No. _____

In The Supreme Court of the United States

CHASE YARBROUGH,

Petitioner,

v.

SANTA FE INDEPENDENT SCHOOL DISTRICT; DOCTOR LEIGH WALL; MARK KANIPES; RICHARD DAVIS; JESS GOLIGHTLY; MATTHEW BENTLEY; CHRISTOPHER CAVNESS; RAYMOND BUSE; MARIE GRIFFIN; TAYLOR WULF,

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

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QUESTION PRESENTED

1. Whether this Court should resolve a Circuit split on the "state-created danger" theory of a constitutional duty to protect citizens from a nonstate actor.

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Signed – but unpublished, Panel Opinion of United States Court of Appeals for the Fifth Circuit:

Yarbrough v. Santa Fe Indep. Sch. Dist., No. 21-40519, 2022 U.S. App. LEXIS 7923; 2022 WL 885093 (5th Cir. 2022).

Report and Recommendation issued by United States Magistrate Judge:

Yarbrough v. Santa Fe Indep. Sch. Dist., 3:20-cv-00322, 2021 WL 2557094; 2021 U.S. Dist. LEXIS 117215 (S.D. Tex. 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yarbrough respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Panel Opinion of United States Court of Appeals for the Fifth Circuit:

Yarbrough v. Santa Fe Indep. Sch. Dist., No. 21-40519, 2022 U.S. App. LEXIS 7923; 2022 WL 885093 (5th Cir. 2022).

Yarbrough v. Santa Fe Indep. Sch. Dist., 3:20-cv-00322, 2021 WL 2557094; 2021 U.S. Dist. LEXIS 117215 (S.D. Tex. 2021).

JURISDICTION

The court of appeals issued its signed, but unpublished, opinion on March 25, 2022. App.1-6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides, in pertinent 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 OF THE CASE

A. Circumstances Underlying This Suit

Chase Yarbrough began playing football in the 7th grade at Santa Fe Junior High in Santa Fe Independent School District ("Santa Fe ISD"). App.2. Yarbrough continued playing football until his sophomore year at Santa Fe High School ("SFHS"). The circumstances underlying this suit took place during Yarbrough's sophomore year at SFHS. Simply put, Yarbrough sustained multiple concussions during several weeks of school football practice required scrimmages with multiple runs of the same drill. In other words, this case does not present against the usual backdrop where a third-party inadvertently harmed another player.

More specifically, on September 21, 2016, Yarbrough attended football practice during 4th period and participated in a variety of full-contact drills. Yarborough sustained a concussion after repeated head-to-head contact. Similar head-to-head contact had

occurred over a period of several weeks since the first team practice in August 2016. It was discovered that Yarborough had likely suffered numerous concussions in the prior weeks.

One such drill required Yarbrough to prevent another player across from him, C.P., from crossing the line of scrimmage. At time of this drill, Yarborough weighed approximately 130-140 pounds, and C.P. was an older, more skilled, and substantially larger player. Notwithstanding the size difference, during the drill Yarborough and C.P. repeatedly collided, helmet to helmet and upper body to upper body. The drill was conducted at the direction, orchestration, instruction, oversight, and requirement of the coaches. The coaches yelled at Yarbrough and other players to line up again, and again, and again, and to hit "harder, harder, harder." The coaches never attempted to stop or prevent the potentially dangerous contact.

After 4th period practice, Yarbrough changed clothes and went to lunch, where he began experiencing a severe headache. He contacted his mother, who instructed him to go to the school nurse. The school nurse sent Yarbrough to the football trainer, Brooke Griffin. Griffin instructed Yarbrough to not participate in that afternoon's practice. As instructed, Yarbrough did not participate.

At practice the following afternoon September 22, 2016, Yarbrough reported to Griffin that he was still experiencing a severe headache. Griffin advised him that he might have a concussion. She sent Yarbrough

home with instructions to rest and report back to her if his symptoms continued into the next day. The next day, September 23, 2016, Yarbrough still had a headache and again spoke with Griffin. Griffin directed him to seek medical treatment.

Unknown to Yarbrough's parents, their son had shown signs of a concussion for several weeks during football practice. The Fifth Circuit explained the situation as follows:

> The doctor advised Yarbrough that he had likely suffered an initial injury at an earlier practice and had been playing football with a concussion for a few weeks.

App.2.

After practice in September 2016 in which he experienced head-to-head contact, Yarbrough vomited. Rather than inform his parents or instruct Yarbrough to seek medical treatment his coaches required him to continue to attend practice and participate in the head-to-head drills.

