No. 20-634

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

Since Felicia Robinson filed this petition, this case has only gotten more cert-worthy. Departing from the decision below, the First Circuit, in *Irish v. Fowler*, 979 F.3d 65, 67 (1st Cir. 2020), now has joined nine other circuits in recognizing the state-created danger theory. Thus, in ten circuits, state and local government actors may be liable under 42 U.S.C. § 1983 if they knowingly create a danger of private violence and thereby cause the deprivation of victims' constitutional rights. The Fifth Circuit alone rejects the doctrine, leaving similarly situated victims of violence subject to different legal regimes depending on the fortuity of their residence.

Respondents dispute neither the presence of the circuit split nor the importance of the question presented. *Amicus* Network for Victim Recovery of DC confirms

that a disproportionate number of the millions of women and men nationwide who are survivors of domestic violence live in the Fifth Circuit. NVRDC Br. 8, 13-18. The state-created danger doctrine is a critical avenue for imposing accountability in egregious cases where state or local officials entrusted with helping victims instead actively worsen private violence. *Id.* at 18-22.

This case is an ideal vehicle to resolve the split on this profoundly important question. The district court below deemed the facts here as a quintessential state-created danger case. Pet.App.29a-30a. Petitioner's husband Daren Patterson was in county custody for assaulting a police officer. Pet.App.43a-44a. Respondents nonetheless furloughed him from jail without supervision, whereupon he tried to run over Ms. Robinson with her car. Pet.App.46a-48a. Respondents knew Patterson had just tried to kill Ms. Robinson, yet continued furloughing Patterson, who, when released again, proceeded to threaten and assault her. Pet.App.48a-50a. She called a dispatcher in the sheriff's office for help. Pet.App.50a. But the dispatcher handed the call off for a jailhouse "trusty" to handle by speaking directly with Patterson—which only stoked Patterson's rage. Pet.App.50a-51a. The dispatcher then washed her hands of the incident. Pet.App.51a. Patterson proceeded to cover Robinson with drain cleaner, nearly burning her to death. Pet.App.51-52a.

In ten other circuits, these allegations would state a claim under section 1983. But because Ms. Robinson lives in the Fifth Circuit, which does not recognize the state-created-danger doctrine, her claim faced an insuperable barrier. The Fifth Circuit and district court thus rejected her claim as foreclosed by precedent. *See* Pet.App.7a,

28a-30a.[1] Respondents' vehicle objections are spurious. The Fifth Circuit rejects the state-created danger doctrine, but even under the test that court has hypothesized would apply, Ms. Robinson plainly stated a claim—as the district court acknowledged. And it is irrelevant whether respondents could raise other arguments down the road to avoid liability. The dispositive issue below was the Fifth Circuit's categorical rejection of the state-created danger doctrine; everything else is a matter for remand. Lastly, it is offensive for respondents to claim that Ms. Robinson should have avoided Patterson's jaw-dropping abuse by fleeing on foot or reporting his abuse earlier. *See* Webster County BIO 19-20; Mitchell BIO 14-15. In short, this case is a clean, ideal vehicle to resolve the entrenched split over the viability of the state-created danger doctrine. This Court should not allow this grossly inequitable split to persist.

I. The Decision Below Deepens an Acknowledged 10-1 Split

The stark circuit split is undisputed. *See* Webster County BIO 1, 15; Mitchell BIO 6-7. Ten circuits recognize the state-created danger doctrine. Pet. 10-17. The Fifth Circuit does not. Pet. 17. Courts and commentators alike have acknowledged the split. Pet. 17-18. This undisputed and widely acknowledged divide over a pure legal question is a textbook case for this Court's review. This split is deeply entrenched, and only this Court can provide resolution.

Respondent Mitchell is incorrect (at 7) that the en banc Fifth Circuit in *Doe ex rel. Magee v. Covington Cnty.*

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[1] The district court dismissed Ms. Robinson's claims against the Webster County Sheriff's Department and Mitchell and Townsend in their official capacities. *See* Pet.App.18a-20a. Ms. Robinson did not appeal those dismissals. That left respondents Webster County, as well as Mitchell and Townsend in their individual capacities.

