No. 20-634

In The
Supreme Court of the United States

FELICIA ROBINSON,

Petitioner,

v.

WEBSTER COUNTY, MISSISSIPPI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF WEBSTER COUNTY, MISSISSIPPI

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QUESTION PRESENTED

Whether this case is the appropriate vehicle to review application of the state-created danger doctrine where the outcome will be inconsequential to Petitioner because she is barred from relief against the remaining Respondents by *Monell* and the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Felicia Robinson is petitioner here and was plaintiff-appellant below.

Webster County, Mississippi and Sheriff Tim Mitchell, individually, are respondents here and were defendants-appellees below.

Webster County Sheriff Department, Dispatcher Santana Townsend, in her individual and official capacity, and Sheriff Tim Mitchell, in his official capacity, were defendants below but are no longer parties to these proceedings.

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STATEMENT OF THE CASE

Petitioner is correct that the district court and the Fifth Circuit dismissed her case at the pleadings stage on the basis that the Fifth Circuit does not currently recognize the state-created danger doctrine. But Petitioner's case was doomed, regardless. Petitioner is not entitled to relief for her claim under 42 U.S.C. § 1983, against the only two remaining Respondents, because her claims are barred by *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) and the defense of qualified immunity. Should this Court wish to decide this issue, a better vehicle exists.

Moreover, applying the Fifth Circuit's test for state created danger, even if her claim was not barred under *Monell* and qualified immunity, Petitioner would not be successful. Therefore, a better vehicle exists.

A. Factual Background

Mrs. Robinson's claim was dismissed at the pleading stage, thus, the only facts available are those as alleged in her Complaint. They are restated by Respondent as follows:

According to her Complaint, for years, Mrs. Robinson had been subject to psychological manipulation and physical abuse at the hands of her husband, Daren Patterson ("Patterson"). Pet. App. 41a. According to her, "[t]hroughout their turbulent relationship, she has vacillated from wanting his approval to wanting to be free from his oppressive behavior to being afraid for her

very life." Pet. App. 41a. "Occasionally, Mrs. Robinson would stand up for herself. Often, though, she would assume the position of his punching bag." Pet. App. 41a. There is no indication in her Complaint, however, that Webster County knew of this years-long, systematic abuse. Pet. App. 41a-52a.

In 2014, Patterson was sentenced to the Mississippi Department of Corrections ("MDOC"), not for crimes against Robinson, but for drug charges. Pet. App. 41a. Four years later, Patterson was released in January 2018, on post-release supervision. Pet. App. 42a. Shortly after his release, Patterson was arrested in May 2018, again, not for crimes against Mrs. Robinson, but for assaulting an officer and possession of methamphetamine. Pet. App. 42a. Patterson never posted bond. Pet. App. 44a. Despite this, Former Sheriff Tim Mitchell made Patterson a "trusty" in September 2018 and released him on a weekend pass on September 1, 2018. Pet. App. 45a-46a.

During his pass, Patterson "became involved in a public altercation with Mrs. Robinson at a pool hall in Eupora, Mississippi." Pet. App. 46a. There, Patterson hit Mrs. Robinson in the face and tried to run her over with her car as Mrs. Robinson "fled [from him] on foot." Pet. App. 46a. The Eupora Police Department were called to the scene but charged Patterson with leaving the scene of an accident, not domestic violence. Pet. App. 48a. "Sheriff Mitchell was notified about this incident." Pet. App. 48a.

A little over a month later, on October 11, 2018, Sheriff Mitchell again released Patterson for another one night furlough. Pet. App. 49a. Mrs. Robinson admits that Patterson did not assault her during this time. Pet. App. 49a.

Finally, Sheriff Mitchell released Patterson for another weekend on November 2, 2018. Pet. App. 49a. Patterson went home, where he "engaged in a pattern of malicious and sadistic abuse toward Mrs. Robinson." Pet. App. 50a. First, at approximately 1:00 p.m., while the two were, again, at a pool hall in Eupora, Patterson threw a beer can at Mrs. Robinson's face. Pet. App. 50a. This time, Mrs. Robinson did not flee on foot or notify the Europa Police Department. *See* Pet. App. 50a. Later, Patterson threatened to burn Mrs. Robinson's house down and screamed at her that he hated her. Pet. App. 50a. "Throughout the evening, Patterson was verbally and physically abusive. He even busted a hole in a wall of Mrs. Robinson's home." Pet. App. 50a.