On September 23, 2016, Yarbrough went to the Houston Methodist Orthopedic & Sports Medicine Clinic, where he was diagnosed with a concussion and a cervical sprain. The physician also advised Yarbrough that he likely suffered a concussion prior to the September 21, 2016 football practice and had been practicing with a concussion for a few weeks.

Following the September 23, 2016 diagnosis, Yarbrough continued to experience various concussion

and hypoxic ischemic encephalopathy related symptoms. "After his diagnosis, Yarbrough continued to experience concussion-related symptoms." App.3.

B. Yarbrough Files Suit; Defendants Prevail On Motion To Dismiss

An amended petition under Section 1983 was filed November 26, 2020. The defendants were Santa Fe ISD; E. Leigh Wall, Ph.D., the Santa Fe ISD Superintendent; Mark Kanipes, the Athletic Director and Head Coach of the SFHS football team; Richard Davis, Jess Golightly, Matthew Bentley, Christopher James Cavness, Taylor Wulf, and Raymond Buse, who are all Assistant Football Coaches at SFHS; and Marie Griffin, the football team's trainer.

A motion to dismiss was filed December 8, 2020. Yarborough filed his response on December 30, 2020. The Magistrate Judge issued a Memorandum and Recommendation that the motion to dismiss be granted on May 25, 2021. App.7. Yarborough filed objections to the report on June 17, 2021. The district court adopted the Magistrate Judge's Report and Recommendation in an Order dated June 22, 2021. The Fifth Circuit affirmed on March 25, 2022.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Resolve A Circuit Split Identified By The Panel Opinion As To The State-Created Danger Theory

A. Circuit Split Was Recognized By The Panel Opinion

The Panel Opinion recognized the Circuit split that has arisen over the state-crated danger exception regarding the constitutional duty to protect citizens from a nonstate actor:

> Generally, the government is not obligated to protect its citizens from violence by third parties. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 199-200 (1989). Some of our sister circuits have recognized an exception to the rule, under which "a state may be liable for private violence if it created or exacerbated the danger." *Bustos v. Martini Club Inc*., 599 F.3d 458, 466 (5th Cir. 2010). Yarbrough asks us to apply that exception here. We have "repeatedly declined to recognize the state-created danger doctrine in this circuit." *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020); *see also Cook v. Hopkins*, 795 F. App'x 906, 914 (5th Cir. 2019); *Estate of C.A. v. Castro*, 547 F. App'x 621, 627-28 (5th Cir. 2013).

App.3-4.

B. Most Circuit Courts Of Appeals Recognize State-Created Danger Theory

Almost every circuit court of appeals has recognized and adopted some form of state-created danger theory of liability. *See Butera v. District of Columbia*, 235 F.3d 637, 648-49 (D.C. Cir. 2001), n.10 (collecting cases from each of the circuits discussing the state-created danger theory):

> *See*, *e.g.*, *Frances-Colon v. Ramirez*, 107 F.3d 62, 64 (1st Cir. 1997); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Kneipp v. Tedder*, 95 F.3d 1199, 1201 (3d Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169, 1175-77 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 994, 116 S.Ct. 530, 133 L.Ed.2d 436 (1995); *Johnson v. Dallas Indep. Sch. Distr.*, 38 F.3d 198, 200-01 (5th Cir. 1994), cert. denied, 514 U.S. 1017, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993), cert. denied, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), cert. denied, 507 U.S. 913, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *Uhlrig v. Harder*, 64 F.3d 567, 572 & n. 7 (10th Cir. 1995), cert. denied, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996); *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997).

Yarborough's concussion did not onset until the specific high school coaches at issue in this case directed repeated, harder upper body contact without appropriate medical attention and training. *See Mann v. Palmerton Area Sch. Dist*., 872 F.3d 165, 172 (3d Cir. 2017) In *Mann*, a high school football player was participating in a full-contact practice session when he sustained a blow to the head. *Mann*, 872 F.3d at 168. The hit was so hard that other members of the team believed that the student athlete had suffered a concussion. *Id*. Nonetheless, the coaching staff, ostensibly aware of the severity of the hit, sent him back into the full-contact practice where he was exposed to further physical contact. *Id.* Following the practice, the student athlete was diagnosed with a traumatic brain injury. *Id.* The Third Circuit determined that these facts were sufficient to show that the coaching staff was "deliberately indifferent to the risks posed" to the student athlete by putting him in danger of further violent physical contact. *Id*. at 172. The Third Circuit stated: "If a jury concluded that Walkowiak was aware of the first blow to Sheldon's head and observed signs of a concussion, the jury could conclude that Walkowiak used his authority in a way that rendered Sheldon more vulnerable to harm by sending him back into the practice session." *Id.* Unlike *Mann*, Yarbrough participated in numerous drills with head-to-head contact at the direction of the coaching staff.

