. Affirmative act.
2. Shock the conscience of the court.

See *Irish*, at 526; *Lombardi v. Whitman*, 485 F.3d 73, 79 (2d Cir. 2007)

In *Irish*, the plaintiff's ex-boyfriend had a history of violence unbeknown to defendants. Plaintiff called the police and informed them of her fears regarding his

threats. The police, without consent by the Plaintiff, called the ex-boyfriend and informed him of the complaint made by Plaintiff, who in turn abducted her, repeatedly raped her, and threatened to kill her if the crimes were reported. *Irish*, 849 F.3d at 524. The First Circuit found that the district should not only consider the actions taken by the police, but what manner they acted in. *Id*., at 526. The First Circuit found that a factual issue remained as to whether the police officer's acted "despite foreseeing" that their actions might harm plaintiff and did they violate police policy and procedure, to which are both questions of fact that required further factual development for determination by a jury. *Id*., at 528. Here, the First Circuit found that the issue of "shock the conscience" to be more factual and riper for a decision by a jury. *Id*.

The Second District of Columbia Circuits maintains the same two-factor test as the First Circuit, with the same levels of focus on the "affirmative act", leaving the concept of "shock the conscience" more open to interpretation. *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Dist. of Columbia,* 375 F.3d 1141, 1146 (D.C.Cir.2004) (emphasis in original) (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)); *see County of Sacramento v. Lewis,* 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (holding that an action that shocks the conscience is "something more than negligence but less than intentional conduct, such as recklessness or gross negligence" (internal quotation marks omitted)). *Barnes v. D.C.*, No. CIV.A. 03-2547 (RWR), 2007 WL 1655868, at *3 (D.D.C. June 6, 2007). The cases where the state-created danger test was applied were based on discrete,

grossly reckless acts committed by the state or state actors leaving a discrete plaintiff vulnerable to a foreseeable injury."). *Caldwell v. City of New York*, No. 18-CV-6064 (CM), 2019 WL 3889799, at *2 (S.D.N.Y. Aug. 19, 2019), *Caldwell v. City of New York, Dep't of Law*, No. 18-CV-6064 (CM), 2019 WL 4170865 (S.D.N.Y. Sept. 3, 2019).

In *Irish*, there was no requirement that the police must know specifically the harm that the ex-boyfriend would cause based on a required history of abducting and/or raping women to find the police liable for the actions. See *Irish*, supra. Rather, the First Circuit only requires that the "manner in which they acted" be considered and factual support of potential and foreseeable harm in general might occur to plaintiff.

There is absolutely no mention of a specific knowledge requirement as the Sixth Circuit requires. Had Petitioner's case been brought in the First, Second or District of Columbia Circuits, the Court would likely have found the affirmative act the same as the Sixth Circuit since it is on video, but would have disagreed as to the concept of "deliberate indifference" and "shock the conscience" and in fact likely found that a factual issue remained for a jury to decide when it came to the deliberate indifference and shock the conscience concepts. The Court would likely have found that by placing C.T. in the most dangerous seat on the bus, that danger might arise to those around him, or directly next to him, thereby rendering the issue a factual dispute to be decided by a jury and not dismissed. Like *Irish*, the Second Circuit court in *Caldwell* relies upon the concept of recklessness and foreseeability of injury, with

no mention of specific injury related to a historical knowledge of said specific injury. *Caldwell*, at. 2.

The First, Second and District of Columbia Circuits interpretation of a State-Created Danger conflicts with the Sixth Circuit. The Sixth Circuit requires/applies the "dog bite rule", that being because the Perpetrator did not have a prior rape on file known to Respondents, they could never have the requisite culpability to understand the specific sexual danger posed to Minor Doe.