Sch. Dist. ex rel. Keys, 675 F.3d 849 (5th Cir. 2012) (en banc), held out some possibility that the Fifth Circuit would adopt the state-created danger doctrine in the future. To the contrary, *Covington* expressly "declin[ed]" to recognize the doctrine. *Id.* at 865. And Fifth Circuit's post-*Covington* precedents uniformly treat the state-created danger doctrine as categorically unavailable.[2] The decision below thus deemed Ms. Robinson's claim foreclosed by circuit precedent precisely because the Fifth Circuit "has declined to join our sister circuits in recognizing that theory on several occasions." Pet.App.6a (collecting cases). In sum, the Fifth Circuit has never expressed willingness to revisit its repeated rejection of a doctrine accepted by ten other circuits.

II. This Case Presents an Ideal Vehicle on a Critical Issue of Nationwide Importance

This case offers the Court a clean vehicle on a profoundly important pure legal question. Respondents do not contest that the state-created danger doctrine is an essential avenue for victims to hold officials accountable for egregious misconduct. Nor do respondents dispute that law enforcement needs clear rules about accountability. *See* Pet. 19-21; NVRDC Br. 21-22.

1. There are no barriers to review; respondents' purported vehicle issues are illusory. Respondents argue that Ms. Robinson would not prevail under the test for the

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[2] *See, e.g.*, *Keller v. Fleming*, 952 F.3d 216, 226-27 (5th Cir. 2020); *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020); *Cook v. Hopkins*, 795 F. App'x 906, 914 (5th Cir. 2019) (per curiam), *cert denied*, 140 S. Ct. (2020); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1002 (5th Cir. 2014); *Whitley v. Hanna*, 726 F.3d 631, 639 n.5 (5th Cir. 2013); *Dixon v. Alcorn Cnty. Sch. Dist.*, 499 F. App'x 364, 366-67 (5th Cir. 2012) (per curiam) (all reaffirming the Fifth Circuit's rejection of the state-created danger doctrine).

state-created danger doctrine that the Fifth Circuit articulated in cases such as *Covington*. Webster County BIO 1, 15-20; Mitchell BIO 12-15. In *Covington*, the Fifth Circuit held that the state-created danger doctrine was not cognizable, but identified the elements "such a cause of action would require": (1) defendants' creation of a danger to plaintiff and (2) defendants' deliberate indifference to that risk. 675 F.3d at 865. *Doe* noted that other circuits had adopted similar formulations. *See id.* at 864-65 & n.9. Respondents' argument that Ms. Robinson would not satisfy the Fifth Circuit's proposed test faces an uphill climb given the district court's conclusion that "the facts alleged by Robinson . . . appear to fall squarely within the parameters of the state-created danger theory." Pet.App.29a.

To start, respondents put Ms. Robinson in the path of a specific, known harm—Daren Patterson. Respondents released Patterson on furlough even after he tried to kill her. Then respondents' dispatcher exacerbated Patterson's rage by putting him on the phone with a fellow inmate when Ms. Robinson called for help mid-assault. Further, respondents were deliberately indifferent to Ms. Robinson's plight. As the complaint alleges, respondents knew that Patterson had recently tried to run Ms. Robinson over. Pet.App.48a-49a. Dispatcher Townsend certainly knew that Ms. Robinson called for help because she answered the phone, then abandoned Ms. Robinson after turning the matter over to an inmate. Pet.App.50a. That is textbook deliberate indifference: officials actually knew of and disregarded "a substantial risk of serious harm." *Irish*, 979 F.3d at 74 (internal quotations omitted).

Respondents disclaim responsibility by suggesting that Ms. Robinson could have done more to avoid abuse. *See* Webster County BIO 18-20; Mitchell BIO 13-15. In Webster County's telling (at 18), respondents could not have aggravated the danger Patterson posed because Ms.

