No. ______

In the Supreme Court of the United States

COUNTY OF TULARE, ET AL.,

Petitioners,

v.

JOSE MURGUIA, FOR HIMSELF AND FOR THE ESTATES OF MASON AND MADDOX MURGUIA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROMAN MARTINEZ
Counsel of Record
BRITTANY M.J. RECORD
URIEL HINBERG
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

JENNIFER M. FLORES
KATHLEEN A. TAYLOR
AMY I. MYERS
THE OFFICE OF TULARE COUNTY COUNSEL
2900 West Burrel Avenue
County Civic Center
Visalia, CA 93291

GEORGE E. MURPHY
GEORGE MURPHY LEGAL SERVICES, PC
13341 W. U.S. Highway 290
Building 2
Austin, TX 78737

BRUCE D. PRAET
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, CA 92705

Counsel for Petitioners

QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment commands that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has held that "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). Nonetheless, many (but not all) circuit courts have invented an exception to this rule—the so-called "state-created danger" doctrine. Under this exception, a State's failure to protect an individual who is not in state custody against violence inflicted by a private party *can* violate substantive due process where state action creates or contributes to the risk of such violence. The circuits vary widely on the legal test for triggering the state-created danger doctrine, with the Ninth Circuit taking the most expansive, pro-plaintiff approach.

The question presented is:

Whether, and under what circumstances, a State's failure to protect an individual who is not in state custody from violence by a private person constitutes a violation of the Due Process Clause.

PARTIES TO THE PROCEEDINGS

Petitioners County of Tulare, City of Tulare, Roxanna Torres, Sergeant Cerda, Deputy Lewis, and Sergeant Garcia were defendants-appellees in the United States Court of Appeals for the Ninth Circuit.

Respondents Jose Murguia, for Himself and the Estates of Mason and Maddox Murguia, were plaintiffs-appellants in the United States Court of Appeals for the Ninth Circuit.

Respondents First Assembly of God of Visalia and Heather Langdon were defendants-appellees in the United States Court of Appeals for the Ninth Circuit.

City of Visalia, Officer Hernandez, Officer Valencia, and Officer Davis were initially defendants-appellees in the United States Court of Appeals for the Ninth Circuit, but the claims against City of Visalia and Officer Hernandez were dismissed with prejudice at respondents' request on October 19, 2022, *Murguia v. Langdon*, No. 21-16709, ECF No. 61, and the claims against Officer Valencia and Officer Davis were dismissed with prejudice at respondents' request on November 3, 2022, *id.*, ECF No. 68.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Murguia v. Langdon, et al., No. 21-16709, United States Court of Appeals for the Ninth Circuit, judgment entered on March 14, 2023 (61 F.4th 1096), petition for panel rehearing and rehearing en banc denied on July 18, 2023 (73 F.4th 1103).

Murguia v. Langdon, et al., No. 1:19-cv-942-DAD-BAM, United States District Court for the Eastern District of California, order granting defendants' motions to dismiss signed on September 30, 2021, and entered on October 1, 2021 (2021 WL 4503055).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RELATED PROCEEDINGS...................................... ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW...1

JURISDICTION...1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.................................1

INTRODUCTION 2

STATEMENT OF THE CASE....................................4

A. *DeShaney* And The State-Created Danger Doctrine 4

B. Factual Background.....................................6

C. Procedural History 8

REASONS FOR GRANTING THE WRIT................11

I. The Circuits Are Intractably Divided Over The State-Created Danger Doctrine 12

A. The Circuits Are Split Over Whether The State-Created Danger Doctrine Is A Valid Substantive Due Process Theory 12

B. The Circuits Are Split Over The Legal Test For The State-Created Danger Doctrine 15

TABLE OF CONTENTS—Continued

Page

1. "Shocks The Conscience" 16

2. Deliberate Indifference 18

3. Magnitude Of State-Created Danger 20

II. The Ninth Circuit's Version Of The State-Created Danger Doctrine Is Wrong 23

A. The State-Created Danger Doctrine Lacks Constitutional Grounding 23

B. The Ninth Circuit's Version Of The State-Created Danger Doctrine Is Far Too Broad 28

III. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving It 32

CONCLUSION 36

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, *Murguia v. Langdon*, 61 F.4th 1096 (9th Cir. 2023) 1a

Order of the United States District Court for the Eastern District of California Granting Defendants' Motions to Dismiss, *Murguia v. Langdon*, No. 1:19-cv-00942-DAD-BAM, 2021 WL 4503055 (E.D. Cal. signed Sept. 30, 2021, and entered Oct. 1, 2021) 60a

TABLE OF CONTENTS—Continued

Page

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rehearing En Banc, *Murguia v. Langdon*, 73 F.4th 1103 (9th Cir. 2023)....................95a

U.S. Const. amend. XIV, § 1....................127a

42 U.S.C. § 1983....................128a

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson ex rel. Anderson v. City of Minneapolis,
934 F.3d 876 (8th Cir. 2019)................................20

Barber v. Overton,
496 F.3d 449 (6th Cir. 2007)..........................20, 22

Beltran v. City of El Paso,
367 F.3d 299 (5th Cir. 2004)..........................13, 14

Bustos v. Martini Club Inc.,
599 F.3d 458 (5th Cir. 2010)................................13

Butera v. District of Columbia,
235 F.3d 637 (D.C. Cir. 2001)..................12, 17, 20