III. Review Is Warranted Because the Sixth Circuit's Decision Conflicts with the Third, Seventh and Eleventh Circuits

The Third, Seventh and Eleventh Circuits have a similar test for the State Created Danger Theory. The Seventh Circuit noted:

> As our colleagues in the Second Circuit have noted, there is considerable variation among the circuits in their application of the state-created danger doctrine. *See Pena v. DePrisco,* 432 F.3d 98, 108 (2d Cir.2005). Some circuits have articulated multi-part tests for determining whether an individual's constitutional rights have been violated under the state-created danger doctrine. *See, e.g., Bright v. Westmoreland County,* 443 F.3d 276, 281 (3d Cir.2006), *cert. denied,* 75 U.S.L.W. 3469 (U.S. Mar. 4, 2007) (No. 06–563), (four-part test); *McQueen v. Beecher Cmty. Sch.,* 433 F.3d 460, 464 (6th Cir.2006) (three-part test); *Hart v. City of Little Rock,* 432 F.3d 801, 805 (8th Cir.2005) (five-part test); *Christiansen v. City of Tulsa,* 332 F.3d 1270, 1281 (10th Cir.2003) (six-part test). Other circuits simply ask whether the state created or increased the danger to the individual and whether the failure to protect against the danger shocked the conscience. *See, e.g., Lombardi v. Whitman,* 485 F.3d 73, 79 (2d Cir.2007); *Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1063–64 (9th Cir.2006); *Fraternal Order of Police v. Williams,* 375 F.3d 1141, 1144 (D.C.Cir.2004). We do not believe that these variations reflect fundamental doctrinal differences. Each of the various approaches limits liability under the state-created danger doctrine to conduct that violates an individual's substantive due process rights because it is arbitrary in the constitutional sense, i.e., shocks the conscience. We believe that the multi-part tests employed by the various circuits simply reflect an effort to guide the necessarily fact-bound inquiry into whether

> the official conduct shocks the conscience. *See County of Sacramento v. Lewis,* 523 U.S. 833, 850, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citing *Betts v. Brady,* 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)); *see also Uhlrig v. Harder,* 64 F.3d 567, 572–74 (10th Cir.1995) (noting that the Tenth Circuit had derived the elements of its test under the state-created danger doctrine from the Supreme Court's substantive due process jurisprudence).
> *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 (7th Cir. 2007).

The Third and Eleventh Circuits have a four-part test that they apply to a State Created Danger Theory.

> 1. The harm ultimately caused to the plaintiff was foreseeable and fairly direct;
> 2. The state-actor acted in willful disregard for the plaintiff's safety;
> 3. The was some relationship between the state and the plaintiff; and
> 4. The state-actor used his authority to create an opportunity for danger that otherwise would not have existed.
>
> *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008).
> *Gayle v. Meade*, No. 20-21553, 2020 WL 1949737, at *28 (S.D. Fla. Apr. 22, 2020), report and recommendation adopted in part, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), order clarified, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020).

The Seventh Circuit has another test, three-part, for considering the State Created Danger Theory. In *Estate of Her v. Hoeppner*, the Seventh Circuit articulated the test as:

> 1. The government, by its affirmative acts, created or increased a danger to the plaintiff;
> 2. The government's failure to protect against the danger caused the plaintiff's injury; and
> 3. The conduct in question "shocks the conscience," which requires a culpable state of mind equivalent to deliberate indifference.
>
> *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019), cert. denied, 140 S. Ct. 1121, 206 L. Ed. 2d 187 (2020); *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (quotation marks omitted); *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007).

The Seventh Circuit holds that cases where liability attaches for a state Created Danger are rare and often egregious. *Estate of Allen v. City of Rockford,* 349 F.3d 1015, 1022 (7th Cir. 2003); *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 917 (7th Cir. 2015).

The key connection between *Phillips* and the matter before this Court is the concept of "foreseeability". The Sixth Circuit's element of "requisite culpability" is not an element in the Third, Seventh or Eleventh Circuits. The Sixth Circuit required Petitioners to establish that Respondents had a specific knowledge of the perpetrator's history of sexual assault in order to find that Respondent had the requisite culpability in their affirmative act of placing minor doe in the most dangerous seat on the bus. However, the Third Circuit has a completely opposite view of this concept. In *Phillips*, the Court found that: "[w]e have never held that to establish foreseeability, a plaintiff must allege that the person who caused the harm had a "history of violence." Indeed, these types of cases often come from unexpected or impulsive actions which ultimately cause serious harm. *Id*. at 237.