Robinson's abuse was "long running." Webster County (at 19-20) likewise emphasizes that respondents did not "prevent[] Petitioner from defending herself or cut off her potential sources of private aid," and suggests Ms. Robinson could have fled on foot. And Webster County (at 20) faults Ms. Robinson for "t[aking] no further action" after calling Dispatcher Townsend and for failing to explain why she did not escape afterwards. But survivors of domestic violence who "leave their abusers risk a retaliatory escalation in violence." *United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016) (Kavanaugh, J.). Unsurprisingly, no court has suggested that state actors can avoid liability under the state-created danger doctrine after knowingly and actively endangering someone just because they did not also remove the victim's phone or block all escape routes.

Respondents' denial of deliberate indifference is equally puzzling. Respondents profess awareness only of Patterson's propensity for violence, not his specific abuse of Ms. Robinson. Webster County BIO 18-19; Mitchell BIO 13-15. But the complaint, which at this stage is controlling, pleads that Mitchell "was notified" about Patterson's attempt to run her over with a car on a prior furlough. Pet.App.48a. Ms. Robinson alleged that Mitchell thus knew the threat Patterson posed to her "health and safety" when he furloughed Patterson again shortly thereafter. Pet.App.49a. Likewise, because respondents knew of Patterson's attempt to run Ms. Robinson over while furloughed, Ms. Robinson did not need to "file charges against" Patterson, demand enforcement of "any restraining orders," or formally divorce him (which she did, in fact, seek to do) for respondents to appreciate that her life was in danger. *See* Webster County BIO 19. It is enough that a police department knew that its affirmative acts would worsen a specific risk of harm that a victim faced, and that the department ignored that risk. *See*

Irish, 979 F.3d at 73 (distilling the "uniform[] require[ments]" of the state-created danger test across circuits).

In sum, respondents do not contest that Ms. Robinson would have stated a claim in ten other circuits. Indeed, other circuits have allowed state-created danger claims involving materially similar facts to proceed. Pet. 19. Ms. Robinson also would satisfy the Fifth Circuit's hypothetical test for the state-created danger doctrine. Regardless, since the Fifth Circuit has refused to adopt the doctrine, the point is academic. Virtually everywhere else in the country, Ms. Robinson's case would proceed. Only the Fifth Circuit forecloses her claim.

2. Respondents also portray this case as a poor vehicle by invoking ancillary issues that would purportedly doom Ms. Robinson's claim later. Specifically, respondents argue that Webster County cannot be subject to municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and Mitchell would be entitled to qualified immunity. Webster County BIO 7-15; Mitchell BIO 15-16. But the only question presented—the outcome-determinative question below—is whether the state-created danger doctrine is cognizable, i.e., whether Ms. Robinson's claim should be heard at all.

Respondents' arguments are thus irrelevant and premature—as evidenced by the fact that the courts below did not pass on any of these purported alternative grounds for affirmance. *See* Pet.App.1a-35a. As respondents acknowledge, "the district court and the Fifth Circuit dismissed [Robinson's] case at the pleadings stage on the basis that the Fifth Circuit does not currently recognize the state created danger doctrine." Webster County BIO 1; *see* Mitchell BIO 6. If the Fifth Circuit was wrong to reject the state-created danger doctrine, this Court would

vacate the decision below and remand for further proceedings to resolve these questions. That is why this Court routinely grants review of unsettled, threshold questions and reserves for remand questions about municipal liability under *Monell* or qualified immunity. *E.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009).

Further, respondents are incorrect that these arguments are surefire winners for them, making it especially important to resolve the availability of the state-created danger doctrine in the first instance. Start with *Monell*: to hold the County liable, Robinson need only show that an "act[] of [the County's] policymaking officials" "cause[d]" her to "be subjected" to a deprivation of rights. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting internal quotations omitted). Here, Webster County concedes (at 12) that Sheriff Mitchell was a County "policymaking official." Robinson alleges that Mitchell engaged in an official act by "ma[king] Patterson a trusty" eligible for furloughs from jail, and furloughed Patterson despite knowing that he recently tried to kill his wife on a previous furlough. Pet.App.45a, 49a. That policy choice "caused" Ms. Robinson "to be subjected to" a deprivation of rights. Webster County (at 10-13) invokes a different line of cases about failure-to-train liability, contending that the County cannot be liable because the Fifth Circuit did not recognize the state-created danger doctrine at the time. But this Court already rejected that type of "good faith" defense to municipal liability. *See Owen v. City of Independence*, 445 U.S. 622, 650-52 (1980). And it would be perverse to rely on the lack of settled law to justify *failing* to settle the law going forward.

