No. 21-_____

In the
Supreme Court of the United States

FIRST MIDWEST BANK, guardian of the estate of Michael D. LaPorta, a disabled person,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can municipalities evade liability under 42 U.S.C. § 1983 for unlawful acts that their official municipal policies undisputedly caused if the municipal actors are off duty when they engage in those acts?

PARTIES TO THE PROCEEDING

Petitioner First Midwest Bank was appellee below. First Midwest Bank is guardian of the estate of Michael LaPorta. LaPorta was left severely and permanently disabled when Chicago Police Officer Patrick Kelly shot him in the back of the head.

Respondent City of Chicago is a municipality in Illinois and was appellant below.

RULE 29.6 STATEMENT

Petitioner First Midwest Bank is a wholly owned subsidiary of First Midwest Bancorp, which is a publicly traded company whose stock ticker symbol is FMBI. Blackrock, Inc. owns 10% or more of FMBI's stock.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit, listed here in reverse chronological order:

- *First Midwest Bank v. City of Chicago*, No. 18-3049 (7th Cir.). Judgment entered Feb. 23, 2021.
- *LaPorta v. City of Chicago*, No. 14-CV-9665 (N.D. Ill.). Judgment entered Oct. 26, 2017.

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PETITION FOR A WRIT OF CERTIORARI

This petition presents a clean opportunity for the Court to resolve circuit splits about whether a municipality can be held liable under 42 U.S.C. § 1983 for the off-duty unlawful acts of its agents when there is no dispute that its policies caused those acts. In 1989—over the space of six days—this Court decided *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and *City of Canton v. Harris*, 489 U.S. 378 (1989). At the time, the courts of appeal understood that *City of Canton* made municipalities responsible when "execution of the government's policy or custom … inflicts the injury." 489 U.S. at 385 (citing *City of Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting)); *see, e.g.*, *Gibson v. City of Chicago*, 910 F.2d 1510, 1512–13, 1519 (7th Cir. 1990) (holding a municipality liable for a shooting by a police officer declared mentally unfit for service, even though the officer was not acting "under color of law," because the policy constituted the § 1983 violation). In other words, municipalities could be held liable if their policies were the "moving force" behind an unlawful act. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). Under *DeShaney*, however, municipalities could *not* be held liable for failing to protect plaintiffs from injuries caused by purely private actors. Over time, confusion arose in the circuits about the application of these precedents in circumstances like those presented here—where the municipality is undisputedly the moving force behind the injury, but the municipal actor is not himself acting under color of state law.

This case illustrates the courts of appeals' confusion. Chicago hired and trained police officer Patrick Kelly. During his years on the Chicago police force, Kelly was the subject of numerous misconduct complaints, including for more than one incident of drunken off-duty violence. Chicago nevertheless repeatedly and actively refused to discipline him for these incidents, going so far as to change the outcome of a sustained complaint to "not sustained," allowing Kelly to remain in uniform. It was no surprise then that Kelly committed a third off-duty assault when he shot and permanently injured his childhood friend Michael LaPorta after LaPorta intervened to stop Kelly from abusing his own dog.

LaPorta sued Chicago under § 1983, contending (as relevant here) that (1) the City's policies of failing to maintain an adequate early warning system and failing to discipline officers were the "moving force" behind the incident and LaPorta's injury, and (2) the City had acted with deliberate indifference. The jury agreed and awarded him $44.7 million. The district court upheld the verdict against Chicago's challenges, relying on *Monell*, and ruling that Chicago could be held liable for the shooting. As the jury found, Chicago's policies empowered Kelly to terrorize with impunity.

Chicago originally contested those facts in the district court, acquiescing in Kelly's implausible story that LaPorta's injuries—to the left rear of his skull—resulted from the right-handed LaPorta attempting suicide with Kelly's service pistol. On appeal, however, Chicago did not challenge the jury's

findings—and, indeed, it recently fired Kelly from its police force for lying in connection with the shooting.