The Third Circuit rather applies "ordinary common sense and experience" when analyzing the foreseeability element of their test for State Created Danger. *Id*., at 237. In *Kneipp v. Tedder*, the Third Circuit found that harm was foreseeable when the police officer left an intoxicated woman outside alone late at night. *Kneipp v. Tedder,* 95 F.3d 1199, 1208 (3d Cir. 1996). To adequately plead foreseeability then, the Third Circuit requires a plaintiff to allege an awareness on the part of the state actors that rises to level of actual knowledge or an awareness of risk that is

sufficiently concrete to put the actors on notice of the harm. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 238 (3d Cir. 2008).

Had the matter before this Court been brought in the Third Circuit rather than the Sixth Circuit, a different outcome would have been found. The Third Circuit would likely have determined the bus driver, placed Minor Doe in the most dangerous seat with Perpetrator who was being disciplined, that danger would occur. Like *Kneipp*, by placing Perpetrator, who had been given the most severe safety plan that the guidance counselor of Respondent had ever seen, at the front of the bus in the most dangerous seat with Minor Doe, the Third Circuit would have applied "ordinary common sense" that harm would be likely and would not have required the Petitioner to demonstrate that Respondents knew that Perpetrator was going to sexually assault Minor Doe because they had specific knowledge of a prior incident by Perpetrator where he committed sexual assault. Therefore, Petitioners would have likely prevailed on their State Created Danger Theory under the test and analysis of the Third Circuit.

The Third Circuit further expounds on their second element that the state-actor acted in willful disregard for the plaintiff's safety, in *Phillips*. *Phillips*, at 240. The Third Circuit applies the theory of "shocks the conscience" with three subparts: deliberate indifference, gross negligence or arbitrariness that indeed shocks the conscience and intent to cause harm. *Id*., 241. The Court determines which test to apply based on the circumstances and timing of decision making by the government actor. *Id*. The Appellate Court in the matter before this Court determined that the

deliberate indifference standard applied as the Respondents had the opportunity for reflection and unhurried judgments. App. p. 11.

The Third Circuit noted in *Phillips* that "the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known." *Phillips*, at 240-241.

The Seventh Circuit holds a similar view of "shock the conscience" as conduct by executive officials which shocks the conscience is that conduct which may be deemed "arbitrary in the constitutional sense." *Lewis,* 523 U.S. at 850, 118 S.Ct. 1708 (citing *Collins v. City of Harker Heights,* 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). The inquiry into whether official conduct shocks the conscience in a given case is a necessarily fact-bound inquiry. *Lewis,* 523 U.S. at 850, 118 S.Ct. 1708 (citing *Betts v. Brady,* 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)). The Supreme Court has noted that this standard lacks precise measurement but has stated that the emphasis on whether conduct shocks the conscience points toward "the tort law's spectrum of liability." *Lewis,* 523 U.S. at 847–48, 118 S.Ct. 1708. Only conduct falling toward the more culpable end of the spectrum shall be found to shock the conscience. *Id.* at 849, 118 S.Ct. 1708. Thus, when the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, we shall find the official's conduct conscience shocking when it evinces a deliberate indifference to the rights of the individual. *See id.* at 851, 118 S.Ct. 1708; *Armstrong v. Squadrito,* 152 F.3d 564, 576–77 (7th Cir.1998). *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 818–19 (7th Cir. 2007).

The Third Circuit case of *L.R. v. School District of Philadelphia* is directly on point to the matter before this Honorable Court.. In *L.R. v. School District of Philadelphia*, the Third Circuit found that qualified immunity was improper under the State Created Danger Theory when in 2013 a teacher of the School District of Philadelphia allowed a kindergarten student to leave his classroom with an adult who failed to identify herself, which led to the sexual assault of the minor child. *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 239 (3d Cir. 2016). The Third Circuit in *L.R.* applied the four-part test applied in *Phillips* of the State Created Danger Theory. Under the "conscience-shocking conduct" section of the Court's analysis, the Third Circuit held that "[w]e have defined deliberate indifference as requiring a "conscious disregard of a substantial risk of serious harm…that is, deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known." *Id*., at 246. The Court in *L.R.* denied immunity finding that the level of risk to a five-year-old is "so obvious" when the defendants permitted the minor child to leave with an unidentified person. *Id*. There is no requirement that the defendant in *L.R.* must know specifically what harm would be caused by the unidentified adult, but rather conceptual harm based on the situation, rooted in "common sense" similar to *Phillips*.