"[S]hortly after the enraged Patterson had busted a hole in the wall of her house," at 9:23 p.m., Mrs. Robinson called former Webster County Dispatcher, Santana Townsend, her relative, on her private cell phone for help. Pet. App. 50a. Robinson alleges that she called Townsend, knowing Townsend would be at work, and that she "felt confident that Townsend would send a deputy to retrieve the out-of-control Patterson." Pet. App. 50a.

But nowhere in her Complaint does Mrs. Robinson say what she told Townsend, what she requested from

Townsend, or even what Townsend may have overheard about what was occurring in Robinson's home at the time. Pet. App. 50a-51a. Townsend did not send anyone to Robinson's home; instead, she put another inmate/trusty on her private cell phone with Patterson. Pet. App. 50a.

After the phone call ended, "[f]or the next three hours, Patterson's anger grew more intense and insatiable." Pet. App. 51a. At approximately 12:30 a.m. on November 3rd, more than three hours after her call to Townsend, Patterson threw Mrs. Robinson on the bathroom floor of her home and punched her repeatedly until she blacked out. Pet. App. 51a. He then poured "Liquid Fire" drain cleaner on her. Pet. App. 51a-52a. Mrs. Robinson suffered serious, life altering injuries as a result of Patterson's attack. Pet. App. 58a. On May 21, 2019, Patterson was indicted for aggravated assault and kidnaping by the Grand Jury of Webster County. Pet. App. 59a.

B. Procedural History

District Court

Robinson filed suit on June 17, 2019, against Webster County, Mississippi, the Webster County Sheriff's Department ("WCSD"), former Webster County Sheriff Tim Mitchell (in his official and individual capacity), former Webster County Dispatcher Santana Townsend

(in her official and individual capacity), and her husband, Daren Patterson. Pet. App. 8a.[1]

Relevant to her Petition here, Robinson alleged that Webster County, the WCSD, Sheriff Mitchell and Dispatcher Townsend (in their respective individual capacities), who she called the "Official Defendants," Pet. App. 51a, were liable for violations of her Fourteenth Amendment rights because they "created the danger that she faced." Pet. App. 77a.

On July 12, 2019, Dispatcher Townsend, individually, filed a *pro se* Answer and Counterclaim against Robinson. Included in her Answer was a 12(b)(6) Motion to Dismiss and attached exhibits. She did not file a 12(c) Motion for Judgment on the Pleadings.

Then on August 12, 2019, Webster County, Mississippi, the WCSD, former Sheriff Tim Mitchell (in his official capacity only), and former Dispatcher Santana Townsend (in her official capacity only) filed their Answer and Affirmative Defenses.

Next, on August 15, 2019, former Sheriff Mitchell and former Dispatcher Townsend (in their official capacities only) filed a joint 12(c) Motion for Judgment on the Pleadings seeking dismissal of all duplicate official capacity claims against them both. Pet. App. 12a. The same day, WCSD also moved for dismissal on the basis that it lacked the capacity to be sued. Pet. App.

[1] Patterson failed to file an answer and a clerk's entry of default was entered against him. Pet. App. 12a. The district court still retains jurisdiction over Robinson's claims against Patterson. Pet. App. 35a.

12a. Robinson did not respond to either of these motions. Pet. App. 19a.

Webster County filed a separate Motion for Judgment on the Pleadings seeking dismissal of all claims against it because, under *Monell*, Robinson had failed to allege a violation of her Constitutional rights. *See* Pet. App. 12a.

Former Webster County Sheriff Tim Mitchell, in his individual capacity, filed his Answer on August 19, 2019. Pet. App. 3a. He too filed a separate 12(c) Motion for Judgment on the Pleadings asserting that he was entitled to qualified immunity. Pet. App. 12a.

Unsurprisingly, as Robinson never responded, the district court granted former Sheriff Tim Mitchell and Dispatcher Townsend, in their official capacities, and the WCSD's Motions for Judgment on the Pleadings. Pet. App. 19a-20a.

