No. 20-320

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,

v.

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

BRIEF IN OPPOSITION FOR RESPONDENTS JACKSON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, TAMARA NEFF, MICHELLE KRIEG, JIMMIE SINGLETON, SUSANNE WALTMAN, and HARLEY NEFTZER

SCOTT C. PETERS
Counsel of Record
PETERS KALIAL & MARKAKIS CO., L.P.A.
6480 Rockside Woods Blvd. S
Suite 300
Cleveland, Ohio 44131
(216) 503-5055
speters@ohioedlaw.com

Counsel for Respondents Jackson Local School District Board of Education, Tamara Neff, Michelle Krieg, Jimmie Singleton, Susanne Waltman, and Harley Neftzer

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1) Whether it is appropriate to review application of the state-created danger doctrine where the outcome will be inconsequential to Petitioners because they are barred from relief against Respondents by *Monell* and the defense of qualified immunity?

2) Whether the Sixth Circuit Court of Appeals' opinion that a Board of Education and school officials were not liable under a state-created danger theory after assigning an 11-year-old student to the front seat of the bus as punishment for lighting a match on the bus, when the student later crossed the aisle and sexually assaulted a kindergarten student sitting directly behind the driver and out of view, is in conflict with other circuit court decisions that reviewed substantive due process claims under factually diverse circumstances?

3) Whether this case presents an appropriate vehicle to determine if this Honorable Court implicitly created the state-created danger theory in *DeShaney* when the Sixth Circuit determined Respondents acted, at most, negligently?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion from the Sixth Circuit Court of Appeals is reported at 954 F.3d 925 (6th Cir. 2020) and is reproduced at Petitioners' Appendix ("Pet. App.") 1-16. The Opinion from the Northern District of Ohio, Eastern Division, is available on LEXIS at *Doe v. Jackson Local School District*, No. 5:17-3019, 2018 U.S. Dist. LEXIS 211131 (N.D. Ohio, January 25, 2018) and reproduced at Pet. App. 17-53.

STATEMENT OF THE CASE

A. Background

During the 2016-2017 school year, Respondent Jackson Local School District Board of Education ("Board") transported Minor Doe – a five-year-old kindergarten student – and C.T. – an eleven-year-old, fifth grade student – to and from Strausser Elementary School each day. Respondent Jimmie Singleton ("Singleton") was the Bus Driver assigned to Minor Doe and C.T.'s bus route. The Board employs regular bus drivers, like Singleton, to transport students to and from school and field trips. The main function of each bus driver is to safely drive/operate the bus each day.

Bus drivers are required to attend training related to their duties, including training on student discipline, bus safety, and special needs students during the

year and participate in *Safe Schools* training (on-line/via computer) each year on several topics related to students and safety issues. Bus drivers also develop seating charts each school year and are encouraged to assign students according to age/grade, with younger students sitting in the front of the bus, and older students sitting in the back of the bus. Bus drivers are encouraged to assign students according to age/grade primarily because topics of discussion differ between different age groups (i.e., the older students may discuss topics that are not age-appropriate for the younger students). Additionally, bus drivers may also assign seats permitting girls to sit together, boys to sit with one another, and siblings to sit in the same seat.

As necessary, Respondent Susanne Waltman ("Waltman"), Strausser Principal, may discipline a student for misbehavior on the bus by placing him/her in detention, placing the student in alternative day assignment, suspending his/her bus riding privileges for a period of time, suspending him/her from school, recommending expulsion, and/or moving the student's seat to the front of the bus or another seat on the bus. Following Waltman's determination, she will contact the Transportation Director and bus driver to advise them of the student's consequences, including the fact that the student needs to be moved to a seat in the front of the bus. In other instances, bus drivers can move a student to another seat on the bus for reasons other than discipline.

After Respondent Harley Neftzer ("Neftzer"), Transportation Director, developed the routes for the

2016-2017 school year, the bus drivers selected the routes based on seniority. Singleton bid on and was awarded the route to which Minor Doe and C.T. were assigned (which route had previously been held by a driver who had just retired), and shortly after the beginning of the 2015-2016 school year, some parents expressed concerns about Singleton's management of the students. It appeared that the parents were concerned that Singleton's management style differed from the other bus driver.

On September 15, 2016, C.T.'s teacher Maria Scavinski ("Scavinski") advised Respondent Michelle Krieg ("Krieg"), Strausser Dean of Students, that a student (Student 1) reported to her that C.T. lit a match on the school bus during the afternoon bus route on September 14, 2016. Waltman was in a meeting at the time. After speaking with Scavinski, Krieg contacted Respondent Tamara Neff ("Neff"), Strausser Guidance Counselor, and they gathered information to pass along to Waltman.

Neff and Krieg spoke with another student (Student 2), who stated she saw C.T. light a match on the bus, blow it out, and throw it out of the window while they were riding the bus home during the afternoon route on September 14, 2016. Student 2 said the match flew over her head, and when she stood up to tell the bus driver about the incident, C.T. blocked her seat. Krieg contacted Neftzer to ask him to review the bus video surveillance recordings for C.T.'s bus. The video confirmed the incident. Neff and Krieg then spoke with C.T., who admitted to lighting the match on the bus

and then throwing a book of matches away in the school restroom.

Krieg and Neff then spoke with three additional students, including Student 1. The students said C.T. lit matches and burned cardboard at the bus stop and lit a match on the bus while riding home. Additionally, Student 1 reported that after C.T. lit the match on the bus, C.T. advised Student 1 that he would not bother Student 1 for the rest of the year if Student 1 did not tell anyone about him lighting matches. After speaking with the students, Krieg and Neff met with Waltman to discuss the incident and facts gathered.