Nevertheless, a two-judge panel quorum of the Seventh Circuit rejected liability and reversed the district court's judgment. It held that because Kelly was off duty when he fired his service weapon, no constitutional violation occurred. App. 2–3. Citing *DeShaney*, the panel reasoned that "a State's failure to protect an individual against private violence … does not constitute a violation of the Due Process Clause." App. 3. In doing so, the panel quorum broke with *Monell* itself and its progeny, prior Seventh Circuit panel precedent, and cases in the Third and Ninth Circuits holding that a municipal actor need not be on duty for a § 1983 action against the municipality to lie.

SUMMARY OF ARGUMENT

The Court should grant certiorari and reverse. (**I**) The Seventh Circuit's analysis contravenes this Court's precedents. (**II**) This petition is a perfect vehicle to resolve several splits in circuit court authority involving confusion over whether and how the *Monell–City of Canton* or *DeShaney* frameworks should be applied in analyzing a § 1983 claim against a municipality. It is, moreover, the rare petition on municipal liability in which no relevant facts are disputed, thus presenting *only* a clear question of law. (**III**) In addition, the question presented is also certworthy because it concerns an exceptionally important issue: the scope of § 1983 liability for municipalities with policies that indisputably cause illegal acts.

OPINIONS BELOW

The opinion and judgment of the Seventh Circuit are reported at *First Midwest Bank v. City of Chicago*, 988 F.3d 978 (7th Cir. 2021). *See* App. 1. The Seventh Circuit's order denying rehearing, App. 170, is unpublished. The order of the U.S. District Court for the Northern District of Illinois denying Chicago's motion for judgment as a matter of law, directed verdict, new trial, and remittitur is reported at *First Midwest Bank v. City of Chicago*, 337 F. Supp. 3d 749 (N.D. Ill. 2018). *See* App. 26. The order of the district court granting in part and denying in part Chicago's motion for summary judgment is reported at *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969 (N.D. Ill. 2017). *See* App. 112.

JURISDICTION

The judgment of the Seventh Circuit was entered on February 23, 2021. App. 1. First Midwest Bank timely sought rehearing en banc. On April 14, 2021, the Seventh Circuit denied rehearing. App. 170–71. On March 19, 2020, this Court extended "to 150 days from the … order denying a timely petition for rehearing" the "deadline to file any petition for a writ of certiorari due on or after" that date. Order, 589 U.S. __ (Mar. 19, 2020), *rescinded* July 19, 2021. This petition is timely because it was filed less than 150 days after the Seventh Circuit's denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> All persons born or naturalized in the United States, and subject to the

> jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT

1. In January 2010, Officer Patrick Kelly and his childhood friend, Michael LaPorta, went out drinking and eventually returned to Kelly's home. App. 3. When Kelly began hitting his dog, LaPorta shouted at him to stop. App. 3. Kelly, in response, pulled the trigger of his service weapon, firing a bullet into the back of LaPorta's head. App. 2, 113. The shot left LaPorta with severe cognitive difficulties, blind in one eye, deaf in one ear, and a triplegic, losing the use of his legs and his right arm. App. 107, 113.

Kelly called emergency services, not to turn himself in, but to claim that LaPorta had attempted suicide. Kelly identified himself as an off-duty officer. App. 113. Emergency personnel and other officers soon arrived to discover a still-intoxicated Kelly, who then punched the windows of an ambulance and verbally assaulted the officer in charge. App. 114. Kelly refused to heed the commands of officers who arrested him, even after being placed in a cruiser. *Id.*

2. This was not the first time Kelly had engaged in extreme misconduct. Between the time Chicago swore Kelly in as a police officer in 2004 and the night he shot LaPorta in the back of the head in 2010, Kelly was the subject of nineteen civilian or internal disciplinary complaints, two of which involved off-duty assaults. App. 153. To put that in perspective, in 2002, the average municipal police department received 9.5 complaints per *100* full-time sworn officers. *See* Matthew J. Hickman, Ph.D., U.S.D.O.J. Office of Justice Programs, NCJ 210296, Bureau of Justice Statistics Special Report: Citizen Complaints about Use of Force, at 1 (2006).

Chicago never punished Kelly for any of his previous offenses. App. 118–20. Nor did it require him to attend any intervention programs, despite the recommendation of a psychologist. App. 39. In all, before the 2010 shooting, Chicago rejected nearly twenty different opportunities to discipline Kelly for what the City belatedly acknowledges were multiple abuses—including two off-duty drunken assaults of personal associates. App. 120–22.