Despite recognizing that the only two remaining parties to file motions were Webster County and Sheriff Mitchell, in his individual capacity, the district court not only dismissed the claims against them but *sua sponte* dismissed the federal claims against Townsend with prejudice. Pet. App. 35a.

The Fifth Circuit

Robinson appealed the district court's order to the Fifth Circuit Court of Appeals. Pet. App. 1a-7a. Robinson did not appeal the district court's dismissal of Webster County Sheriff Department, either of the official

capacity claims against Sheriff Mitchell or Dispatcher Townsend, or the district court's *sua sponte* dismissal of her federal law claims against Dispatcher Townsend, individually. *See* Pet. App. 4a.

Nor did Robinson appeal Sheriff Mitchell's claim of qualified immunity, only the district court's determination that the Fifth Circuit did not recognize state created danger. Pet. App. 4a. In his brief to the Fifth Circuit, Sheriff Mitchell pointed out that "in Robinson's brief-in-chief, she fails to address the immunity defenses raised by Sheriff Mitchell and as such, has waived her claims against Mitchell in his individual capacity." *See Matter of Dallas Roadster, Ltd.*, 846 F.3d 112, 126 (5th Cir. 2017).

Robinson failed to file a reply brief. Thus, any response to this argument is waived. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020) (citing *Procter & Gamble Co. v. Amway Corp*., 376 F.3d 496, 499 n.1 (5th Cir. 2004)). The Fifth Circuit affirmed the district court's holding. Robinson did not appeal the panel decision for an *en banc* review.

REASONS FOR DENYING THE PETITION

I. Petitioner's claim will fail, regardless of the outcome of this Petition.

Petitioner's claim cannot survive. Regardless of this Court's decision, Petitioner is not entitled to relief for her state created danger claim under 42 U.S.C.

§ 1983 because her claim is barred against Webster County by *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) and against Tim Mitchell, individually, by the defense of qualified immunity.

A. Petitioner's claim against Webster County would fail under *Monell*.

Petitioner cannot establish liability on the part of Webster County. This Court's decisions in *Monell* and its progeny establish a clear and stringent standard for municipal liability. Under *Monell*, a municipality may be held liable under Section 1983 only for its own unconstitutional acts. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *accord Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for their own illegal acts." (internal quotation marks omitted)).

There are only two ways in which Webster County could potentially be held liable and Petitioner cannot survive under either. For Webster County to be liable on account of its policy, the Petitioner must show either "(1) that the policy *itself* violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality's policymakers 'with "deliberate indifference" as to its known or obvious consequences. . . . A showing of simple or even heightened negligence will not suffice.'" *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (quoting *Board of Cty. Comm'rs v. Brown*, 520

U.S. 397 (1997)) (citations omitted) (emphasis added). Petitioner's claim fails under either analysis.

As to the first, Petitioner has not alleged that the policy of releasing trusties for the weekend "facially" violated federal law. *Johnson*, 379 F.3d at 309; Pet. App. 77a-80a. Here, Petitioner alleges that "Sheriff Mitchell adopted, promulgated, or ratified one or more policy statements, ordinances, regulations, decisions, customs, or usages (a) giving inmates or trusties exceptionally broad latitude to do almost as they pleased and/or (b) giving Patterson multiple jail furloughs." Pet. App. 73a. But, "[i]solated violations [like the one Petitioner alleges here] are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." *Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir. 2001) (citing *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985)). Hence, Petitioner "must show that the policy was adopted or maintained with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Johnson*, 379 F.3d at 309. That "generally requires that a plaintiff demonstrate at least a pattern of similar violations." *Id.* (quoting *Burge v. St. Tammany Par.*, 336 F.3d 363, 370 (5th Cir. 2003) (citations omitted)). "Here [Petitioner] did not plead that there had ever been any similar incidents. . . ." *Id.* at 310. "[Petitioner] relies solely on this single incident. The claim against the County hence fails for a lack of any showing of deliberate indifference." *Id.*

Petitioner will likely attempt to circumvent this by pointing out that in 2019 the Webster County grand jury issued multiple indictments against Sheriff Mitchell and Townsend for official corruption. Pet. App. 69a. But, Petitioner does not allege that these charges were related to the same alleged policy violations as hers. Pet. App. 69a. In fact, she specifically states that the criminal acts specified in the indictments have no direct bearing upon her damages. Pet. App. 69a. As such, they cannot be considered part of the same pattern of similar violations. *See Piotrowski*, 237 F.3d at 581.

