No.

In the Supreme Court of the United States

FELICIA ROBINSON, PETITIONER,

v.

WEBSTER COUNTY, MISSISSIPPI, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MATTHEW D. WILSON
THE LAW OFFICE OF
MATTHEW WILSON, PLLC
P.O. Box 4814
Mississippi State, MS 39762

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
THOMAS S. CHAPMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether a person injured by a private actor can state a claim under 42 U.S.C. § 1983 against a state or local government actor who created the danger of that injury.

PARTIES TO THE PROCEEDING

Petitioner, who was plaintiff in the district court and appellant in the court of appeals, is Felicia Robinson.

Respondents, who were defendants in the district court and appellees in the court of appeals, are Webster County, Mississippi; the Webster County Sheriff's Department; Tim Mitchell, Sheriff of Webster County, in his individual and official capacities; and Santana Townsend, an employee of the Webster County Sheriff's Department, in her individual and official capacities. Daren Patterson, a defendant in the district court, was not a party in the court of appeals.

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Felicia Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is available at 825 F. App'x 192 (5th Cir. 2020). Pet.App.1a-7a. The opinion of the district court is unreported and is available at 2020 WL 1180422 (N.D. Miss. Mar. 11, 2020). Pet.App.8a-35a.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

42 U.S.C. § 1983 provides in relevant part:

> 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[.]

STATEMENT

This case is an optimal vehicle to resolve an acknowledged and entrenched circuit split on a recurring and significant question: whether liability under 42 U.S.C. § 1983 extends to state or local government actors who knowingly create a danger of private violence to victims, and thereby cause them injury. The Fifth Circuit has long rejected liability under this "state-created danger" doctrine, and reaffirmed that holding in the decision below. But the Fifth Circuit repeatedly has acknowledged that it alone rejects the state-created danger doctrine. Nine other courts of appeals—the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits—have repeatedly held that state and local officials can be liable under section 1983 on this basis.

The decision below underscores the anomalousness of the Fifth Circuit's position. As the district court below observed, if any case calls out for recognizing the state-created danger theory of liability, it is this one. After petitioner Felicia Robinson's husband was arrested and imprisoned for assaulting a police officer, the sheriff granted him unsupervised weekend furloughs. On one such furlough, Ms. Robinson's husband tried to run her over. Local police reported that incident to the sheriff, but the sheriff kept releasing Ms. Robinson's husband until events ended in tragedy. When Ms. Robinson called the sheriff's office dispatcher to complain about the husband's violent behavior during another furlough, the dispatcher, who was on duty at the county jail, simply handed the call off to a nearby jail "trusty" so that the inmate could speak with Ms. Robinson's volatile husband. That decision did not end well. The call further enraged Ms. Robinson's husband, culminating in an attack in which he beat her to unconsciousness, then poured a strong, sulfuric acid-based drain cleaner all over her body until she was burned beyond recognition.

In nine other circuits, Ms. Robinson could have pursued a section 1983 claim against the sheriff and dispatcher for causing this violation of her constitutional right to bodily integrity. Other domestic-violence victims and plaintiffs endangered by extraordinarily egregious official misconduct have done so for years. The district court thus stated that "the facts alleged by Robinson … appear to fall squarely within the parameters of the state-created danger theory." Pet.App.29a. The Fifth Circuit called the facts of the case "unsettling." Pet.App.2a. But because Fifth Circuit precedent categorically forecloses the state-created danger theory, both the district court and the Fifth Circuit panel dismissed Ms. Robinson's claim without reaching the merits. Pet.App.7a, 28a-30a.

Only this Court can settle this acknowledged divide on this recurring and important issue. In most of the country, officials can be held accountable under section 1983 for singularly reprehensible actions that are so closely tied to private acts of violence that state officials may face liability under ordinary causation principles. The possibility of liability for extreme acts of misconduct, in turn, informs how officials train for and respond to incidents. But the Fifth Circuit alone leaves victims of horrific acts of violence without recourse against the officials who threw them to the wolves. State-created danger cases arise with unfortunate regularity.

It is unconscionable as well as pointless to allow this deeply entrenched split to persist any longer. All nine circuits that recognize the state-created danger theory have done so many times throughout the decades. In the face of this opposition, the Fifth Circuit has remained steadfast in rejecting the state-created danger theory. There is no hope that this circuit split will resolve itself, and no justification for leaving similarly-situated citizens subject to different rights depending on where they live. Nor will this Court likely encounter a better vehicle. The Fifth Circuit's refusal to recognize the state-created-danger doctrine was outcome-determinative here. This is a perfect opportunity for the Court to settle a recurring, highly significant question about the scope of liability under section 1983.