Following a discussion with C.T., Waltman contacted his parents, advised them about C.T.'s behavior, told them that C.T. would be in Alternative Day Assignment (ADA) for the remainder of the day (September 15, 2016), and invited them to meet with her later that day. Waltman met with C.T. and his parents after school, discussed the allegations with them, and provided C.T. with another opportunity to respond to the allegations. After considering the investigation and C.T.'s response, Waltman determined that he had violated the Student Code of Conduct, and placed him in ADA on September 16, 2016, as well.

Given C.T.'s conduct on the bus, Waltman also determined that he would be suspended from riding the bus beginning September 15, 2016, through September 23, 2016, and would be required to sit in the front seat of the bus (opposite of the driver) upon his return on September 26, 2016, through the remainder of the

school year. C.T. was assigned to sit in the front of the bus to ensure he would not light any additional matches. Waltman spoke with Singleton, the bus driver, about the match lighting incident and advised him of C.T.'s bus consequences, including the fact that C.T. needed to sit in the front seat of the bus upon his return on September 26, 2016, and Singleton confirmed that he understood. Neftzer spoke with Singleton afterwards to confirm that Waltman had spoken with Singleton and to verify that he understood the directives. Singleton confirmed that he understood C.T.'s bus consequences.

Additionally, to avoid any further issues with matches in the school building, Waltman determined that C.T. would be excluded from certain privileges in the building and placed on building restriction. Waltman developed a confidential memorandum setting forth such building restrictions and sent it to C.T.'s teachers. The building restrictions required C.T. to: 1) Be escorted off the bus each morning and brought to the main office by a staff member; 2) Have his backpack checked by her or two other staff members; 3) Be escorted to class from the office; 4) Be placed on restroom and hallway restriction, including not being permitted to be in the hallway or use the restroom unless he was accompanied by an adult; and 5) Only be permitted to play on the black top on the playground; and 6) Be required to have an assigned seat in gym, music, library, and cafeteria. Given that C.T.'s building restrictions did not impact him while riding the bus to and from school, Singleton was not advised of, and

Neftzer was not involved in, the development of such restrictions.

Before the September 2016 match-lighting incident, Waltman had not received any complaints regarding C.T.'s behavior or disciplined C.T. Scavinski testified that she did not have any discipline issues with C.T. and did not see any signs of him acting out in class. Although C.T. was placed on a Success Plan while he was in third grade (during the 2014-2015 school year) to assist him in transitioning to the new school environment and making better choices, that Plan was not disciplinary in nature, and did not continue beyond the 2014-2015 school year. A few months after C.T.'s enrollment, Neff worked with C.T.'s teacher in developing a Success Plan which was designed to assist C.T. with learning the expectations of a new school; put some supports into place to help C.T. be accountable for making good choices; and assist C.T. with being truthful, being respectful of other people's property, and following directions without a reminder. C.T. did not need a Success Plan by the end of his third-grade year and did not have a Success Plan in place for the fourth or fifth grade. Moreover, Neff did not receive any complaints about C.T. or have any interactions with C.T. other than greeting him in the building between the end of third grade and September 2016, when he was in fifth grade.

Upon his return to the bus on September 26, 2016, C.T. sat in the front seat of the bus to the right of Singleton. Another male student had previously been assigned to sit in the seat since the beginning of the

2016-2017 school year, and continued to sit in that seat with C.T. Minor Doe had been assigned to sit in the seat directly behind Singleton since the beginning of the school year. Minor Doe would sit with another female kindergarten student while riding the bus to school during the morning route; however, the other student did not ride the bus home during the afternoon route.

On Saturday, November 12, 2016, Waltman learned via email from Jane Doe that C.T. had sexually assaulted Minor Doe on the bus. Video surveillance from the bus confirmed the allegations. On November 14, 2016, Officers from the Police Department met with Neftzer, and they reviewed a portion of the recordings, and were able to substantiate the allegations as well.

Waltman contacted C.T.'s parents during the morning of November 14, 2016, to advise them to keep C.T. home from school and that he had been placed on emergency removal. Afterwards, Waltman met with Minor Doe's parents and Neff concerning the allegations. Minor Doe's Parents described what Minor Doe had shared with them concerning what happened on the bus. The Parents also advised the District that they were not only concerned about the incident that occurred, but wanted the matter kept confidential so as not to impact their daughter's well-being at school.

Continuing the investigation, Neftzer reviewed the recordings to determine whether any other students witnessed the assault of Minor Doe by C.T., and to see if C.T. had assaulted any other children on the

bus and/or whether there were any other incidents of assault involving any other students. Neftzer did not see any other witnesses or victims, but given that C.T. rode the bus the previous school year Neftzer specifically reviewed bus video surveillance recordings for a total of sixty-six (66) days from May 2016 through November 2016.

Waltman continued to investigate the matter by interviewing C.T.'s teachers and by discreetly interviewing students on the bus to verify whether any students witnessed the sexual assaults on Minor Doe. None of the students on the bus witnessed anything. The Police Department conducted its own investigation and met with individuals including Singleton. The Police determined that Singleton had not engaged in any criminal misconduct, and that C.T. positioned his backpack such that the bus driver would not have been able to see C.T.'s misconduct.