Petitioner must establish three essential elements to prove liability under the second theory. These elements include: (1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose "moving force" is the policy or custom. *Piotrowski*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell*, 436 U.S. at 694). An official policy "usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Piotrowski*, 237 F.3d at 579) (internal quotation marks omitted). To establish municipal liability under *Monell*, Petitioner "must prove that 'action pursuant to official municipal policy' caused [her] injury." *Connick*, 563 U.S. at 60-61 (quoting *Monell*, 436 U.S. at 691). Liability cannot be predicated on a *respondeat superior* theory. *James*, 577 F.3d at 617 (citing *Monell*, 436 U.S. at 694).

Instead, liability must rest on official municipal actions, typically "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61. "[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citations omitted) (internal quotation marks omitted).

For Webster County to be liable as a municipality for a violation of section 1983 pursuant to state created danger, a policy must have been the "moving force" behind Petitioner's constitutional violation. *See Piotrowski*, 237 F.3d at 580 (quoting *Monell*, 436 U.S. at 694). Stated differently, Petitioner "must show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." *James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580). This causal connection "must be more than a mere 'but for' coupling between cause and effect." *Johnson*, 379 F.3d at 310 (quoting *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992)).

"Additionally, [Petitioner] must demonstrate that the policy was implemented with 'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result." *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (quoting *Brown*, 520 U.S. at 407). The causal link ("moving

force") requirement and the degree of culpability ("deliberate indifference") requirement "must not be diluted, for 'where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'" *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998) (quoting *Brown*, 520 U.S. at 415).

"Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of municipal liability under section 1983." *Burge*, 336 F.3d at 370. To base deliberate indifference on a single incident, as the Petitioner does here, "it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of particular policy." *Id.* at 373. It would be, therefore, impossible to premise section 1983 municipal liability on a policymaker's deliberate indifference to a constitutional right that a circuit court had yet to expressly hold exists. *See Alvarez*, 904 F.3d at 391-92.

Petitioner's claims against Webster County cannot survive this analysis. Webster County does not dispute that under Mississippi law sheriffs are official policymakers for the county. And, even assuming that Petitioner could prove that the sheriff's policy of releasing Patterson for multiple furloughs was the "moving force" behind Petitioner's alleged state created danger violation and not a mere 'but for' coupling between cause and effect, there is no set of facts under which Petitioner could prove that he did so with deliberate indifference to a constitutional right that the Fifth

Circuit has expressly held that it did not recognize at the time of Petitioner's injury. *See Alvarez*, 904 F.3d at 391-92; *see Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020) ("[T]he Fifth Circuit has never recognized this 'state-created-danger' exception. . . . Plaintiffs therefore have not demonstrated a clearly established substantive due process right."). Thus, Petitioner's claim against Webster County must fail.

B. Petitioner's claim against former Sheriff Tim Mitchell, individually, would fail.

For similar reasons, the Petitioner's claims against the sole remaining individual Respondent, former Sheriff Tim Mitchell, would fail. To begin with, Petitioner failed at lower level to preserve her claim against Sheriff Tim Mitchell when she utterly failed to respond to his qualified immunity arguments. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

Even if she had, her claim would still be barred. 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 second prong of the qualified immunity test protects officers " 'unless it is shown that, at the time of the incident, he violated a clearly established

constitutional right.'" *Mangieri v. Clifton*, 29 F.3d 1012, 1015 (5th Cir. 1994) (quoting *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993)). Qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

It is vital to note that the right that the "official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

As Robinson acknowledges throughout her complaint, and in all her subsequent briefing, the state-created danger theory had not been recognized as a viable theory of liability in the Fifth Circuit at the time of her injuries. Pet. App. 29a, 78a; *see also Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 864 (5th Cir. 2012) (acknowledging that the Fifth Circuit has "never explicitly adopted the state-created danger theory") (citation omitted); *Shumpert v. City of Tupelo*, 905 F.3d 310, 324 n.60 (5th Cir. 2018) (noting that "the theory of state-created danger is not clearly established law"); *Hernandez v. Fort Bend ISD*, No. CV H-19-915, 2019 WL 1934674, at *8 (S.D. Tex. May 1,

2019) ("Because the Fifth Circuit has 'repeatedly noted' that the state-created danger exception has not been recognized in this circuit, it is neither beyond debate nor clearly established law."). Therefore, Petitioner's claims against Mitchell would fail.