A. Factual Background

Petitioner Felicia Robinson and her husband Daren Patterson hail from Eupora, a 2,000-person town in rural Webster County, Mississippi, near the middle of the state. Pet.App.38a-41a. In January 2014, Mr. Patterson was convicted of felony cocaine possession, and served a four-year term of imprisonment until January 2018. At that

point, Mr. Patterson left state prison to begin a four-year period of supervised release. Pet.App.41a-42a. Mr. Patterson's release was short-lived. In May 2018, he assaulted a Eupora police officer and was found in possession of methamphetamine. The police arrested him and took him to the Webster County Jail. Pet.App.42a. The court set bond, which Mr. Patterson never posted. Pet.App.44a. So the Webster County Sheriff's Department and its then-Sheriff, Tim Mitchell, assumed custody of Mr. Patterson. The state put into motion revocation of his supervised release, and made plans to take him back to state prison. Pet.App.45a.

In the meantime, Mr. Patterson spent several months in Webster County custody. On September 1, 2018, Sheriff Mitchell appointed Mr. Patterson as a jail "trusty," despite his recent assault on an officer and possession of methamphetamine. Pet.App.45a. In Mississippi, trusty status is reserved for only those state prisoners whom state correctional authorities have deemed to pose minimal danger to the community, and allows inmates to take part in approved work release programs. *See* Miss. Dep't of Corrections Inmate Handbook 12 (2011); Miss. Code Ann. § 47-5-138.1.

That same day, September 1, Sheriff Mitchell released Mr. Patterson from jail on an unsupervised weekend pass. Pet.App.46a. Once set loose, Mr. Patterson embarked upon a rampage of violence. At a Eupora pool hall that evening, a "highly intoxicated" Mr. Patterson brutalized his wife in front of a "crowd" of witnesses. He started by hitting her in the face. She fled on foot. So he tried to run her over with her car. *Id.* Witnesses called 911; Ms. Patterson ran away and flagged down a car for help. Mr. Patterson fled the scene. Pet.App.46a-48a. The Eupora police charged Mr. Patterson with leaving the scene of an accident and reported the episode to Sheriff Mitchell.

Pet.App.48a. At the end of the weekend, Mr. Patterson returned to jail.

Sheriff Mitchell continued giving Mr. Patterson special privileges as a trusty and granting him further unsupervised furloughs. Sheriff Mitchell released Mr. Patterson for the day on October 11, 2018, and for the weekend starting Friday, November 2, 2018. All Mr. Patterson had to do was report back to jail Sunday morning. In the meantime, despite his well-known propensity for violence and his recent attempt to kill his wife, no one planned to check up on him. Pet.App.49a.

Thus, Mr. Patterson encountered no difficulties in resuming his abuse of Ms. Robinson on November 2. Around 1 PM, he took her to a pool hall, where he threw a beer can at her and punched her in the face. Pet.App.50a. He took her back to her house, then threatened to burn it down. He screamed expletives at her for hours. *Id.*

Around 9:23 PM, as Mr. Patterson was punching holes in the wall of her home, Ms. Robinson called Santana Townsend, a dispatcher for the Sheriff's Department, and asked Townsend for assistance. But Dispatcher Townsend passed the phone to one of Mr. Patterson's fellow jail trusties, so that he could speak with Mr. Patterson. The two inmates spoke for seven minutes. Pet.App.51a.

Townsend neither resumed speaking with Ms. Robinson nor sent help to Ms. Robinson. Pet.App.51a. Having handed off her phone to an inmate to handle Ms. Robinson's plea for help, Townsend washed her hands of the incident—even though Mississippi law required her to have the husband arrested. *See* Miss. Code Ann. § 99-3-7(3)(a).

Townsend's decision to have an inmate handle Ms. Robinson's domestic-violence emergency backfired spectacularly. The conversation with his fellow inmate enraged Mr. Patterson further. Shortly after midnight, Mr.

Patterson threw his wife to the floor and punched her until she blacked out. Then he searched her cabinets. He found a bottle of "Liquid Fire" drain cleaner—which contains sulfuric acid—and drenched his wife's nearly naked body until the acid was burning her alive. Pet.App.51a-52a.