Next consider qualified immunity. Respondents cannot automatically defeat Ms. Robinson's claim by arguing

that the Fifth Circuit's failure to recognize the state-created danger doctrine guarantees qualified immunity. The qualified-immunity doctrine asks whether the official's conduct "violate[s] clearly established . . . *constitutional rights*," not whether the theory of liability was clearly established. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotations omitted) (emphasis added). Here, the underlying constitutional right is the right to be free of "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Unquestionably, had respondents grievously harmed Ms. Robinson themselves, they would have violated her clearly established constitutional rights. *See id.* The question here is whether state officials *caused* the deprivation of that constitutional right.

Respondents also err in accusing Ms. Robinson of waiving a response to respondents' claims of *Monell* municipal liability and qualified immunity. Webster County BIO 7; Mitchell BIO 12. That objection is mystifying given that neither the district court nor Fifth Circuit addressed either municipal liability or qualified immunity. It is bizarre for respondents to fault Ms. Robinson for not "appeal[ing]" or addressing Mitchell's claim of qualified immunity before the Fifth Circuit when the district court never ruled on it. Webster County BIO 7; Mitchell BIO 12. And it is even stranger for Webster County to fault Ms. Robinson for not addressing municipal liability when the County never raised that argument before the Fifth Circuit. *See* Webster County Br., *Robinson v. Webster Cnty., Miss.*, No. 20-60301 (5th Cir. Aug. 31, 2020). Parties need not address issues on appeal that the district court never ruled upon.

Finally, Webster County's assertion (at 21) that Ms. Robinson should be satisfied with pursuing state-law

claims is absurd, and certainly no barrier to review. Congress enacted section 1983 to ensure a federal forum for claimed deprivations of federal rights, squarely rejecting the notion that state-law remedies were always good enough. *See Monroe v. Pape*, 365 U.S. 167, 179-80 (1961).

III. The Decision Below Is Wrong

The Fifth Circuit has not articulated a basis for rejecting the state-created danger doctrine, and respondents do not dispute that other circuits have applied the doctrine without difficulty. Pet. 22. The Fifth Circuit's outlier position is especially indefensible because the text and history of section 1983, as well as basic principles of causation, support the state-created danger doctrine. Pet. 22-23.

Respondents portray the state-created danger doctrine as inconsistent with this Court's observation in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), that individuals do not have an "affirmative right to governmental aid." Mitchell BIO 7-8; *see* Webster County BIO 17-18. That argument misapprehends both *DeShaney* and the state-created danger doctrine, both of which flow from the premise that the government has no affirmative obligation to aid. The government can only be liable for aggressively worsening a known danger of private violence. Put differently, the government has no affirmative duty to help people avoid encountering snake pits. But when the government discovers a victim in a pit and releases venomous snakes at the precipice, the government cannot avoid liability for the ensuing bites by pointing out that the snakes are non-state actors.

DeShaney confirms as much. The Court stressed that state officials cannot be liable for failing to protect a child from known "dangers that [he] faced in the free

world." *DeShaney*, 489 U.S. at 201. But the Court suggested that the outcome might be different where the state "played" some "part in their creation" or "did . . . anything to render him any more vulnerable" to known dangers. *Id.*

The County (at 21) also asks this Court to deny review to avoid expanding the scope of substantive due process. But there is hardly a *per se* rule against granting review of cases implicating substantive due process rights. In all events, recognizing the state-created danger theory would not require any expansion of substantive due process. This Court has already held that there is a due process right for individuals to be free from bodily harm. *See Ingraham*, 430 U.S. at 673. The only question is whether, under section 1983, state actors may avoid liability for taking steps to deprive individuals of that liberty interest simply because a private actor inflicts the harm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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