B. The District Court Granted Respondents' Motions for Summary Judgment.

On August 15, 2017, Petitioners filed a Complaint in State Court, and the matter was removed to the United States District Court in the Northern District of Ohio on September 13, 2017. Petitioners filed an Amended Complaint to identify Singleton and filed a Second Amended Complaint ("Complaint") to add Neff and Krieg. The Complaint alleged causes of action under both federal and state law. Petitioners specifically raised federal claims under 42 U.S.C. §1983, alleging

violations of Minor Doe's substantive due process rights by Respondents for injuries caused by a private actor, C.T. After the Parties engaged in extensive discovery, they each moved for summary judgment.

On December 14, 2018, the District Court issued its Opinion granting Respondents' Motions for Summary Judgment. Pet. App. 17-53. With respect to Petitioners' federal claims under 42 U.S.C. §1983, the District Court relied on precedent from the Supreme Court and noted that "[t]he 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 County Dep't of Social Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Pet. App. 30. The District Court further noted that while the Supreme Court in *DeShaney* "refused to impose municipal liability for parental abuse a child sustained after officials failed to remove a child from his father's custody," the Supreme Court "impliedly recognized, and courts such as the Sixth Circuit have endorsed, two exceptions whereby state actors have an affirmative duty of protection," including "where their conduct toward the individual results in a 'state-created danger.'" *Brooks v. Knapp*, 221 F. App'x 402, 406-07 (6th Cir. 2007) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998)). Pet. App. 31.

In analyzing the state-created danger exception to *DeShaney*, the District Court reasoned that "[l]iability 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*, 136 F.3d at 1066. Pet. App. 32. Moreover, the District Court noted that in *Kallstrom*, the Sixth Circuit recognized that a plaintiff must satisfy three elements 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 v. Beecher Cmty. Sch.*, 433 F.3d 460, 463 (6th Cir. 2006); *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003). *Id.*

Here, the District Court found that Petitioners could not demonstrate that the Respondents "acted with the 'requisite culpability to establish a substantive due process violation under the Fourteenth Amendment.'" *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). Pet. App. 34. The District Court reasoned that only conduct that "shocks the conscience" will be sufficient to establish the requisite culpability. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). The Court further reasoned that to establish this element under the requisite "subjective recklessness" standard, a plaintiff must show the state actor was both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and that he drew the inference. *McQueen*, 433 F.3d at 469. More specifically, the District Court acknowledged that the Sixth Circuit has

held that a plaintiff fails to establish subjective recklessness when he cannot show the officials could infer "a substantial risk *of the kind of serious harm that occurred.*" *Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014) (emphasis added).

The District Court determined that there was "nothing about C.T.'s school record that could have put the JLSD Employees on notice that he posed a risk of sexually assaulting other students." Pet. App. 37. Indeed, the District Court found that there is no evidence in the record to show that the school officials' awareness of a fifth-grade student lighting matches on the bus meant that they inferred he posed a specific threat of harm in the form of sexual violence, or that by placing the student in the front of the bus, they acted with deliberate indifference to the risk of a sexual assault against another student. Pet. App. 37-38. As a result, the District Court granted Respondents summary judgment, holding that no reasonable jury could find that they knowingly exposed Minor Doe to the risk of sexual assault.

C. The Sixth Circuit Affirmed.

On January 4, 2019, Petitioners appealed a single issue to the Sixth Circuit Court of Appeals, challenging the District Court's decision regarding the state-created danger exception and holding that Respondent employees did not act with deliberate indifference. Pet. App. 6. The remaining federal and state claims and arguments advanced at the District Court were abandoned. Pet. App. 15.

The Sixth Circuit issued its Opinion affirming the District Court's decision on April 1, 2020. Pet. App. 1-16. At the outset, the Sixth Circuit noted that the Petitioners only challenged the District Court's holding that Respondent employees did not act with deliberate indifference, and did not in any way challenge the District Court's holdings "that *Monell* and qualified immunity would bar relief against the Board and the school employees even if they had violated due process." Pet. App. 6. The Sixth Circuit then noted that it has imported the deliberate indifference standard into the state-created danger context, and that the standard has two parts. Pet. App. 9. First, an official "must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ewolski*, 287 F.3d at 513 (quoting *Farmer*, 511 U.S. at 837). Pet. App. 9. When analyzing this first part, the Sixth Circuit reasoned that "a public official must know of more than a *general risk* of harm." "The official must know of the *specific risk* that later develops." Pet. App. 10. Second, "[h]aving drawn the inference," the official next must "act or fail to act in a manner demonstrating 'reckless or callous indifference' toward the individuals rights." *Id.* (citations omitted). Pet. App. 10. Turning to the second part, the Sixth Circuit reasoned that "a public official must do more than be aware of 'a substantial risk of serious harm.'" See, *Ewolski*, 287 F.3d at 513 and *Hunt*, 542 F.3d at 543. "The official's response to that harm must also be 'conscience shocking.'" *Schroder*, 412 F.3d at 731. Pet. App. 10..

The Sixth Circuit found that measured against these standards, Petitioners have not created a genuine dispute of material fact over the culpability element of the state-created danger test. *McQueen*, 433 F.3d at 463. Pet. App. 11. To that end, the Sixth Circuit affirmed the decision of the District Court, finding nothing about C.T.'s school record could have put Respondents on notice that C.T. posed a risk of sexually assaulting Minor Doe. The Sixth Circuit further found that Respondents' responses to the risk also do not show the "callous disregard" or "conscience-shocking" behavior that state-created danger cases require.