At some point, Ms. Robinson regained consciousness and fled her house in the hopes of reaching her neighbor's home. But Mr. Patterson dragged her back inside by her hair. She eventually grabbed her keys and made it to her car, only to have Mr. Patterson force his way into the passenger seat. Once Ms. Robinson and Mr. Patterson reached a local hospital, staff determined that Ms. Robinson's neck was so severely burned that the hospital had to intubate her to help her breathe before airlifting her to a specialized burn hospital. Pet.App.52a-54a, 56a-57a.

Since then, Ms. Robinson has received near-constant treatment for the 16 second- and third-degree burns that Mr. Patterson inflicted all over her face, neck, chest, arms, and legs. She has endured multiple surgeries, skin grafts, and extensive therapy; her medical bills total nearly $1 million. Pet.App.57a-59a. Mr. Patterson was later charged with aggravated assault and attempted kidnapping for his November 2 abuse of Ms. Robinson. Pet.App.59a-60a.

As for the officers who enabled Mr. Patterson and placed Ms. Robinson in harm's way, Sheriff Mitchell is now serving a 15-year prison term for unrelated offenses. Pet.App.39a. He resigned in 2019 after being charged with a dozen felonies, including sex with inmates, trafficking in stolen firearms, and furnishing inmates with firearms and controlled substances. He pled guilty to embezzlement and trafficking in stolen firearms. Pet.App.69a; Jeff Amy, *Trafficking, Embezzlement: Mississippi Sheriff Admits Guilt. Prison Next*, The Clarion-Ledger (June

13, 2019). Dispatcher Townsend was fired as part of the same investigation. Pet.App.39a. She was charged with sexual activity with an inmate and furnishing contraband to an inmate, pled guilty to some charges, and received a ten-year suspended sentence. Sydney Franklin, *Former Webster County Jailer Sentenced In Connection To Investigation Of Illegal Activity At Facility*, WCBI (Feb. 24, 2020).

B. Procedural History

In June 2019, Ms. Robinson filed a complaint in the United States District Court for the Northern District of Mississippi against Mr. Patterson, Webster County, the Webster County Sheriff's Department, Sheriff Mitchell and Dispatcher Townsend in their individual and official capacities. Pet.App.38a-39a. Her complaint pled violations of 42 U.S.C. § 1983 against the governmental defendants, whom Ms. Robinson alleged violated her constitutional right to bodily integrity and personal security under the state-created danger theory. Ms. Robinson alleged Sheriff Mitchell and Dispatcher Townsend put her in harm's way—and proximately caused her injuries—by granting Mr. Patterson multiple, unsupervised furloughs after he tried to kill her, and by not only ignoring her call for help, but delegating the response to an inmate who enraged Mr. Patterson further. Pet.App.73a-82a.

The district court granted the governmental defendants' motion for judgment on the pleadings. Pet.App.8a-35a. The court noted the "extensive number of circuits across the country that have recognized the state-created danger theory." Pet.App.28a. The court further explained that "the facts alleged by Robinson, including both Sheriff Mitchell's alleged knowledge as to Patterson's violent propensity prior to granting furlough to Patterson and Dispatcher Townsend's failure to dispatch law enforcement to Robinson's home and the failure

to train aspect associated therewith, appear to fall squarely within the parameters" of that theory. Pet.App.29a. However, the district court explained that the "Fifth Circuit has … declined to adopt the state-created danger theory on multiple occasions," and thus the court dismissed Ms. Robinson's state-created danger claim of section 1983 liability. *Id.* The court declined to exercise supplemental jurisdiction over Ms. Robinson's remaining state-law claims. Pet.App.33a-34a.[1]

The Fifth Circuit affirmed. The court acknowledged that "the facts of this matter … are unsettling," and that "[s]everal other circuits" have adopted the state-created danger theory. Pet.App.2a. But the court explained that the Fifth Circuit "has declined to join our sister circuits in recognizing that theory on several occasions." Pet.App.6a. Thus, the Fifth Circuit concluded, "[t]he district court correctly declined to stray from circuit precedent. And we decline as well." Pet.App.7a.

REASONS FOR GRANTING THE PETITION

This petition presents a stark, widely acknowledged circuit split on a significant, oft-recurring question about the scope of liability under section 1983. Nine circuits have held that state and local officials may face section 1983 liability for state-created dangers if they are responsible for placing plaintiffs in harm's way. By contrast, the Fifth Circuit alone has categorically rejected that theory. In the decision below, the Fifth Circuit reiterated its outlier position yet again, despite recognizing that its position parts ways with all other circuits to confront the issue.