Chicago instead actively intervened to keep Kelly on the streets. Before the LaPorta shooting, Chicago went so far as to change a complaint regarding one of Kelly's off-duty assaults from "sustained, meaning that 'the allegation is supported by substantial evidence to justify disciplinary action'"—after investigation—to "not sustained." App. 118–19. This complaint involved a situation in which Kelly battered his then-girlfriend after the two had been out drinking at a bar, leaving her bloodied and in need of stitches. App. 120–21. An official from the Office of Professional Standards interviewed Kelly and his girlfriend and found that Kelly's account wasn't credible. App. 121. This official and his supervisor recommended sustaining the complaint. *Id.* But the Chief Administrator of that office overrode their recommendation without any specific evidentiary basis to do so. *Id.* Kelly was never arrested or subjected to prosecution. App. 122.

3. LaPorta sued Chicago under § 1983 alleging that Chicago's policies—its failure to adequately investigate and discipline officers; its failure to maintain an early warning system that would identify officers who would engage in misconduct in the future;

and its maintenance of a code of silence—caused Kelly to shoot LaPorta. App. 37–40.[1] Given Chicago's policies and practices, LaPorta argued, it was only a matter of time before Kelly's improper conduct would result in serious harm—whether on or off duty. *See* App. 38–40.

Seven years of litigation ensued. Through those seven years and until recently, Chicago continued to affirmatively reject any consequences for Kelly by maintaining that LaPorta's injuries had been self-inflicted. App. 113. At trial, however, the jury heard a wealth of evidence establishing both that Kelly was the shooter and that Chicago's practices were the moving force behind the shooting.

Although Chicago had written policies that required it to discipline its sworn officers for misconduct, the City systematically chose not to enforce them. *See, e.g.*, App. 123–25. The jury heard evidence that officer misconduct was prevalent within the police department but that officers "avoid meaningful consequences" in a discipline system that is "haphazard, unpredictable, and arbitrary." App. 33 (quotation marks omitted). This evidence included a Department of Justice investigation, which found that Chicago "seldom holds officers accountable for misconduct," and that its "accountability systems are broadly ineffective at deterring or detecting misconduct, and at holding officers accountable when they violate the law." U.S.D.O.J., Investigation of the

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[1] First Midwest Bank has since been substituted as plaintiff and guardian of his estate.

Chicago Police Department, at 46–47 (2017), https://bit.ly/2QLzWwR ("DOJ Report"). It also included an April 2016 report from the City-created Police Accountability Task Force ("PATF Report"), which found that "officers are simply not disciplined for sustained complaints." App. 33. Chicago's Police Board "has long been known for reversing many of the Superintendent's findings of misconduct, including most cases in which the Superintendent proposes discharging an officer." DOJ Report at 86. Indeed, "[b]oard officials have overturned … findings of misconduct and/or the level of proposed discipline … in cases where they firmly believe that the officer committed the alleged misconduct." *Id.* at 87.

The jury also learned that Chicago did not have a functional early warning system that identified officers in need of intervention. App. 30–31. This evidence included testimony from a police-practices expert and Chicago's former chief administrator for the Office of Professional Standards as well as the findings from the PATF report. *Id.* The testimony and report revealed that Chicago made no effort "to identify officers whose records suggest repeated instances of misconduct or bias." App. 30.

In addition, the jury learned that Chicago was well aware of these shortcomings for years before Kelly shot LaPorta. A Chicago Alderman (the City's 30(b)(6) witness) testified that the City had been warned about these deficiencies during 2007 public hearings. App. 37 ("We knew there were problems."). Nevertheless, the City "took no action to right these deficiencies." *Id.*

The jury also heard evidence that the City's ongoing practice of inadequate discipline created and reinforced among officers a sense of impunity that extended to off-duty behavior. App. 38–39. Both the PATF and DOJ reports and testimony at trial underscored that Chicago's policies "emboldened" officers to break the rules. *Id.* As the evidence showed, Chicago police officers understood that they could be violent, both on and off-duty, without the City imposing consequences. App. 38–40. The evidence also showed that Kelly was "one such officer emboldened by the City's failure to discipline or correct his behavior … and that this conditioning led Kelly to shoot LaPorta." App. 39.