REASONS FOR DENYING THE PETITION

Petitioners are not entitled to relief for their claim under 42 U.S.C. §1983 because their claims are barred by *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) and the defense of qualified immunity. The Sixth Circuit Court's decision does not conflict with a decision of any United States court of appeals. Petitioners have not carried their burden of demonstrating any "compelling reason" for the Petition to be granted. See, Sup. Ct. R. 10.

I. The Sixth Circuit identified alternate grounds for its decision to uphold summary judgment in favor of Respondents.

Petitioners' case is moot regardless of the outcome of this Petition. The Sixth Circuit has already indicated it could affirm the District Court's decision granting summary judgment on alternate grounds.

First, Respondent Board is not liable under the jurisprudence of this Honorable Court's opinion in *Monell*. As a political subdivision of the State of Ohio, the Board can only be liable under 42 U.S.C. §1983 if a plaintiff successfully asserts the deprivation of a constitutional right, and that the Board is responsible for a violation of that right because of an "official policy or custom." *Monell*, 436 U.S. at 690. See also, *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205 (1989) (Municipal liability under Section 1983 "attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986)). Respondent Board argued upon motion for summary judgment that there was no deliberate choice by the Board, as a governmental entity, to create and adopt a policy, custom, or usage with the force of law permitting employees to negligently enforce "safety plans," or even more generally to permit allegedly violent and dangerous children to sit, unsupervised, near small children on the bus. The District Court determined there was no custom or policy to establish municipal liability. Pet. App. 39. Further, the District Court rejected any claim

that the Board was liable under a theory of failure to train its employees. *Id*. 39-40.

As for the individual Respondents, the defense of qualified immunity protects government officials performing discretionary functions from actions pursuant to 42 U.S.C. §1983, unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). The District Court, in determining the individual Respondents were entitled to qualified immunity, found that Petitioners could not show that the rights asserted were "clearly established" regardless of whether they had been able to prove the existence of a constitutional violation under a state-created danger theory. Specifically, Petitioners failed to identify "any controlling caselaw from the Sixth Circuit or the Supreme Court, or even persuasive authority from other jurisdictions, that would support a finding that the employee Respondents were on notice that the alleged unlawfulness of their conduct in the mandated 'particularized sense' was apparent or they were 'plainly incompetent' for failing to protect Minor Doe from the actions of CT." Pet. App. 49-50.

Petitioners did not appeal the District Court's ruling concerning municipal liability or qualified immunity to the Sixth Circuit. The Sixth Circuit acknowledged it could affirm the District Court's ruling on the bases that Petitioners' claims were barred by *Monell* and the defense of qualified immunity. (*Id*. at 6.) Were

certiorari granted here, this Court's review would be inconsequential to Petitioners' claims.

II. Petitioners assert a false conflict between the Sixth Circuit and other circuit courts on the state-created danger theory. The statement that their claims would have survived summary judgment in other circuits is purely speculative, and no circuit court has flouted this Court's opinion that mere negligence does not amount to a constitutional deprivation

A. Petitioners have not demonstrated the Sixth Circuit's decision would be in conflict with another circuit.

The Fourteenth Amendment's Due Process Clause provides "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "touchstone of due process is protection of the individual against arbitrary action of government, . . . whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g.*, *Daniels v. Williams*, 474 U.S. at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised)." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846, 118 S. Ct. 1708, 1716 (1998). The Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of

oppression.'" *Id*. at 846 (citing *Collins v. Harker Heights*, 503 U.S. 115, 126, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992) (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989) (citation omitted)).

Executive conduct will violate the substantive due process guarantee only if it is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.*, 523 U.S. at 847 n.8. This Honorable Court has placed this shocks-the-conscience test within tort law's traditional "spectrum of culpability." *Id*. at 848. The Sixth Circuit summarized in the opinion at issue:

> On one end, negligent conduct will never shock society's conscience. *Daniels* [*v. Williams*, 474 U.S. 327, 328 (1986)]. On the other, conduct unjustifiably "intended to injure" is the "most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849. The Court has reserved a case-by-case approach for public actors who cause harm with a state of mind falling in between these extremes – such as actors who are deliberately indifferent to the risk of a private party's harm. *Id*. It has said that deliberate indifference can at times support liability if a public official injures (or fails to protect) someone that the government has taken into custody. See, *Farmer v. Brennan*, 511 U.S. 825, 835–38 (1994). But it has added that an actual intent to injure is required when public actors must

> make hasty decisions, such as during a high-speed chase or a prison riot. *Lewis*, 523 U.S. at 852–53.

Pet. App. 9.

As a general matter, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197 (holding the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."). One exception to this rule recognized by this Court is when the individual and the state have a "special relationship," such as a custodial relationship, that gives rise to an affirmative duty to protect, which exception is not at issue in this case. See *id.* at 199-200. Another exception, however, has been interpreted by a majority of circuit courts to have been "implicitly recognized" in *DeShaney*, and is commonly referred to as the "state-created danger" doctrine. See, e.g., *Turner v. Thomas*, 930 F.3d 640, 645 (4th Cir. 2019) (citing *DeShaney*, 489 U.S. at 201 ("While the State may have been aware of the dangers that [the child] faced . . . it played no part in their creation, nor did it do anything to render him any more vulnerable to them.")).

Many circuit courts have created multi-part tests for determining when constitutional rights have been violated under the state-created danger doctrine, while

other circuits analyze whether the state created the danger and whether a government official's actions in failing to prevent the injury shocked the conscience.

As the Seventh Circuit commented, the variations in approach by the circuits do not "**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 multipart 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**." *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 n.3 (7th Cir. 2007) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), in turn citing *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)); *Uhlrig v. Harder*, 64 F.3d 567, 572-74 (10th Cir. 1995) (emphasis added).