Similarly to the matter before this Court, there should not have been a requirement that the Respondents knew specifically that the perpetrator would sexually assault Minor Doe over a dozen times on the bus in order for the Sixth Circuit to find that deliberate indifference was met. Rather, had this matter been brought in

the Third, Seventh or Eleventh Circuit, the Court would likely have found that by placing a student who was on the most severe safety plan that the school's guidance counselor had ever seen, rooted in wrongful behavior that occurred on the bus as part of his safety plan requiring him to sit in the front right seat of the bus, that by the bus driver affirmatively placing the perpetrator in the most dangerous seat on the bus next to minor doe, that harm would occur. That is deliberate indifference that shocks the conscience.

IV. Review Is Warranted Because the Sixth Circuit's Decision Conflicts with the Fourth Circuit.

The Fourth Circuit has a two-part test in determining the State Created Danger Theory:

1. That the State Actor created or increased the risk of private danger;
2. Did so directly through affirmative acts, not merely through inaction or omission.

Turner v. Thomas, 313 F. Supp. 3d 704, 712 (W.D. Va. 2018), aff'd, 930 F.3d 640 (4th Cir. 2019), cert. denied, 140 S. Ct. 905, 205 L. Ed. 2d 461 (2020); see also *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015).

As the Sixth Circuit clearly found that an affirmative act had taken place in the matter before this Court, Petitioners would have undoubtedly prevailed on the State Created Danger Theory in the Fourth District. The Fourth Circuit only factors in the affirmative act in their analysis of the State Created Danger Theory, as interpreted by the Fourth Circuit in *DeShaney*.

V. Review Is Warranted Because the Sixth Circuit's Decision Conflicts with the Fifth Circuit

Whereas other Circuits apply differing tests of the State Created Danger opposed to the Sixth Circuit, the Fifth Circuit does not recognize the State Created

Danger Theory as an exception to *DeShaney*. In 2019, the Court of *Cook v. Hopkins* stated: "this circuit does not recognize the state-created danger theory, and we decline to do so today, despite Plaintiffs' urging that "[t]his is that case." *See Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (citing *McClendon*, 305 F.3d at 327–33) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented."); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017) ("[P]anels [in this circuit] have repeatedly noted the unavailability of the [state-created danger] theory.") *Cook v. Hopkins*, 795 F. App'x 906, 914 (5th Cir. 2019), cert. denied, 206 L. Ed. 2d 714 (Apr. 6, 2020).

As such, had the matter before this Court been brought in the Fifth Circuit, it would have been likely dismissed immediately upon lack of application of the State Created Danger Theory outright.

VI. Review Is Warranted Because the Sixth Circuit's Decision Conflicts with the Eighth and Tenth Circuit

The Eighth and Tenth Circuits have a five-step test for the State Created Danger Theory.

1. They were members of a limited, precisely definable group;
2. The conduct put the plaintiff at significant risk of serious, immediate, and proximate harm;
3. The risk was obvious or known to the defendant;
4. The defendant acted recklessly in conscious disregard of the risk;
5. The conduct shocks the conscience.

Avalos v. City of Glenwood, 382 F.3d 792, 799 (8th Cir. 2004); *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995)

The Eighth and Tenth Circuit are one of the only Circuits that introduces the idea that the plaintiff who alleges a State Created Danger must also present evidence that they are members of a limited and precisely definable group. *Avalos*, supra; *Uhlrig*, supra. This concept of a definable group is not presented at anytime by this Court in *DeShaney*. Rather, due to the vagueness of *DeShaney*, circuits have been permitted to interpret, outside of their authority, what the Supreme Court of the United States potentially meant when they stated "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201.