At the trial's conclusion, the jury found that (1) Kelly had fired the gun, (2) the City's policies of failing to maintain an adequate early warning system and failing to discipline officers caused the incident, and (3) the City had acted with deliberate indifference. App. 26–27, 37. It awarded LaPorta $44,700,000.00, App. 27—reflecting LaPorta's past and future medical expenses, past and future lost earnings, disfigurement, increased risk of harm, past and future pain and suffering, past and future loss of a normal life, and shortened life expectancy. App. 103.

4. The City filed multiple post-trial motions, pressing its argument that LaPorta's theory of liability did not permit recovery against the City. App. 28. The district court denied each of the City's motions, and—relying on binding Seventh Circuit precedent—reasoned that § 1983's "color of law" requirement was supplied by the City's systemic policy failures, not by Kelly himself. App. 28.

The City timely appealed. On appeal, it did not challenge any of the jury's findings, including that (1) Chicago had practices and policies of failing to discipline officers, (2) it lacked an adequate early-warning system for police misbehavior, (3) the lack of a system and the policy rejecting discipline were the "moving force" behind LaPorta's injuries, *or* that (4) it had acted with deliberate indifference to LaPorta's welfare.[2] Instead, on the issue of its liability, the City contended only that the Fourteenth Amendment does not provide a cognizable cause of action against a municipality for an officer's off-duty conduct. *See* App. 8–9.

A two-judge panel quorum of the Seventh Circuit reversed the jury verdict, ruling that the City was entitled to judgment as a matter of law. App. 25. The panel quorum concluded that the "plaintiff must establish that he suffered a deprivation of a federal right *before* municipal fault, deliberate indifference, and causation come into play." App. 12. It then ruled that LaPorta had not suffered a deprivation of any federal constitutional right because the last actor in the chain of causation—Kelly—was off duty, converting his actions to acts of private violence. App. 12–13. Citing *DeShaney*, the court held that the City was not obligated to protect LaPorta from private actors. App. 13–14.

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[2] Indeed, at oral argument, the City confirmed that "we accept … the findings that the jury made." Oral Argument at 37:46, *First Midwest Bank v. City of Chicago*, No. 18-3049 (7th Cir. Dec. 10, 2019), *available at* https://bit.ly/2X3hH98.

5. LaPorta filed a petition for a rehearing and for rehearing en banc. Two groups of amici sought to file briefs in support. One of the groups comprised advocates for domestic-violence victims. Despite Chicago's consent to the filing, the court rejected this group's brief because it had not adequately explained how the brief differed from the merits briefing. The court then denied the advocates' request for rehearing of that decision without further explanation.

The second amicus group comprised three retired major-city police executives: Stephen Ambrose, Edward Davis, and Janee Harteau. Director Ambrose was Newark's Director of Public Safety. Commissioner Davis was the Commissioner of the Boston Police Department, running the department during the Boston Marathon bombing and subsequent manhunt for its perpetrators. And Chief Harteau was the first female chief of the Minneapolis police department. Without explanation, the court of appeals denied these retired police chiefs' motion for leave to file an amicus brief.

The panel quorum then denied rehearing, and the Seventh Circuit denied rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Contravenes This Court's Precedent.

Holding Chicago to account should have been straightforward given the jury's findings in this case. *Monell* sets out the key inquiry: was the municipal policy the "moving force behind the constitutional violation"? *City of Canton,* 489 U.S. at, 389; *see Monell*, 435 U.S. at 694; *Bd. of Cnty. Comm'rs v.*

Brown, 520 U.S. 397, 404 (1997) (a municipality's approved policy or widespread custom fairly subjects the municipality to liability).

LaPorta proved at trial that Chicago's policies and procedures were the "moving force" behind Kelly's trigger-pull and that Chicago was deliberately indifferent to LaPorta's constitutional rights. Chicago's policies and practices included ignoring—and in some cases affirmatively rejecting discipline for—officer misconduct, including Kelly's own, and failing to maintain an adequate system to identify and correct that misbehavior. The City affirmatively accepted those findings on appeal. *See supra* note 2.