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[1] The court had previously entered a default against Mr. Patterson, who never responded to the complaint. Pet.App.34a.

Without the Court's intervention, this split will persist indefinitely, and this is an optimal case for the Court to step in. This Court should not tolerate a split that accords diametrically opposite treatment respecting the rights of vulnerable citizens who have been placed in positions of danger by the authorities who are supposed to protect them. The question of governmental liability for state-created danger arises constantly across the country. And this is the ideal case for the Court to resolve the question presented. Both decisions below recognized that the facts of this case amply fit the state-created danger doctrine.

I. The Circuits Are Divided 9-1 Over Whether To Recognize the State-Created Danger Theory

Nine circuits (the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits) recognize the validity of the state-created danger theory. Thus, in 74% of the country, state and local officials may face section 1983 liability if their affirmative acts aggravate the dangers a victim faces from a private actor, thereby causing a violation of the victim's right to be free from bodily harm. But the Fifth Circuit rejects the state-created danger theory, and has repeatedly reaffirmed its outlier position in the face of disagreement from almost every other federal appellate court in the country. Courts and commentators have widely recognized this clear conflict. And this conflict produces grossly inequitable results. Vulnerable individuals within the States with some of the highest rates of domestic violence and child abuse lack recourse under section 1983, even as similarly situated plaintiffs in most of the rest of the country can use section 1983 as an avenue for accountability.

1. The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have long embraced the state-created danger doctrine and held that plaintiffs can bring a section 1983 claim against a state official for causing harm by knowingly or affirmatively placing them in danger of private violence.

Start with the Second Circuit. In *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), the court held that local police officers could face section 1983 liability if "the officers in some way had assisted in creating or increasing the danger to the victim." *Id.* at 99. Because the plaintiff alleged that police officers at the scene of a protest had told skinhead counter-protestors that the police would not interfere if the skinheads attacked protestors, the Second Circuit allowed the plaintiff's section 1983 claim to proceed on remand. *Id.* at 96-97, 99.

Since then, the Second Circuit has repeatedly allowed plaintiffs to pursue state-created danger theories. In *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005), the court recognized that when "state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct," *id.* at 111. And in *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F.3d 415 (2d Cir. 2009), the court vacated a grant of summary judgment in favor of police officers who had allegedly encouraged a domestic abuser, and reiterated that a jury could find the officers liable under section 1983 for "enhanc[ing] the danger to [plaintiff] by implicitly but affirmatively encouraging or condoning [her partner's] domestic violence," *id.* at 429-30.

The Third Circuit, in *Kneipp v. Tedder*, 95 F.3d 1199

(3d Cir. 1996), similarly held that state officials can be liable under section 1983 for injuries inflicted by private actors when an official's "affirmative acts … created a dangerous situation" and the official "failed to take the appropriate measures" to secure the plaintiff's safety. *Id.* at 1210. Twenty years later, the Third Circuit reiterated that conclusion, holding that where a state actor "affirmatively misused his authority" to "create[] a dangerous situation or at least make [the victim] more vulnerable" to private violence—specifically, where a teacher released a kindergartner from class into the custody of a stranger who sexually assaulted her—plaintiffs could pursue a section 1983 claim against the state actor. *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 244 (3d Cir. 2016).

The Fourth Circuit likewise has agreed that plaintiffs can allege section 1983 claims against officials under the state-created danger theory. The court initially questioned whether state actors could be liable absent a "custodial relationship" between the state and the plaintiffs. *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc). But the Fourth Circuit has since held that plaintiffs may allege section 1983 claims where "affirmative action, not inaction, on the part of the State ... creates or increases the risk that the plaintiff will be harmed by a private actor." *Robinson v. Lioi*, 536 F. App'x 340, 344 (4th Cir. 2013), *cert. denied*, 572 U.S. 1002 (2014).

In *Robinson*, for example, the Fourth Circuit allowed a state-created danger claim against a police officer to proceed based on allegations that the defendant police officer had helped a husband evade a warrant for his arrest immediately before the husband murdered his wife. 536 F. App'x at 341, 344. And in *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 811 (2016), the

Fourth Circuit reaffirmed that a plaintiff can state a section 1983 claim when a "state actor created or increased the risk of private danger, and did so directly through affirmative acts," but affirmed the grant of summary judgment to a defendant who had merely failed to mitigate an already existing danger, *see id.* at 439-40.