As such, had Petitioners brought their matter in the Eighth or Tenth Circuit they would likely have struggled to present evidence that satisfied the first element of the *Avalos* and *Uhlrig* test for State Created Danger Theory. Although, a review of Eighth and Tenth Circuits cases does not provide much articulation as to what would qualify as satisfactory of the first element of the Eighth and Tenth Circuits' State Created Danger, the Court in *Kruger v. Nebraska* did state: Membership in the general public is not tantamount to membership in a limited, precisely definable group. *Kruger v. Nebraska*, 90 F. Supp. 3d 874, 881 (D. Neb. 2015), aff'd, 820 F.3d 295 (8th Cir. 2016).

In fact, upon the *Kruger* case going to the Eighth Circuit Court of Appeals, Judge Kelly in the concurring opinion noted:

> Unlike the "special relationship" exception, the "state-created-danger" exception is not extensively discussed in *DeShaney v. Winnebago Cty.*

> *Dep't of Soc. Servs.,* 489 U.S. 189, 197–99, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), but rather is circuit developed. While the elements of this judicially-created theory vary somewhat among the courts, in order to state a claim based on "state-created-danger," most require a plaintiff to articulate something like "a limited, precisely definable group" at risk. *Fields v. Abbott,* 652 F.3d 886, 891 (8th Cir.2011) (quoting *Hart v. City of Little Rock,* 432 F.3d 801, 805 (8th Cir.2005)); *see also, e.g., Ray v. Owens,* 622 Fed.Appx. 97, 99 (3d Cir.2015) (unpublished per curiam) (holding that harm must be "foreseeable and fairly direct" and there must be "a special relationship between the [victim] and the state"); *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys,* 675 F.3d 849, 864–66 (5th Cir.2012) (en banc) (explaining that the Fifth Circuit has not adopted the theory, but has stated the "theory is inapposite without a known victim" (citation omitted)); *Guy v. Lexington–Fayette Urban Cty. Gov't,* 624 Fed.Appx. 922, 933 (6th Cir.2015) (unpublished) (state-created danger requires special danger that affects "a few potential victims, not a few hundred."); *Jahn v. Farnsworth,* 617 Fed.Appx. 453, 462–63 (6th Cir.2015) (unpublished) (state's actions must place plaintiff specifically at risk, as distinguished from risk that affects public at large); *Wood v. Ostrander,* 879 F.2d 583, 590 (9th Cir.1989) (plaintiff distinguished from the general public); *Currier v. Doran,* 242 F.3d 905, 918 (10th Cir.2001) (plaintiff must be a member of a limited and specifically definable group). *See also Flint v. City of Belvidere,* 791 F.3d 764, 770–71 (7th Cir.2015) (no mention of public or group); *Slade v. Bd. of Sch. Dirs. of City of Milwaukee,* 702 F.3d 1027, 1033 (7th Cir.2012) (questioning usefulness of Tenth Circuit's test, including "limited and specifically definable group" requirement). *Kruger v. Nebraska*, 820 F.3d 295, 306–07 (8th Cir. 2016).

The Eighth and Tenth Circuits clearly has merged the concepts of special relationship exception of *DeShaney* and the State Created Danger Theory in that a relationship of some sort must be established as a definable group. *Kruger*, at 306–07. Judge Kelly clearly finds that the current test of the Eighth and Tenth Circuits conflicts issues often related between common tort law and constitutional law and even begs the notion that the current legal mold may need to be reconsidered by the United States Supreme Court:

> Establishing a constitutional violation in this setting may be more difficult than bringing a claim based on state tort law that the state could very well expand, and understandably and justifiably so. *See DeShaney,* 489 U.S. at 203, 109 S.Ct. 998 (noting that the State may change tort law if the people wish to expand liability); *Rivera,* 402 F.3d at 35–36 ("[C]ourts must be careful to distinguish between conventional torts and constitutional violations." (quoting *Soto v. Flores,* 103 F.3d 1056, 1064 (1st Cir.1997))). Yet the merits of these few and far between claims are worth considering, and not dismissing out of hand. While tragic circumstances themselves must not dictate judicial outcomes adverse to the law, it is precisely the unusual fact pattern that can challenge the wisdom of reflexively rejecting a claim that does not quite fit into the current legal mold. This may be such a case, and one in which we have the opportunity to reevaluate, within the bounds of Supreme Court precedent, the efficacy of that current mold. *Kruger*, at 308 (8th Cir. 2016).