That should have been the end of this case. As the district court recognized, LaPorta's *Monell* claim asserted that Chicago's policies and practices created the danger that deprived LaPorta of his due process right to bodily integrity. App. 28 (distinguishing *DeShaney*).

The correct application of the Court's precedents requires reversal here. By focusing on Kelly's off-duty status, the Seventh Circuit insisted that the last actor in a chain of causation in which the municipality is the "moving force" must nevertheless act under color of state authority. In doing so, it conflated "moving force" liability with a form of *respondeat superior* liability. That was error because "*[r]espondeat superior* or vicarious liability will not attach under § 1983." *City of Canton*, 489 U.S. at 385; *see Monell*, 436 U.S at 691.

Instead, the Seventh Circuit should have focused solely on whether Chicago *itself* caused the injury. *See*

City of Canton, 489 U.S. at 385. "A municipality or other local government may be liable under [Section 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011). Here, Chicago's policies undisputedly caused LaPorta's injury. The jury's findings, unchallenged on appeal, resolved that question; there was no reason to examine any issue of private conduct at that point.

Accordingly, *DeShaney* should not help Chicago. While the general rule is that the State has no constitutional duty to *protect* individuals from the dangers of private violence, as nearly every court of appeals has held, an exception applies to dangers that the State "played" some part in "creati[ng]." *DeShaney*, 489 U.S. at 201. That exception harmonizes *DeShaney*, *City of Canton,* and *Monell*. When the municipality is a "moving force" behind off-duty violence, it has "played" some part in "creati[ng]" the danger of that violence. In that circumstance, *DeShaney*'s rule about protection from private violence has no application; and the "moving force" liability rule of *Monell* and *City of Canton* governs. Correctly understood, *DeShaney* cannot entitle the City to judgment. The Court should grant certiorari to reverse a judgment that contravenes its precedents.

II. The Court Should Grant Certiorari to Resolve Circuit Splits Over the Legal Framework for Analyzing Municipal Liability.

Granting review would also enable the Court to resolve multiple splits among the courts of appeals over the important and recurring issue of how to assess municipal liability in circumstances like those here. Some courts depart from *Monell* and *City of Canton*'s "moving force" framework, and instead attempt to assess cases like this one under *DeShaney*'s very different—and wholly inapposite—framework. This confusion has played out again and again, resulting in mutually incompatible approaches to the question of municipal liability for off-duty agents' acts that the municipalities policies and procedures caused, depending on whether the court in question looks at the facts through a *Monell–City of Canton* lens or a *DeShaney* lens. The overall result is two main fault lines in the courts of appeals, with multiple variations, underscoring the need for this Court's intervention.

First, the circuits are split over whether a municipality can be held liable for an off-duty municipal employee's unlawful actions when the municipality's own policies caused those actions. The Second, Fifth, Seventh, and Eighth Circuits have all concluded that the answer is no. *See Bustos v. Martini Club, Inc.*, 599 F.3d 458, 466–67 (5th Cir. 2010) (rejecting *Monell* claim because "the alleged danger … was created by off-duty officers"); *Roe v. Humke*, 128 F.3d 1213, 1218 (8th Cir. 1997) (similar); *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006)

("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct.").

On the other side of the split, the Third and Ninth Circuits have held that the answer is yes. In *Stoneking v. Bradford Area School District*, 882 F.2d 720, 724 (3d Cir. 1989), the Third Circuit considered a case remanded to it for consideration in light of *DeShaney*. There, a school employee had allegedly sexually abused a student—including away from the school, in the employee's house and car. *Id.* at 722. The plaintiff contended that the school district—and thus the municipality—was responsible for the abuse because its "practice, custom, or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers" had created a climate of impunity for sexual misconduct. *Id.* at 724–25. In stark contrast to the decision below, the Third Circuit held that it was "immaterial" for purposes of municipal liability whether the employee's actions were "attributable to the state." *Id.* at 724. The school district committed the constitutional violations; everything else was mere consequence. As the court explained, "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725.