The Sixth Circuit endorsed the state-created danger theory in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), holding that a government actor may be liable if it knew "or clearly should have known that its actions specifically endangered an individual," *id.* at 1066. *Kallstrom* held that this test was satisfied when a city released undercover officers' personnel files to attorneys for gang members. *Id.* at 1067. The Sixth Circuit recently reaffirmed that "the state-created danger doctrine ... applies when the state affirmatively acts in a way that either creates or increases a 'risk that an individual will be exposed to private acts of violence.'" *Lipman v. Budish*, 974 F.3d 726, 744 (6th Cir. 2020) (quoting *Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017)). The court thus allowed a plaintiff's section 1983 claim to proceed in a case involving a social worker who interviewed a child abuse victim in front of her abuser, thereby increasing the danger of further abuse. *Id.* at 746-47.

The Seventh Circuit has recognized state-created danger claims for decades, reasoning that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The court has repeatedly reaffirmed its acceptance of the state-created danger doctrine, allowing claims to proceed when the

governmental actor "played a part in ... creating the danger" and/or in "rendering the public more vulnerable to the danger." *E.g.*, *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990).

For instance, in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the Seventh Circuit reiterated that state actors may "infring[e] the rights of [plaintiffs] by creating a dangerous situation and failing to protect them from it." *Id.* at 1125. The court thus allowed a section 1983 claim to proceed against police officers who had removed a sober driver from a car and left behind an obviously drunk passenger, who took the wheel and caused a fatal crash. *Id.* at 1123-24. More recently, the Seventh Circuit affirmed the denial of qualified immunity to police officers on a state-created danger claim, observing that "[i]t is clearly established that state actors who, without justification, increase a person's risk of harm violate the Constitution." *Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012).

The Eighth Circuit, too, has long held "that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action." *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990). Thus, in *Freeman,* the Eighth Circuit allowed a section 1983 claim to advance where the police chief defendant ordered other officers not to enforce a restraining order against one of the chief's good friends, who later killed his estranged wife and daughter. *Id.* at 53-55. Since *Freeman*, the Eighth Circuit has consistently held that "if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor,

depending on his or her state of mind, may have committed a constitutional tort." *S.S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (en banc); *accord Anderson ex rel. Anderson v. City of Minneapolis*, 934 F.3d 876, 881 (8th Cir. 2019) (same).

The Ninth Circuit first recognized state-created danger liability in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), holding that an officer could be liable under section 1983 for acting with "deliberate indifference to [the plaintiff's] interest in personal security," when he arrested a drunk driver and left a passenger without transportation in a remote area, where she was raped. *Id.* at 586, 588. The Ninth Circuit later emphasized that plaintiffs can pursue section 1983 claims against defendant state officials who "affirmatively created the particular danger that exposed [the plaintiff] to third party violence." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993). The Ninth Circuit has since affirmed denial of qualified immunity on a state-created danger theory in a case where officers responding to a 911 call canceled a request for paramedics for a "seriously ill" man, locked him in his house, and abandoned him there to die, *Penilla v. City of Huntington Park*, 115 F.3d 707, 708-10 (9th Cir. 1997); where officers removed a drunk man from a bar on a bitterly cold night and left him alone with no coat, to die of hypothermia, *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084, 1086-87 (9th Cir. 2000); and where a police officer notified a young man, who he knew to be violent, that his neighbors had accused him of molesting their daughter, and declined to protect the neighbors, whom the young man shot. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006).

The Tenth Circuit has, for many decades, also allowed state-created danger claims to proceed. In *Uhlrig v.*

Harder, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996), the Tenth Circuit recognized that a state actor "may be liable for an individual's safety under a 'danger creation' theory if it created the danger that harmed that individual," *id.* at 572. In *Armijo ex rel. Chavez v. Wagon Mound Public Schools*, 159 F.3d 1253, 1264 (10th Cir. 1998), the Tenth Circuit affirmed the denial of summary judgment to defendants who suspended a student they knew, or should have known, to be suicidal, and left him alone at home with access to firearms. The court recently confirmed again that "the state-created danger doctrine is clearly established in this circuit." *Estate of Reat v. Rodriguez*, 824 F.3d 960, 965 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1434 (2017).

Finally, the D.C. Circuit, in *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001), held that plaintiffs' section 1983 claims can proceed "when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm," *id.* at 651. The D.C. Circuit explained that when the officer has the opportunity to deliberate over the correct course of action, a plaintiff can premise a viable state-created danger claim on deliberate indifference, as well as specific intent to cause harm. *See id.* at 652.