Had Petitioners brought their case in the Eighth or Tenth Circuit they would likely have failed on the first element of their State Created Danger Theory of a members of a limited, precisely definable group; although, these circuits do not clearly define these groups, but only refer to the special relationship articulated in *DeShaney* as support.

VII. Review is Warranted Because the Sixth Circuit's Decision Conflicts with the Ninth Circuit

The Ninth Circuit has a similar test to the First and the Second Circuit, but rather than having a definitive "shock the conscience" element to their test, they have a deliberate indifference standard. Based on the analysis and test of the Ninth Circuit, had Petitioners brought their case in the Ninth Circuit, they would have likely prevailed, and the matter been sent to the jury for the factual dispute regarding deliberate indifference.

1. Affirmative conduct on the part of the state in placing the plaintiff in a situation that was more dangerous than when they found him

2. State acts with deliberate indifference to a known or obvious dangerous. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).

The Ninth Circuit recognizes the seminal case on State Created Danger Theory in *Wood v. Ostrander*. In *Wood,* a state trooper determined that the driver of an automobile was intoxicated, arrested the driver and impounded the car. The officer's actions allegedly left Wood, a female passenger, stranded late at night in a known high-crime area. Subsequently, Wood accepted a ride from a passing car and was raped. The court held that Wood could claim § 1983 liability, since a jury presented with the above facts could find "that [the trooper] acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment." *Wood v. Ostrander,* 879 F.2d 583, 588 (9th Cir.1989); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006).

Deliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Patel*, 648 F.3d at 974 (quoting *Bryan Cty. v. Brown*, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)). It "requires a culpable mental state," and the "standard [the Court] appl[ies] is even higher than gross negligence." *Id.* (citing *L.W. v. Grubbs (Grubbs II)*, 92 F.3d 894, 898–90 (9th Cir. 1996)). To claim deliberate indifference, the Attendees must allege facts demonstrating the Officers "recognize[d] [an] unreasonable risk and actually intend[ed] to expose [the Attendees] to such risks without regard to the consequences to [the Attendees]." *Id.* (quoting *Grubbs II*, 92 F.3d at 899). "In other words, the [Officers] [must] [have] 'known that something [*was*] going to happen but ignor[ed] the risk and expose[d] [the Attendees] to it

[anyway].' *Id.* (quoting *Grubbs II*, 92 F.3d at 900). *Hernandez v. City of San Jose*, 897 F.3d 1125, 1135 (9th Cir. 2018).

Like *Wood*, had Petitioner brought their case in the Ninth Circuit, the Court would likely have agreed with the Sixth Circuit that by the Respondent placing Perpetrator in the most dangerous seat on the bus, next to Minor Doe, that an affirmative act occurred and that they increased the danger of Minor Doe. Further, the Ninth Circuit would likely have also found that based on the knowledge of the Respondents that Perpetrator had a history of abusive tendencies on the school bus that actually resulted in the most severe safety plan that the Respondents' guidance counselor had ever seen, that harm would be likely to Minor Doe.

Unlike the Sixth Circuit, the Ninth Circuit does not require that specific knowledge of a history of specific abuse by the perpetrator, i.e. the dog-bite rule. Rather, the Ninth Circuit applies the deliberate indifference standard. Like *Wood*, where the police officer clearly did not have a specific knowledge that the victim would be raped, but rather that foreseeable harm would occur, Respondents in this matter would not have been required, under the Sixth Circuit's test, to know that Perpetrator would rape Minor Doe, but rather that foreseeable harm, harm of some sort, would occur. *Wood,* at 583.

Applying the Ninth Circuit's deliberate indifference standard to the matter before this Honorable Court, the Court would likely have determined that Respondents, in their totality of facts known, should have known that "something

was going to happen" to minor doe by placing perpetrator in the row on the most dangerous row on the bus. *Grubbs II*, 92 F.3d at 900.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted as the nation is split with numerous tests of a state created danger and it is time for clarity under the law which can only be provided by this Honorable Court.

Respectfully submitted,

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