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,

vs.

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

Respondent,

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

REPLY BRIEF

A. Respondents cite incorrect material facts.

It is foreseeable that a Respondent would have their own version of the facts in a matter; however, it was not predictable that the Respondent would rewrite the facts. The following are material facts that Respondent either omitted, altered, or drastically rewrote:

1. Respondent incorrectly presented in their Brief the fact that C.T. was required to sit in the front seat of the bus (opposite of the driver) upon his return from suspension. (Respondent Brief, p. 4).

    a. 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."

    Respondents incorrectly cited the facts of this case, specifically the affirmative fact found by the District Court in this matter where Respondent Singleton told C.T. to sit in the seat behind him next to Minor Doe. The District Court held that following Perpetrator's return to the bus after 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: an affirmative act, 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.

2. Respondents introduced for the first time since this matter was filed the fact that the reason why Respondent Singleton was not informed of the Safety Plan for C.T. was because it "did not impact him while riding the bus to and from school". (Respondent Brief, p. 5). This fact was never testified to in any form by any Respondent or Petitioner in this matter and is mere unsupported conjecture. Rather, 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.
3. Respondents introduced for the first time in this matter the fact that the prior Success Plan for C.T. was not "disciplinary in nature". (Respondent Brief, p. 6). This fact is nowhere in the facts presented to the District Court and the Court of Appeals by either party. Rather, Jackson Local School District ("JLSD") implemented a "success plan" to correct Perpetrator's deceitful behavior as testified to by Respondent Neff.
4. Respondents also omitted the material fact that Respondent Waltman determined that that C.T. violated the Student Code of Conduct following his behavior on the bus involving matches, specifically citing the following violations of the Student 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.

B. Respondents improperly present legal arguments that were never reviewed in the District Court or Court of Appeals.

Respondents' First Question Presented is meritless. Respondents present the following question:

> 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?

What is highly concerning regarding such a Question Presented is that the argument of qualified immunity and *Monell* were never reviewed by the District Court or the Court of Appeals. The District Court never reached the analysis of qualified immunity and *Monell* as it did not find the requisite culpability to increase the risk of harm form a third-party. 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. Clearly, had the Court of Appeals reversed the District Court relative to the requisite

culpability, the issues of *Monell* and qualified immunity would have been required to be briefed further by the parties at the District Court level.

Respondents did not acknowledge the inconsistency within the Circuits and the lack of clarity provided with the state created danger theory. Rather, Respondents completely disregarded the questions presented by the Petitioners in an attempt to divert the Court's attention from the questions presented by Petitioners to incorrect facts and meritless legal arguments related to qualified immunity and *Monell*.

Respondents *Monell* analysis is misplaced in their Response Brief. The Sixth Circuit Court of Appeals stated:

> The Does challenge only the district court's holding that the school employees did not act with deliberate indifference; they nowhere challenge (or even acknowledge) the district court's alternative holdings that Monell and qualified immunity would bar relief against the Board and the school employees even if they had violated due process. Yet "[a] ruling by us that the [Does] have shown a constitutional violation, unaccompanied by a ruling with respect to any municipal policy [or qualified immunity], would not suffice to alter the judgment." Hardrick v. City of Detroit, 876 F.3d 238, 244 (6th Cir. 2017). That fact might suggest we could affirm on these unchallenged grounds alone. See id. at 243–44; White Oak Prop. Dev., LLC v. Washington Township, 606 F.3d 842, 854 (6th Cir. 2010). Oddly, however, the school defendants also did not raise these Monell and qualified-immunity bases for affirmance. Given the parties' briefing decisions, we exercise our discretion not to "address the municipal-policy and qualified immunity issues . . . because both theories share an initial premise—the violation of a federally protected right—that has not been satisfied." Schroder v. City of Fort Thomas, 412 F.3d 724, 727 (6th Cir. 2005); see Hardrick, 876 F.3d at 244.
>
> App. P. 6.

For Respondents to claim "the Sixth Circuit has already indicated it could affirm the District Court's decision granting summary judgment on alternate

grounds" is disingenuous, at best. Respondents Brief, P. 14. There is no question that the first step to the analysis of qualified immunity and *Monell* is a constitutional deprivation or due process violation. *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 463 (6th Cir. 2006); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1977); *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017); see *Doe v. Claiborne Cty. ex rel. Clairborne Cty. Bd. of Educ.,* 103 F.3d 495, 505–06 (6th Cir. 1996). As such, before any further analysis or argument was presented of qualified immunity and *Monell*, the District Court determined that there was no state created danger theory exception applicable to this matter and therefore stopped the analysis of *Monell* and qualified immunity on the very first element: constitutional deprivation or due process violation.

C. Respondents Brief Regarding the Circuit Split of State Created Danger Theory Supports Petitioners' Writ.

Respondents spend a majority of their Brief analyzing the facts of the Circuit cases contained in Petitioner's Writ. By doing so, Respondents themselves have aided Petitioners in shedding light on how many different tests are applied by the Circuits when faced with a state created danger argument. Whereas no case is identically on point to the matter before this Court, the analysis of how this case would have been likely applied using different Circuits tests is the fulcrum of Petitioners Writ: there has never been a test determined by the United States Supreme Court to be utilized

when determining the state created danger theory and as a result the Circuits have been forced to create their own differing tests.

Respondents do not contend that 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. *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 recitation of Petitioners' cited cases by Respondents only supports the argument that 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 reality is that Respondents cannot dispute that Petitioners' chart in their Writ is accurate and demonstrates that the Circuits are clearly looking for guidance and direction from this Honorable Court as to what the state created danger theory test should be and how it should be applied.

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. 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).	Prevail
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.	Failed

	5. The conduct shocks the conscience. *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004)	
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. 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).	Prevail
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

D. Respondents' position that this is a negligence case is incorrect.

It is disappointing that Respondents, those tasked with educating our children and acting *in loco parentis*, chose to classify the rape and sexual assault of a five-year-old girl while riding their school bus to and from their school, is "at most" negligence. Respondents Brief, P. 34. The Court of Appeals stated: this is not a negligence claim, but one sounding in a rare species of one of the narrowest doctrines of constitutional law. *See Estate of Romain v. City of Grosse Pointe* Farms, 935 F.3d 485, 492. App. P. 15. The lack of respect for this case, this child and these parents, is not unnoticed. The issue before this Court on Petitioners' Writ of Certiorari relates to the factors of the state created danger theory in the Sixth Circuit compared to the other Circuits and not a fabrication of this matter being a negligence claim. The reality is that Respondents reacted from a match lighting incident mixed with lying and bullying by C.T. with what Respondent Neff characterized as the strictest "Safety Plan" she had ever seen at the school. It is undisputed that C.T. was disciplined for his behavior and was placed with a list of restrictions upon him and his person ranging from the playground to the bus. However, no Respondent acknowledged that by placing C.T. next to a five-year-old kindergartner that she may be harmed, that she was placed in the eye of the storm of C.T. As a result of Respondents willful disregard of their own created Safety Plan, Minor Doe faced every parents' nightmare.

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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