The Sixth Circuit also looked to see whether official conduct shocked the conscience in this matter. It determined that the employees' responses to C.T.'s behavior did "not show the 'callous disregard' or 'conscience shocking' behavior that our state-created-danger cases require." Pet. App. 12. To the contrary:

> [The employee Defendants] did not ignore a risk that C.T. would harm his fellow students. Far from it. Soon after the dean of students

> got word of the match-lighting claims, the school employees quickly investigated the incident. And Principal Waltman designed a Safety Plan tailored to C.T.'s misconduct. That plan would, for the most part, put C.T. "close to an adult at all times," which would reduce the opportunities for the type of reckless behavior that C.T. had undertaken on the bus and at the bus stop. To be sure, Waltman's choice to move C.T. to the front of the bus put him closer to Minor Doe. But Waltman did not make this seating change for some "arbitrary" reason designed to increase the risks of harm to Minor Doe. (Citation omitted.) Waltman was instead "motivated by a countervailing, legitimate governmental purpose." (Citation omitted.) She moved C.T. to his front-row seat across from Minor Doe because it would be "easier [for the bus driver] to see" him, and because "if he lit a match, the bus driver could smell it."

(*Id*. 12-13.)

Petitioners contend that they would have prevailed in the First, Second, Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuit Courts. This is pure speculation, and an analysis of the cases reveals that they are not in conflict with the Sixth Circuit in any way that is outcome determinative.

The First Circuit's opinion in *Irish v. Maine*, 849 F.3d 521 (1st Cir. 2017), vacated a dismissal on a Rule 12(b)(6) motion. It did not, as Petitioners claim, determine there were questions of fact requiring further

development for a jury. (Petition 17.) While the First Circuit has not applied the state-created danger exception in any case, it has recognized its existence in other circuits. *Id.* at 526.

Irish is factually and procedurally distinct from this case, but any legal consistencies would weigh against success for Petitioners in the First Circuit. After *Irish* called police to report her ex-boyfriend had abducted, raped, and threatened to kill her, police officers left a voicemail for the ex-boyfriend informing him of the report. After police then refused to provide protection for the woman and her family, the ex-boyfriend shot the woman's mother, killed her current boyfriend, and abducted the woman before being apprehended after a shootout with police. The *Irish* court vacated the dismissal of the complaint because discovery was necessary to determine if the officers involved violated police protocols:

> All or some of the answers to these questions may be pertinent to the substantive due process and qualified immunity issues. If discovery reveals that the officers' actions violated accepted norms of police procedure or that they acted despite foreseeing the harm to Irish, it may strengthen the plaintiffs' argument that the officers exacerbated the danger that Lord posed. It may also directly speak to whether the officers acted in deliberate indifference to Irish's safety, so much so that their conduct shocks the conscience. By contrast, if discovery reveals that no protocols were violated, then the plaintiffs may have a harder

> time surviving a 12(b)(6) motion. While the fact that the officers did not take further discretionary steps to ensure Irish's safety may amount to negligence, mere negligence would be insufficient to maintain a claim of substantive due process violation.

Irish at 528. Plainly, the First Circuit, in the qualified immunity context, intended for the trial court to consider whether the officers' conduct was deliberately indifferent such that their conduct shocked the conscience, which would evince the substantive due process claim, or whether some of their conduct was merely negligent, which would be insufficient. Where the Sixth Circuit expressly found that school officials were not deliberately indifferent to any danger presented by C.T., that their conduct could not be characterized as conscience shocking, and, at most, there could have been negligent conduct insufficient to rise to the level of a constitutional violation, it is clear Petitioners' purported conflict with the First Circuit is false and misleading. Pet. App. 12-15.

Similarly, Petitioners claim they would have been successful in the D.C. Circuit, but the case they cite is inapt. A union claimed that two officials acted with deliberate indifference to the safety of correctional officers when they laid off several hundred of them at the same time they added to the number of inmates housed at the facility. *FOP Dep't of Corr. Labor Comm. v. Williams*, 375 F.3d 1141, 1142 (D.C. Cir. 2004). The *Williams* court engaged in the same conscience-shock inquiry as its sister circuits, under the authority of this

Court: "The conscience-shock inquiry is a 'threshold question' 'in a due process challenge to executive action.'" *Williams*, 375 F.3d at 1145 (citing *Lewis*, 523 U.S. at 846, 847 n.8 ("Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'") (quoting *Collins*, 503 U.S. at 129)). The union argued for the use of a lower threshold for meeting the "shock the conscience test" by showing deliberately indifferent conduct as opposed to intentional conduct and an opportunity to make an unhurried judgment, but the D.C. Circuit held the "lower threshold" only applies in "circumstances where the State has a heightened obligation toward the individual." *Id*. at 1145-46. It is because custody of a prisoner, for example, is a special relationship that the opportunity for deliberation can render a "State official's deliberate indifference 'truly shocking.'" *Id.* at 1146 (citation omitted).

Petitioners do not analyze the Second Circuit Court decision listed in their chart, *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007). (Petition 13, 15-19.) *Lombardi* involved rescue and clean-up workers at the World Trade Center site after the attacks on September 11, 2001, who claimed federal officials knowingly lied about the air quality in lower Manhattan causing the plaintiffs to believe it was safe to work at the site without needed respiratory protection, resulting in harm. It bears no resemblance to the case before the Sixth Circuit, other than the fact that the court did examine whether the officials' conduct shocked the conscience of the court. It did not.