In short, in dozens of decisions over more than 30 years, nine circuits comprising three quarters of the country have held that plaintiffs can allege state-created danger claims under section 1983. Of course, the availability of those claims is no guarantee of success on the merits, and every one of these circuits reserves the availability of the state-created danger doctrine for truly extraordinary circumstances, not garden-variety negligent acts. But within those nine circuits, plaintiffs can at least take a first step towards holding officials accountable when officials,

through their affirmative acts, create or increase the danger to a plaintiff who is later grievously injured.

2. In direct conflict with every other circuit to address the question, the Fifth Circuit has repeatedly rejected the state-created danger theory. The opinion below aptly summed up the Fifth Circuit's longstanding refusal "to join [its] sister circuits in recognizing th[e] theory." Pet.App.6a; *accord, e.g.*, *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1002 (5th Cir. 2014) (noting that the state-created danger theory is unavailable in Fifth Circuit); *Cook v. Hopkins*, 795 F. App'x 906, 914 (5th Cir. 2019) (same). The decision below is one of many Fifth Circuit decisions acknowledging that the court is an outlier within a circuit split. *Cancino v. Cameron Cnty.*, 794 F. App'x 414, 416 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2752 (2020) ("[T]he state-created danger doctrine … has been accepted by some of our sister circuits … [but] we have never adopted that theory."); *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 863-65 (5th Cir. 2012) (en banc) (same); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) (same); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006) (same); *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (en banc) (acknowledging view of "[m]any of our sister circuits" that state officials may be liable for state-created danger, but refusing to accept that theory). No surprise, then, that the decision below "declined to stray from circuit precedent" and affirmed the dismissal of Ms. Robinson's state-created danger claim. Pet.App.7a.

3. Other courts of appeals have acknowledged this entrenched conflict. *E.g.*, *Cutlip v. City of Toledo*, 488 F. App'x 107, 114-15 & n.6 (6th Cir. 2012) ("[T]he Fifth Circuit has refused to explicitly recognize the state-created

danger doctrine" which, in other circuits, "imposes a liability on the municipality for harms that it has *indirectly* inflicted on the victim."); *Kruger v. Nebraska*, 820 F.3d 295, 307 (8th Cir. 2016) (Kelly, J., concurring) ("the Fifth Circuit has not adopted" the state-created danger theory); *Pena*, 432 F.3d at 109 & n.12 (noting split); *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005) (same).

Commentators have emphasized the Fifth Circuit's outlier status as well. *See, e.g.*, Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165, 1173 (2005) (observing that "every circuit, except for the [F]ifth, has embraced the concept of state-created danger"); Jeff Sanford, *The Constitutional Hall Pass: Rethinking the Gap in § 1983 Liability That Public Schools Have Enjoyed Since* DeShaney, 91 Wash. U.L. Rev. 1633, 1639 & n.59 (2014) (noting that only the Fifth Circuit has "rejected [state-created danger] outright"); Chris W. Pehrson, Bright v. Westmoreland County*: Putting the Kibosh on State-Created Danger Claims Alleging State Actor Inaction*, 52 Vill. L. Rev. 1043, 1043 n.4 (2007) (noting that most of the circuits have adopted the doctrine, but not the Fifth Circuit); Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 Penn. St. L. Rev. 893, 902-03 (2016) (explaining how, unlike other circuits, the Fifth Circuit "all but rejected the doctrine" even before its en banc decision in *Covington*).

In short, further percolation is unnecessary. Ten circuits have decided whether to recognize the state-created danger theory. The Fifth Circuit has doubled down on its position despite acknowledging the lopsided circuit split,

and nine other circuits have remained unmoved by the Fifth Circuit's reasoning.

4. This 9-1 conflict is intolerable. Texas, Louisiana, and Mississippi have some of the highest per capita rates of child abuse and domestic violence. *See* Ctrs. for Disease Control, The National Intimate Partner and Sexual Violence Survey figs. 5.1-5.2 (2017); U.S. Admin. for Children & Families, Child Maltreatment 2016, tbl.3-4. But in those three States, people cannot pursue section 1983 liability against state and local officials whose affirmative acts put them in danger.