"If the state puts a man in a position of danger from private persons and fails to protect him . . . 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 passage of Natasha's law in 2011 by the Texas Legislature was in direct response to the risk of concussions that occur during high school athletic events and practices. Even though the risk of injury arose from physical contact with opponents and fellow teammates (clearly private persons), the Defendants are liable for their failure to develop and maintain appropriate guidelines addressing the management of concussions at SFHS and Santa Fe ISD, to adhere to the concussion protocols required under Natasha's law, and for exhibiting a conscious indifference to the potential for concussions, hypoxic ischemic encephalopathy, and other neurological injuries by requiring the student athletes – in this case, Yarbrough – to practice against older, more experienced, and much larger teammates.

C. Fifth Circuit Caselaw Is Frenetic In Its Treatment Of This Issue

The Fifth Circuit's treatment of the state-created danger theory has not been linear. In a series of cases decided in the immediate aftermath of *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Fifth Circuit first recognized the existence of, then adopted, the state-created danger theory of liability. *See Johnson v. Dallas Indep. Sch. District*, 38 F.3d 198, 200 (5th Cir. 1994) ("When state actors knowingly place a person in danger, the due process clause of the constitution has been held [by other courts] to render them accountable for the foreseeable injuries that result

from their conduct, whether or not the victim was in formal state 'custody.' "); *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001) (identifying the elements of state-created danger liability and holding that, even if theory was available in this circuit, plaintiff had not met its elements); *McClendon v. City of Columbia*, 258 F.3d 432, 435 (5th Cir. 2001) ("We have not heretofore explicitly adopted and enforced this theory. We do so now."). But the panel opinion in *McClendon*, which expressly adopted the theory, was vacated by the *en banc* court. *McClendon v. City of Columbia*, 285 F.3d 1078 (5th Cir. 2002). The *en banc* court then held that even if the state-created danger theory of liability was available, it was not met in the case. *McClendon v. City of Columbia*, 305 F.3d 314, 325-27 (5th Cir. 2002).

The following year, the Fifth Circuit again acknowledged that it had "never explicitly adopted the state-created danger theory," but it noted that it had previously "set out the elements of a state-created danger cause of action" and then reversed the district court's dismissal of the claim because "even a cursory review of the complaints shows that plaintiffs pleaded facts to establish deliberate indifference," the element of state-created danger liability that the district court found to have been lacking, thereby effectively adopting the theory. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 537 (5th Cir. 2003). In *Beltran v. City of El Paso*, however, the Fifth Circuit noted that it had "consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented." 367

F.3d 299, 307 (5th Cir. 2004). The Court then found it unnecessary to settle the issue at the time because "[e]ven if a state-created danger theory were acknowledged in this circuit," the 911 operator defendant had not acted with the deliberate indifference necessary to state a claim. *Id.*

A few years later, another panel of the Fifth Circuit held that *Scanlan* "necessarily recognized that the state-created danger theory is a valid legal theory." *Breen v. Texas A&M Univ.*, 485 F.3d 325, 335 (5th Cir. 2007). But that opinion was then withdrawn in part on rehearing, with the sections of the opinion discussing state-created danger liability deleted. *Breen v. Texas A&M Univ.*, 494 F.3d 516, 518 (5th Cir. 2007).

Subsequently, this Fifth Circuit reiterated that, "[d]espite the potential confusion created by *Scanlan* and *Breen*, recent decisions have consistently confirmed that '[t]he Fifth Circuit has not adopted the "state-created danger" theory of liability.'" *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010); *see also Bustos v. Martini Club, Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) ("[T]his circuit has not adopted the state-created danger theory.").

CONCLUSION

Because Yarbrough would have prevailed in most other regional Courts of Appeals, and because Yarbrough would have likely prevailed in the Fifth Circuit prior to *Breen v. Texas A&M Univ.*, 494 F.3d 516, 518

(5th Cir. 2007), this Court should grant a writ of certiorari to resolve this issue of national import.

Respectfully submitted,

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