In *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), the Third Circuit overruled the dismissal of a complaint under Rule 12(b)(6), finding the plaintiff should be permitted to amend the complaint as to the conduct of employees of a 911 call center who allegedly helped a co-worker use the 911 databases to locate the whereabouts of his former girlfriend and her then-boyfriend, whom he later killed. The co-worker had made statements to fellow employees about being distraught and wanting to make the new boyfriend pay. The Third Circuit held the plaintiff had "alleged sufficient facts, which, if proven, would demonstrate that these [co-worker] defendants were deliberately indifferent, establishing a level of culpability that was conscience-shocking." *Phillips v. County of Allegheny*, 515 F.3d 224, 241 (3d Cir. 2008). While Petitioners focus on the foreseeability prong of the Second Circuit's state-created danger test, they neglect to acknowledge that the Sixth Circuit concluded school officials were not at all deliberately indifferent to the risk of harm presented by C.T., and that it was their concern that led to the formation of the safety plan in the first place. Further, the Third Circuit in *Phillips*, after reviewing the complaint and taking as true all of the allegations and drawing reasonable inferences therefrom, held that the complaint did sufficiently allege not only foreseeability, but deliberate indifference, as well. *Id*.

Petitioners also attempt to compare this case with the circumstances in another Third Circuit case, *L.R. v. Sch. Dist. of Philadelphia*, where a kindergarten teacher was not entitled to qualified immunity after he

released a student to an unidentified adult who sexually assaulted the child later that day. The court held it was shocking to the conscience that a kindergarten teacher would allow a child in his care to leave his classroom with a complete stranger. *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 239 (3d Cir. 2016). Much like in the Sixth Circuit, the Third Circuit required evidence the state actor acted with a degree of culpability that shocks the conscience. *Id*. at 242. There was a policy in place prohibiting teachers from releasing young students to an adult without proper documentation and the teacher was aware of the policy. He asked the perpetrator for ID, yet when it could not be produced, still released the student to the perpetrator. The court determined the risk of harm in releasing a five-year-old child to an unidentified, unverified adult is "so obvious" as to rise to the level of deliberate indifference. The fact that there was a school policy in place tended to show that school officials were aware that releasing a young child to a stranger is inherently dangerous. This "inherently dangerous" conduct and obvious risk of harm led the court to find that the teacher's conduct rose to the level of conscience-shocking behavior. *Id*. By contrast, the Sixth Circuit, undergoing a similar analysis, held it was reasonable to punish C.T. by placing him in the front of the bus by the driver, and that such conduct was not conscience-shocking. Pet. App. 12-15.

It is also not clear, as Petitioners claim, that they would have prevailed on the state-created danger exception in the Fourth Circuit. Petitioners cite to *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019), a case in which

the plaintiff was attacked by protesters at the "Unite the Right" rally in Charlottesville, Virginia. The plaintiff claimed officers watched the attack and did nothing to help, pursuant to a stand-down order under which police officers at the rally were instructed not to intervene in violence among protesters. Petitioners claim that the Fourth Circuit "only factors in the affirmative act in their analysis of the State Created Danger Theory," and that because the Sixth Circuit determined an affirmative act occurred in this case, they would have prevailed in the Fourth Circuit. But the claim that the Fourth Circuit "only factors in the affirmative act" is misleading, as it was the part of the analysis in contention in the *Turner* case.

In reality, the Fourth Circuit's analysis on whether conduct shocks the conscience is more complete:

> [T]he Supreme Court has, for half a century now, marked out executive conduct wrong enough to register on a due process scale as conduct that "shocks the conscience," and nothing less. *County of Sacramento* [*Lewis*], 523 U.S. at 846 (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)). The shocks-the-conscience test turns on degree of fault. For a due process challenge to executive action to succeed, the general rule is that the action must have been "intended to injure in some way unjustifiable by any government interest." *County of Sacramento*, 523 U.S. at 849. As to "negligently inflicted harm," it is "categorically beneath the threshold of constitutional due process." *Id.* And as to

> "culpability falling within the middle range, following from something more than negligence but less than intentional conduct," the Court has allowed that it may have constitutional implications, but only in special circumstances. *Id.* (quotation omitted). As to what those special circumstances are, the Court has issued no general rule except that judges should proceed with "self-restraint" and "utmost care," *Collins*, 503 U.S. at 125, and make "an exact analysis" of the circumstances presented "before any abuse of power is condemned as conscience shocking," *County of Sacramento*, 523 U.S. at 850.

Waybright v. Frederick County, 528 F.3d 199, 205 (4th Cir. 2008). The court's reliance on this Court's decision in *Lewis* mirrors the decision of the Sixth Circuit. Pet. App. 9.

The Seventh Circuit's analysis in *King* does not appear to be in conflict in any way with the Sixth Circuit. In *King*, a student who missed the school bus attempted to reenter the building to make a telephone call, and was allegedly denied reentry by a hall monitor citing specific school policy against students reentering the building after school. While walking to a public transportation station, the student was abducted and raped. *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 814 (7th Cir. 2007). Like the Sixth Circuit here, the Seventh Circuit found the defendants' alleged actions were not conscience-shocking. Because the school official was implementing a policy designed to prevent the unsupervised return of students to the

school after hours, there was no indication of deliberate indifference to student safety. As in Petitioners' case, the Seventh Circuit determined that "[a]t most," the implementation of the policy under the facts amounted to "simple negligence, which was an insufficient basis for liability under the state-created danger doctrine." *Id*.