By contrast, in 40 other States and the District of Columbia, plaintiffs in Ms. Robinson's shoes can obtain recourse. Indeed, several other circuits have allowed state-created danger claims to proceed on facts that are strikingly similar to this case: the Second Circuit in *Okin*, where police conduct tacitly encouraged a domestic abuser to continue his abuse, 577 F.3d at 429-30; the Fourth Circuit in *Robinson*, where an officer helped an abuser evade an outstanding warrant, 536 F. App'x at 341, 344; and the Eighth Circuit in *Freeman*, where a police chief protected one of his friends from arrest, enabling the friend to murder his wife and daughter, 911 F.2d at 53-55. Only this Court can resolve this irreconcilable divide.

II. The Question Presented Is Recurring, Important, and Squarely Presented

This case is an ideal vehicle to decide the question presented, which recurs with regularity and is of critical importance. Resolving the question presented will help state and local governments understand their obligations and avoid facilitating private violence, will help eliminate a disincentive for victims of serious crimes to report to authorities, and will clarify the boundaries of qualified immunity in this type of case.

1. State-created danger cases most commonly arise from episodes of domestic violence, where the police somehow affirmatively enable the abuser, *e.g.*, *Freeman*, 911 F.2d at 53-55, or from incidents of child abuse, where a teacher or social worker misuses their authority and exposes a child to increased danger, *e.g.*, *L.R.*, 836 F.3d at 240. In the United States, more than one in three women, and nearly one in three men, have experienced violence or stalking from an intimate partner in their lifetime. National Intimate Partner & Sexual Violence Survey, *supra*, at 117, 121. And nearly 180,000 children suffer physical or sexual abuse each year. Child Maltreatment, *supra*, tbl.3-8. In the vast majority of these cases, of course, public officials do not exacerbate the harm. But given the frequency of these crimes, it is especially important for state and local governments to know their obligations, and to know that if they cross the line, they could face liability. That possibility incentivizes government agencies to establish appropriate policies and provide proper training to ensure that cases like this one do not occur.

The availability of section 1983 liability in extraordinary cases also promotes public confidence in government actors. It is already difficult enough for many survivors of domestic violence and child abuse to make a report to the appropriate authorities: one study estimated that only 27% of women and 13.5% of men report physical assault by an intimate partner to law enforcement. U.S. Dep't of Justice, Nat'l Inst. of Justice, Practical Implications of Current Domestic Violence Research 5 (2009). But fearing that officers will respond in ways that exacerbate abuse makes it all the harder for victims to seek help. It is critical for the courts to signal that government officials who actively enable violence will face accountability.

Resolution of the question presented by this Court would also benefit state and local governments. In particular, clarity from this Court on the threshold question—as to whether state-created danger liability may exist as a general matter—could help lower courts resolve when qualified immunity is available in state-created danger cases by providing a definitive baseline of clearly established law.

2. This case is the ideal vehicle for resolving the question presented. As the district court recognized, "the facts alleged by Robinson, including both Sheriff Mitchell's alleged knowledge as to Patterson's violent propensity prior to granting furlough to Patterson and Dispatcher Townsend's failure to dispatch law enforcement to Robinson's home and the failure to train aspect associated therewith, appear to fall squarely within the parameters of the state-created danger theory." Pet.App.29a. Both the district court and the Fifth Circuit decided Ms. Robinson's section 1983 claim on the merits. Pet.App.7a, 28a-30a. And the Fifth Circuit's refusal to recognize the state-created danger doctrine was unquestionably outcome-determinative: both courts categorically rejected Ms. Robinson's claim solely because that claim is unavailable in the Fifth Circuit. And because the district court declined to exercise supplemental jurisdiction over Ms. Robinson's state-law claims, the failure of her section 1983 claim disposed of her entire case. There are thus no jurisdictional, procedural, or prudential barriers to this Court's review.[2]

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[2] Recent state-created-danger cases in which this Court denied certiorari were much less suitable vehicles for resolving the question presented. *See Cook v. Hopkins*, 795 F. App'x 906 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2643 (2020); *Cancino v. Cameron Cnty.*, 794 F. App'x 414 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2752 (2020); *Estate*

III. The Decision Below Is Wrong

Despite repeatedly refusing to endorse the state-created danger theory, the Fifth Circuit has yet to elaborate *why* it has not adopted that theory. At most, the Fifth Circuit has suggested that the state-created danger theory creates difficult line-drawing problems between state inaction and state action. *See Saenz v. Heldenfels Bros.*, 183 F.3d 389, 392 (5th Cir. 1999). Yet nine other circuits have engaged in that line-drawing for many decades without condemning the state-created danger doctrine as unworkable.