The Ninth Circuit has taken a similar approach. In *Van Ort v. Estate of Stanewich*, the court found that a police officer who lawfully searched a home and then returned the next day as a burglar was not acting under color of state law. 92 F.3d 831, 837 (9th Cir.

1996). But instead of ruling at that point that there could be no municipal liability, the Ninth Circuit went on to analyze whether the municipality's policies caused the injuries inflicted by the officer. *Id.* at 837. Like the Third Circuit, the Ninth Circuit has thus declined to embrace the Seventh Circuit's dubious theory that a *Monell* claim is dead on arrival if the last actor in an alleged causal chain was technically off duty.

Moreover, in this case, the Seventh Circuit cast its own circuit precedent into confusion. In a decision decided before the one below, the Seventh Circuit was aligned with the Third and Ninth Circuits. It previously held that an individual officer's off-duty status did not dispose of a claim against the municipality for the officer's unlawful actions. *Gibson*, 910 F.2d at 1519–20. In that case, a Chicago police officer was declared mentally unfit for service and was forbidden from carrying his gun or any other deadly weapon. *Id.* at 1512. However, the City of Chicago made no attempt to recover his weapon or department-issued ammunition. *Id.* The officer subsequently shot and killed a man. *Id.* at 1513. The Seventh Circuit ruled that the officer did not act "under color of law" because he was dispossessed of all power. *Id.* at 1519. It nevertheless denied the City's summary judgment motion on the municipal liability issue, stating that "the municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the 'color of law' requirement under § 1983." *Id.* But now—without overruling *Gibson*—the Seventh Circuit has held just the opposite, leaving a trail of abrogated district court decisions in its wake. *See* App. 19 (collecting cases).

Second, there is an entrenched, widely acknowledged, and closely related 9–1 circuit split over whether a municipality can *ever* be liable for creating the circumstances that lead inexorably to so-called "private violence."

In *DeShaney*, this Court held that the Due Process Clause did not impose a duty on a municipal welfare agency to protect a young boy from his abusive father. The Court explained that, as a general matter, "a State's failure to protect an individual against private violence … does not constitute a violation of the Due Process Clause." 489 U.S. at 197. But in articulating that general rule, the Court emphasized that the municipality had "played no part in the[] creation" of the danger. *Id.* at 201.

Taking a cue from that language, nine federal courts of appeal—the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits—have expressly recognized that *DeShaney*'s rule is subject to a "state-created danger" exception. *Dwares v. City of New York*, 985 F.2d 94, 97 (2d Cir. 1993); *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 244 (3d Cir. 2016); *Robinson v. Lioi*, 536 F. App'x 340, 344 (4th Cir. 2013) (per curiam), *cert. denied*, 572 U.S. 1002 (2014); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1124–25 (7th Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989); *Estate of Reat v. Rodriguez*, 824 F.3d 960, 965–67 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1434 (2017) (mem.); *Butera v. District of Columbia*, 235 F.3d 637, 647 (D.C. Cir. 2001).

But the Fifth Circuit—in direct and acknowledged conflict with that consensus—has rejected the state-created danger exception. *See e.g., Robinson v. Webster Cnty.*, 825 F. App'x 192, 196 (5th Cir. 2020) (per curiam)*, cert. denied,* 141 S. Ct. 1450 (2021) (mem.) ("[T]his Court has 'repeatedly noted the unavailability of the [state-created danger] theory' in this circuit" (quoting *Doe v. Columbia-Brazoria Indep. Sch. Dist. ex rel. Bd. of Trs.*, 855 F.3d 681, 688 (5th Cir. 2017)); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1002 (5th Cir. 2014) (same); *Cook v. Hopkins*, 795 F. App'x 906, 914 (5th Cir. 2019) (per curiam) (same); *Cancino v. Cameron Cnty.*, 794 F. App'x 414, 416 (5th Cir. 2019) (per curiam)*, cert. denied*, 140 S. Ct. 2752 (2020) (mem.) ("[T]he state-created danger doctrine ... has been accepted by some of our sister circuits ... [but] we have never adopted that theory"). Commentators, too, have noted the Fifth Circuit's outlier status. *See* 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" (footnote omitted)); 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) (similar).