Petitioners do not cite to an actual Eleventh Circuit opinion on the state-created danger exception, but do provide a case from the Southern District of Florida that cites to other courts' opinions regarding the exception, as well as an Eleventh Circuit opinion finding that "the government's affirmative acts 'rise to the level of a substantive due process violation [when] the act can be characterized as arbitrary or conscience shocking in a constitutional sense.'" *Gayle v. Meade*, 2020 U.S. Dist. LEXIS 71953, at *78 (S.D. Fla. Apr. 22, 2020) (quoting *L.L. ex rel. Linda L. v. Tuscaloosa City Bd. of Educ.*, No. 7:08-CV-2051-LSC, 2013 U.S. Dist. LEXIS 5591, 2013 WL 169612, at *8 (N.D. Ala. Jan. 15, 2013)) (citing *Waddell v. Hendry Cnty. Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003)). Again, this statement is not in conflict with the Sixth Circuit's analysis.

Only the Ninth Circuit in *Kennedy* has indicated that deliberate indifference, as opposed to gross negligence or conduct that is shocking, is required. In that case, a police officer received a report from plaintiff that her 13-year-old neighbor ("perpetrator") had molested her nine-year-old daughter. The plaintiff communicated her fear about the perpetrator's propensity for violence by informing the officer not only about the assault on her daughter, but also about violence she

had observed in his home, that he had been involved in fights at school, had lit a cat on fire, had broken into his girlfriend's house and attacked her with a baseball bat, and had thrown rocks at a building in town. After hearing about the perpetrator's violent behavior, the officer assured plaintiff that she would be given notice prior to any police contact with the perpetrator's family about her allegations. *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1057-58 (9th Cir. 2006). The officer not only failed to inform plaintiff in advance that he informed the perpetrator of her report, but also failed to protect plaintiff and her family. The perpetrator shot and killed plaintiff's husband within eight hours of learning of the report.

The decision is distinguishable because the court in *Kennedy*, as in other Ninth Circuit cases, analyzed deliberate indifference within the context of a danger that the defendant officer himself created. For instance, the officer "affirmatively created an actual, particularized danger that plaintiff would not otherwise have faced" when he notified the perpetrator of plaintiff's allegations without first warning plaintiff as he had promised to do. "The officer's misrepresentation that the police would patrol the neighborhood that night was an additional and aggravating factor." *Id*. at 1057, 1062 (citing *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (holding state employees could be liable for the rape of a registered nurse assigned to work alone in the medical clinic of a medium-security custodial institution with a known, violent sex-offender); *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997)

(holding as viable a state-created danger claim against police officers who, after finding a man in grave need of medical care, cancelled a request for paramedics and locked him inside his house); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (holding police officers could be held liable for the hypothermia death of a visibly drunk patron after ejecting him from a bar on a bitterly cold night)). See also, *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (finding an assertion of government power amounted to deliberate indifference on the part of an officer who arrested the driver of the car Wood was riding in, impounded the car, and left Wood by the side of the road at night in a high-crime area).

The Respondents in this case did not actively create a dangerous situation (like the officer in *Kennedy*, who triggered the assault by the neighbor and failed to protect plaintiff) by assigning C.T. to the front of the bus after lighting matches. After all, he was "not moved to the front of the bus for fear he might violently attack older students in the back[, h]e was moved to the front because he might light a match." Pet. App. 14. Moreover, the Sixth Circuit explicitly declared that Respondents were not deliberately indifferent to the danger C.T. presented. While Petitioners contend the "extensive" Safety Plan is evidence that the school employees knew that C.T. posed a serious risk of harm and were indifferent to the risk, the Sixth Circuit rejected this argument, determining that the attempt to use the Safety Plan "to impose liability on the school employees flips the deliberate-indifference standard on

its head. That approach would impose liability on officials who vigorously respond to risks of harm (because this response evinces their knowledge), while giving a free pass to officials who do nothing in response (because this omission evinces their lack of knowledge)." (*Id*. 14). A more analogous situation (to the one in *Kennedy*) would have occurred had Petitioners complained of violence by C.T. against their daughter, school officials then informed C.T. of the complaint, and then placed him near Minor Doe on the bus. The Ninth Circuit required nothing more than deliberate indifference where a defendant puts an individual in (a known and obvious) danger that the plaintiff would not have faced without the assertion of government power. *Kennedy*, 439 F.3d at 1064; *Wood*, 879 F.2d at 588.

Finally, Petitioners point out that the Fifth Circuit has not recognized the state-created danger doctrine. But in *Leffall*, the Fifth Circuit analyzed a claim in the manner of several sister circuits consistent with the Sixth Circuit's analysis. *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994). In that case, Dameon Steadham attended a dance sponsored by Lincoln High School and a PTA. After the dance, individuals began to fire handguns randomly and recklessly into the air in the Lincoln High School parking lot. In the course of the shooting, a student from another high school accidentally and fatally shot Steadham in the head. *Id.* at 523. The decedent's mother, Leffall, filed suit essentially alleging the decision of the public school district and school officials to sponsor the dance, "despite their knowledge of the danger of such an occurrence,"

violated Steadham's constitutional rights. *Id*. The Fifth Circuit analyzed decisions from other circuits on the issue of deliberate indifference, without accepting the state-created danger exception:

> Assuming arguendo that the decision of the [school officials] to sponsor the dance at Lincoln High School despite their awareness of the dangers posed thereby was negligent, perhaps even grossly so, we conclude that the conduct of the state actors did not rise to the level of deliberate indifference, which is, after all, a "lesser form of intent" rather than a "heightened degree of negligence." [*Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 n. 7 (5th Cir. 1994)] This was not a case in which the state knowingly brought the victim into close proximity with a specific individual known to be likely to commit violence, like *Grubbs*, or abandoned the victim in a highly dangerous environment, like *Wood* or [*White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (finding Section 1983 plaintiffs, who were small children, had stated a claim when they alleged that police officers had arrested their uncle and left them unattended in a car on the side of the freeway)], or conspired with the private actor who inflicted the deprivation, like *Dwares*. [*Dwares v. New York*, 985 F.2d 94 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with "skinheads" and sanction violence by skinheads against persons demonstrating and burning American flags).] Nor did the defendants decide to sponsor the dance with an utter lack of

> regard for the safety of the attendees. [S]chool officials provided two security guards, albeit unarmed guards, on the night in question, which refutes any contention that the school officials deliberately ignored the risk to persons attending the dance. Although the existence of deliberate indifference is often a "fact-laden question," *Doe*, 15 F.3d at 456 n. 12, we conclude that Leffall's complaint affirmatively discloses that the state actors in the instant case were not deliberately indifferent to Steadham's constitutional rights, see *id.* (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference).

Leffall, 28 F.3d at 531-32. The court stated it did "not condone the decisions made by the state actors in this case," but was "bound by the principle that 'there is a significant distinction between a tort and a *constitutional* wrong.'" *Id*. (quoting *De Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989)) (finding plaintiff failed to allege facts that demonstrated deliberate indifference to Steadham's constitutional rights).

The purported conflict between the Sixth Circuit and other circuits that Petitioners allege would have yielded denials of Respondents' motions for summary judgment is illusory. As the Seventh Circuit noted, the circuit courts have simply made efforts to "guide the necessarily fact-bound inquiry into whether the official conduct shocks the conscience." *King*, 496 F.3d at 817 n.3. Each approach limits liability under the state-created danger doctrine to conduct that violates a

plaintiff's substantive due process rights because it is "arbitrary in the constitutional sense, i.e., shocks the conscience." *Id*.

B. The Due Process Clause of the 14th Amendment must not be a font of tort law. Where the Sixth Circuit identified ("at most") negligent conduct by officials, Petitioners' claim would not have survived in any federal appeals court jurisdiction because it does not rise to the level of a constitutional claim.

The Sixth Circuit acknowledged that Petitioners focused on the conduct of two school employees responsible for implementation of the safety plan, Principal Waltman and Singleton, the bus driver. It observed that, "at most," Petitioners asserted a tort claim for negligence in the implementation of the Safety Plan:

> As will often be the case in retrospect, Waltman and Singleton also could have done more when implementing this discipline. Singleton could have ensured that C.T. stayed in his assigned seat. And Waltman could have followed up with Singleton about the discipline. At most, however, the failure to take these additional precautions suggests negligence, which falls well short of establishing the required "callous disregard for the safety" of Minor Doe. And even these specific choices came with tradeoffs of their own. The more time Singleton spent monitoring for student misconduct, the less time he spent watching

> the road. It is not callously indifferent to prioritize his "focus on driving the bus" for the safety of all. And, as Waltman explained, "there are so many moving parts in a school building during a day" that "following up with every single on-the-spot decision is not even humanly possible." In short, "the practicalities of day-to-day governance require officials to make difficult allocation choices and tradeoffs," and "it is generally not for the courts to compel affirmative steps in one area at the expense of another in weighing competing policy options." *Schroder [v. City of Fort Thomas*, 412 F.3d 724], 730.

Pet. App. 13.

While Petitioners pursued state tort claims against Respondents, they were ultimately dismissed by the District Court (Pet. App. 45-46, 53), and later abandoned on appeal. This Court has held "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Deshaney*, 489 U.S. at 202 (citing *Daniels v. Williams*, 474 U.S., at 335-336; *Parratt v. Taylor*, 451 U.S. 527, at 544 (1981); *Martinez v. California*, 444 U.S. 277, 285 (1980); *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Further, this Court has "rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and ha[s] held that the Constitution does not guarantee due care on the part of state officials." *Lewis*, 523 U.S. at 848-49 (citing *Daniels v. Williams, supra*, at 328 and

Davidson v. Cannon, 474 U.S. 344, 348, 88 L. Ed. 2d 677, 106 S. Ct. 668 (1986) (clarifying that *Daniels* applies to substantive, as well as procedural, due process)).

None of the federal circuit courts has determined that mere negligence is sufficient to raise a violation of a substantive due process claim. That is, none has contravened the Supreme Court's statement that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 848-49. See also, *Shapiro, et al.*, Supreme Court Practice, Ch. 4.14, at p. 272 and Ch. 4.3, p. 242 ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

CONCLUSION

The Petition should be denied where Petitioners' claims cannot proceed on other grounds. The Sixth Circuit is not in conflict with other circuit courts that recognize the state-created danger doctrine simply because there is some variation in the otherwise same analysis of whether conduct amounts to a constitutional violation. Finally, where negligence "at most" is involved, *DeShaney* need not be revisited.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

SCOTT C. PETERS
Counsel of Record
PETERS KALIAL & MARKAKIS
CO., L.P.A.
6480 Rockside Woods Blvd. S
Suite 300
Cleveland, Ohio 44131
(216) 503-5055
speters@ohioedlaw.com

Counsel for Respondents Jackson Local School District Board of Education, Tamara Neff, Michelle Krieg, Jimmie Singleton, Susanne Waltman, and Harley Neftzer

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