Both the text and history of section 1983 and elementary principles of causation support the state-created danger doctrine. Section 1983 imposes liability on any person, acting under color of state law, who "subjects, or causes to be subjected" any person to a deprivation of federal rights. 42 U.S.C. § 1983. The text thus recognizes that a

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of Reat v. Rodriguez, 824 F.3d 960 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1434 (2017). *Cook* did not involve the same degree of *affirmative* police misconduct as this case, which involves the unsupervised release of a known domestic abuser from jail with no supervision and for no discernible reason. *See* 795 F. App'x at 909-10. *Cancino*, unlike this case, did not involve a known danger to an identifiable victim. *See* 794 F. App'x at 416-17. And *Reat* arose in the Tenth Circuit, which *recognizes* the state-created danger doctrine, meaning the circuit split presented here was not outcome-determinative; in addition, the Tenth Circuit decided the case "on the clearly established prong of the qualified immunity test," and thus "express[ed] no opinion as to whether [the dispatcher's] actions violated [plaintiff's] constitutional rights." 824 F.3d at 967. Another recently filed petition from the Sixth Circuit, *Doe v. Jackson Local School District*, 954 F.3d 925 (6th Cir. 2010), *pet. docketed*, No. 20-320 (U.S. Sept. 10, 2020), is an equally poor vehicle, both because the Sixth Circuit recognizes state-created danger and because the plaintiffs could not show that the defendants had been aware of the risk at issue, let alone created it, *see* 954 F.3d at 935.

state actor need not personally "subject" the plaintiff to a constitutional deprivation; instead, it is sufficient that that the state actor *caused* a constitutional deprivation. *See, e.g.*, *Covington*, 675 F.3d at 871 (Higginson, J., concurring in the judgment). Nothing in the text categorically excludes state actors from liability just because the causal chain includes a private actor. Indeed, Congress enacted section 1983 in part to deter state officials from violating civil rights through the agency of private actors, such as the Ku Klux Klan. *See* David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 Rev. Litig. 357, 375 (2001).

This Court also has recognized that ordinary principles of proximate cause govern recovery under section 1983. *See County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1548-49 (2017) (so holding in context of Fourth Amendment violation). And in *Martinez v. California*, 444 U.S. 277 (1980), the Court indicated that state officials might be liable for a private actor's violence if there was a close enough connection between the state act and the private violence, and if the victim was foreseeable. Thus, although the Court held that state officials were not liable on the facts presented, it did not foreclose possible liability in the event of a closer relationship between the state actor and the harm. *Id.* at 285. A state actor who is so closely involved in private acts of violence that he can fairly be deemed responsible for those acts may be liable under section 1983 for depriving the victim of life or liberty. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (recognizing in dicta that deliberate indifference by state actors in a non-emergency situation may rise to the level of a constitutional violation).

Recognition of state-created danger liability is also supported by this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *DeShaney* held that the Due Process Clause did not impose an affirmative duty on state child welfare officials to protect a young boy from his abusive father. *Id.* at 195-97. But the Court suggested a critical distinction: "While the State may have been aware of the dangers that [the victim] 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." *Id.* at 201. Such an observation would have been unnecessary if there could be no liability for state actors who affirmatively place others in danger.

Nine out of ten circuits have correctly understood section 1983 to mean that state officials may violate an individual's constitutional right to bodily integrity and personal security by affirmatively creating or increasing a danger to that individual. *See, e.g.*, *Kallstrom*, 136 F.3d at 1066; *Dwares*, 985 F.2d at 98-99; *Freeman*, 911 F.2d at 54-55. The Sixth Circuit in *Kallstrom*, for example, explained that the Due Process Clauses protect the individual's freedom from "unjustified intrusions on personal security," which was well-established at common law. 136 F.3d at 1062 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). The Sixth Circuit accordingly explained that affirmative government acts creating a "serious risk to the personal safety" of individuals, in the form of private violence, can constitute an injury of "constitutional dimensions." *Id.* at 1063-64.

In sum, the 9-1 circuit split regarding the state-created danger theory warrants this Court's intervention. The Fifth Circuit's rejection of the doctrine does not withstand scrutiny. And this case is an optimal vehicle for this Court to resolve the entrenched split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW D. WILSON
THE LAW OFFICE OF
MATTHEW WILSON, PLLC
P.O. Box 4814
Mississippi State, MS 39762

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
THOMAS S. CHAPMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

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