Even among the circuits that recognize the state-created danger exception, courts are divided over how to apply it. Most circuits have adopted variants of a multi-factor test, but the variations can be significant. For example, the Third Circuit requires the state actor to have acted with a degree of culpability that "shocks the conscience," whereas the Ninth Circuit does not

mention such a requirement, and the Sixth Circuit only sometimes applies such a requirement. *Compare Sch. Dist. of Phila.*, 836 F.3d at 242, *with Hernandez v. City of San Jose*, 897 F.3d 1125 (9th Cir. 2018) *& Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017); *see also Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019) (noting intra-circuit variation). For another example, where the Eighth Circuit requires that the plaintiff be a member of a "limited, precisely definable group," the Ninth Circuit does not. *Compare Kruger v. Nebraska,* 820 F.3d 295, 303 (8th Cir. 2016), *with Hernandez*, 897 F.3d at 1133. Other circuits have eschewed multi-factor tests altogether, relying instead on a simple recitation of language from *DeShaney*. *See*, *e.g.*, *Butera*, 235 F.3d at 651.

This case presents an ideal vehicle to resolve these entrenched and related circuit splits, and to clarify the correct interpretations of *Monell* and its progeny, including *City of Canton* and *DeShaney*. There is no factual dispute over whether Chicago was the moving force behind LaPorta's injury or whether it was deliberately indifferent to those injuries. A jury so found, App. 26, and Chicago did not challenge those findings on appeal, *see supra* note 2. That makes this a rare case regarding municipal liability that raises *only* a clear question of law.

III. The Question Presented Concerns a Recurring Issue of Exceptional Importance.

The question presented is also worthy of this Court's attention. Uncertainty about the law—resulting from the shifting winds of divided precedent—is unfair to litigants on all sides. Municipalities cannot be sure of what policies and enforcement mechanisms are either necessary or sufficient to avoid liability because the requirements are different from circuit to circuit. Similarly, as this case demonstrates, no victims of municipality-caused violence can be certain of compensation for their injuries *even if* they clear the significant hurdle of convincing a jury that the municipality was the moving force behind those injuries and deliberately indifferent.

There can also be no doubt that the question presented is an important question of federal law. Few issues have channeled nationwide public outrage like violence committed by rogue police officers against the civilians they are sworn to serve and protect. Protests over deaths resulting from encounters with police convulsed the country for much of the summer of 2020. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (Sept. 7, 2021). People on all sides recognize the fundamental truth that bad-apple police officers are a blight on their forces and on civil society. *E.g.*, *Stewart v. City of Euclid*, 970 F.3d 667, 683 (6th Cir. 2020) (Donald, J., concurring in part and dissenting in part) ("We rightly protect police from penalties that otherwise would follow from poor conduct when officers act with reason. But when officers fail to act

with reason, … they violate our sacred trust. And then the same system that empowers and protects police must, if it is to function properly, … strip those powers and protections away."); *see* Holly Bailey, *Prosecutor Argues Chauvin's 'Ego' Led to Floyd's Death; Jury Deliberations Begin*, Wash. Post (Apr. 19, 2021).

In addition to the profound effects those rogue officers' violence has on the lives of their victims, they undermine public trust in the police. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. Times (Aug. 12, 2020) (finding that only 48% of the American people have confidence in the police). And their continued impunity reduces morale among the vastly larger corps of good and law-abiding officers.

This Court has held that a key consideration in police use-of-force cases is the "perspective of a reasonable officer on the scene." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Municipal policies that ignore misconduct or—as in this case—actively protect officers who commit misconduct warp that perspective. When a city actively rejects discipline and encourages its officers to believe that they are immune from any consequences of misconduct, a reasonable officer may come to believe that misconduct is an acceptable response to common policing situations.

Clarifying municipal liability for municipality-caused violence is an important first step in ensuring that municipalities create enforceable discipline policies that are followed. Municipalities are ultimately responsible for selecting government employees that represent them, for setting the policies

that govern those agents' behavior, and for ensuring that those policies have clear means of enforcement. So *only* municipal liability will do. Anything less divorces responsibility from liability and leaves victims of deliberately indifferent municipalities without recourse for the injuries those municipalities' indifference causes.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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