II. Petitioner's claim fails under the Fifth Circuit's state created danger test.

Despite acknowledging that it does not recognize the state created danger theory, the Fifth Circuit has, on multiple occasions, outlined the elements of its test for the theory, applied it, and found the underlying case lacking on the merits. *See, e.g.*, *Johnson v. Dallas Indep. Sch. District*, 38 F.3d 198, 200 (5th Cir. 1994); *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *McClendon v. City of Columbia*, 305 F.3d 314, 325 (5th Cir. 2002); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004); *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 864-65 (5th Cir. 2012). Respondent acknowledges that the district court stated that Robinson's allegations "would likely" be enough to survive a motion to dismiss, but, as the district court never applied the Fifth Circuit's test, respectfully disagrees. Pet. App. 30a.

The *Scanlan v. Texas A&M Univ.* Court explained that the state-created danger theory requires "a plaintiff [to] show [1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff." 343 F.3d 533, 537-38

(5th Cir. 2003). For the Petitioner to establish deliberate indifference, she must show that "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Piotrowski*, 237 F.3d at 585 (citations omitted) (internal quotation marks omitted); *see also McClendon*, 305 F.3d at 326 n.8 ("To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the victim's health or safety.") (internal quotation marks omitted) (alterations omitted).

The Fifth Circuit has also explained that the "state-created danger theory is inapposite without a known victim." *Doe*, 675 F.3d at 865 (quoting *Rios v. City of Del Rio*, 444 F.3d 417, 424 (5th Cir. 2006) (citations omitted) (internal quotation marks omitted)). Importantly, the "key to the state-created danger cases . . . [is] the state actors' culpable knowledge and conduct in affirmatively placing [the] individual in a position of danger, effectively stripping the person of [his] ability to defend himself, or cutting off potential sources of private aid." *Rivera*, 349 F.3d at 249 (quoting *Johnson*, 38 F.3d at 201 (internal quotation marks omitted)); *see, e.g., Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) (finding that the plaintiff had stated a valid state created danger claim where the sheriff ordered qualified bystanders not to rescue a drowning boy). "To be liable, they must have used their authority to create an opportunity that would not otherwise have existed

for the third party's crime to occur." *Rivera*, 349 F.3d at 249. Robinson cannot survive such an analysis.

As this Court is aware, circuits that recognize state created danger trace its existence back to *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). In *DeShaney*, the Winnebago County Department of Social Services ("DSS") received multiple reports, from numerous sources, about the physical abuse of a young boy, Joshua. *Id.* at 192. Because of this, DSS took Joshua into its custody but eventually returned him to his abusive father. *Id.* Regrettably, the abuse continued. *Id.* Eventually, Joshua's father beat him so severely that he suffered permanent, life altering damage. *Id.* at 193.

Joshua's mother, the plaintiff, argued that DSS, by giving Joshua back to his abusive father, had created the dangerous situation that Joshua was in and, therefore, owed him a duty under the Due Process Clause. The *DeShaney* Court disagreed and held "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

Here, Robinson's argument for state created danger is not even as strong as the failed *DeShaney* argument. Just like in *DeShaney*, Robinson's abuse had been ongoing for years. As such, Robinson cannot argue that Webster County used its authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. *Piotrowski*, 237 F.3d at

585. According to Robinson, "[f]or years, [she had] been subject to psychological manipulation and physical abuse from her husband, Patterson." Pet. App. 41a. "Occasionally, Mrs. Robinson would stand up for herself. Often, though, she would assume the position of his punching bag." Pet. App. 41a. This situation, though regrettable, was long running, and while "[j]udges and lawyers . . . are moved by natural sympathy in a case like this to find a way for [Robinson][] to receive adequate compensation for the grievous harm inflicted upon [her][], before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the [state actor], but by [Patterson]." *Deshaney*, 489 U.S. at 202-03. It is axiomatic that Webster County cannot create a situation that has existed "[f]or years." Pet. App. 41a.

Next, there is also no evidence that Webster County acted with deliberate indifference to the plight of Robinson. In *DeShaney*, Winnebago County had extensive, documented, notice of Joshua's father's excessive abuse. *Id.* at 192. First, by his father's ex-wife, then from two separate doctors, and finally from a Winnebago County DSS worker who noted her suspicions in her file. *Id.* In this case, Robinson has failed to allege anything close to this. Pet. App. 41a-52a. To be sure, Robinson alleges that she suffered physical and mental abuse from Patterson for years. Pet. App. 41a. But she does not allege that *Webster County* was aware of that ongoing abuse. *See* Pet. App. 41a-52a.

In fact, nowhere in her Complaint does Robinson allege that Patterson was ever charged with domestic

violence, or any other violence against *her*. *See* Pet. App. 41a-52a. While Patterson was arrested and sent to jail in 2014, it was for drug charges. Pet. App. 41a. His parole was revoked for more drug charges and an assault on an officer, not Robinson. *See* Pet. App. 42a. In fact, during Patterson's entire criminal career, there are no allegations by Robinson that she filed charges against him, that she requested Webster County enforce any restraining orders against him, or even that she filed for divorce from Patterson. *See* Pet. App. 41a-52a. Robinson alleges one incident of domestic violence, prior to November 2, 2018, that Webster County may have been aware of. Pet. App. 46a-48a. But, Robinson also admits Patterson was arrested not for domestic violence but, rather, for leaving the scene of the accident. Pet. App. 48a. In short, comparing Webster County's knowledge of Robinson's situation to Winnebago County's extensive knowledge of Joshua's abuse, it can hardly be said that Webster County had "culpable knowledge" of Robinson's alleged dangerous situation. *Rivera*, 349 F.3d at 249; Pet. App. 48a.

Additionally, Wester County never prevented Petitioner from defending herself or cut off her potential sources of private aid. *Rivera*, 349 F.3d at 249. Petitioner acknowledges that Patterson's actions on November 2, 2018, began in public, at a pool hall in Eupora, Mississippi. Pet. App. 50a. Previously, Petitioner "fled on foot" from Patterson at just such a pool hall and voluntarily gave a statement against him to the Eupora Police Department. Pet. App. 46a-47a. She utterly fails to allege how the actions of Webster

County, or any of its employees, prevented her from doing the same on November 2, 2018. Pet. App. 49a-51a. Additionally, Petitioner acknowledges that Patterson's behavior escalated throughout the day, from the event at the pool hall at 1:00 p.m. to "later in the day" when Patterson and Robinson returned to "Mrs. Robinson's home" but, again, Petitioner utterly fails to allege that during that time period Webster County, or any of its employees, prevented Robinson from driving away from Patterson and going to a neighbor's or family member's home. Pet. App. 49a-50a. Additionally, Robinson does not allege that Webster County did anything to prevent her from calling 911. *Id.* *Robinson* chose to call a relative rather than officially call for assistance. Pet. App. 51a. Robinson admits that her phone worked properly and that she did not feel so unsafe that she was incapable of calling for help. *Id.* Yet when Robinson's call to her family member did not work, Robinson took no further action. *Id.* Robinson admits she had her car, admits that she lived near neighbors, and admits that other family members lived in the same town. *See* Pet. App. 52a, 55a. Yet Robinson did not leave. Pet. App. 49a-51a. Instead, for three hours after her telephone call to Townsend Robinson remained in her home with Patterson. Pet. App. 51a. Robinson does not provide any information as to what occurred during those three hours or how the actions of Webster County prevented her from leaving Patterson, defending herself, or cut off her potential sources of private aid during that time period. *Id.* In short, under *Rivera*, Robinson's claims must fail.

III. Petitioner has a state law remedy.

Petitioner would have this Court believe that because her federal case was dismissed, she, and other similarly situated persons, are without remedy. This is not true. Petitioner's state law claims were dismissed without prejudice. She is free to proceed in state court, where her claims would be better served.

This Court has regularly held that it "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)). As noted by Justice Gorsuch, while on the Tenth Circuit, "there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1084 (10th Cir. 2015) (citing *Parratt v. Taylor*, 451 U.S. 527, 539-44 (1981)). This Court has declined to expand substantive due process to date and this is not the appropriate vehicle to do so now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted, this the 19th day of January, 2021.

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