Callahan v. North Carolina Department of Public Safety,
18 F.4th 142 (4th Cir. 2021) 13, 17

Christiansen v. City of Tulsa,
332 F.3d 1270 (10th Cir. 2003)............................17

Collins v. City of Harker Heights,
503 U.S. 115 (1992)....................................4, 27, 34

Cook v. Hopkins,
795 F. App'x 906 (5th Cir. 2019) 13

County of Sacramento v. Lewis,
523 U.S. 833 (1998)......................16, 17, 18, 29, 33

Currier v. Doran,
242 F.3d 905 (10th Cir. 2001)..............................33

TABLE OF AUTHORITIES—Continued

Page(s)

Daniels v. Williams,
474 U.S. 327 (1986).......................................16, 24

Davidson v. Cannon,
474 U.S. 344 (1986)...24

DeShaney v. Winnebago County Department of Social Services,
489 U.S. 189 (1989)..........2, 4, 5, 11, 23, 24, 25, 26

Doe v. Rosa,
795 F.3d 429 (4th Cir. 2015)................................12

Doe ex rel. Johnson v. South Carolina Department of Social Services,
597 F.3d 163 (4th Cir. 2010)................................33

Doe ex rel. Magee v. Covington County School District ex rel. Keys,
675 F.3d 849 (5th Cir. 2012)................2, 13, 14, 22

Dwares v. City of New York,
985 F.2d 94 (2d Cir. 1993) 12, 13

Estate of C.A. v. Castro,
547 F. App'x 621 (5th Cir. 2013) 13

Estate of Romain v. City of Grosse Pointe Farms,
935 F.3d 485 (6th Cir. 2019).............17, 25, 26, 27

Estate of Stevens v. City of Green Bay,
105 F.3d 1169 (7th. Cir. 1997).............................20

Fields v. Abbott,
652 F.3d 886 (8th Cir. 2011)................................21

TABLE OF AUTHORITIES—Continued

Page(s)

Fisher v. Moore,
73 F.4th 367 (5th Cir. 2023) 13, 14, 15, 16

Freeman v. Ferguson,
911 F.2d 52 (8th Cir. 1990)...........................12, 20

Gray v. University of Colorado Hospital Authority,
672 F.3d 909 (10th Cir. 2012).......................24, 33

Green v. Post,
574 F.3d 1294 (10th Cir. 2009)...........................19

Hart v. City of Little Rock,
432 F.3d 801 (8th Cir. 2005).........................17, 19

Hurtado v. California,
110 U.S. 516 (1884)..24

Irish v. Fowler,
979 F.3d 65 (1st Cir. 2020) 12, 13, 17, 20

Johnson v. City of Philadelphia,
975 F.3d 394 (3d Cir. 2020) 27, 33

Joiner v. United States,
955 F.3d 399 (5th Cir. 2020)...............................13

Jones v. Reynolds,
438 F.3d 685 (6th Cir. 2006)...............................22

Kallstrom v. City of Columbus,
136 F.3d 1055 (6th Cir. 1998).............................12

Kaucher v. County of Bucks,
455 F.3d 418 (3d Cir. 2006) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Kennedy v. City of Ridgefield,
439 F.3d 1055 (9th Cir. 2006)...........17, 18, 22, 31

King ex rel. King v. East St. Louis School District 189,
496 F.3d 812 (7th Cir. 2007)..........................17, 19

Kneipp v. Tedder,
95 F.3d 1199 (3d Cir. 1996) 12

Kovacic v. Villarreal,
628 F.3d 209 (5th Cir. 2010)................................13

L.S. ex rel. Hernandez v. Peterson,
982 F.3d 1323 (11th Cir. 2020)......................17, 18

M.J. ex rel. S.J. v. Akron City School District Board of Education,
1 F.4th 436 (6th Cir. 2021) 19

Martinez v. City of Clovis,
943 F.3d 1260 (9th Cir. 2019)........................22, 31

Matthews v. Bergdorf,
889 F.3d 1136 (10th Cir. 2018)...........................21

McClendon v. City of Columbia,
305 F.3d 314 (5th Cir. 2002)..........................13, 20

Monell v. Department of Social Services of the City of New York,
436 U.S. 658 (1978)..8

Moore v. Guthrie,
438 F.3d 1036 (10th Cir. 2006)...........................19

TABLE OF AUTHORITIES—Continued

Page(s)

Munger v. City of Glasgow Police Department,
227 F.3d 1082 (9th Cir. 2000)..............................21

Nix v. Franklin County School District,
311 F.3d 1373 (11th Cir. 2002)............................18

Okin v. Village of Cornwall-on-Hudson Police Department,
577 F.3d 415 (2d Cir. 2009) 17

Paul v. Davis,
424 U.S. 693 (1976)...28

Peete v. Metropolitan Goverment of Nashville & Davidson County,
486 F.3d 217 (6th Cir. 2007)................................20

Pena v. DePrisco,
432 F.3d 98 (2d Cir. 2005) 22

Pinder v. Johnson,
54 F.3d 1169 (4th Cir. 1995)....................28, 29, 32

Piotrowski v. City of Houston,
237 F.3d 567 (5th Cir. 2001)................................13

Polanco v. Diaz,
76 F.4th 918 (9th Cir. 2023) 31

Randolph v. Cervantes,
130 F.3d 727 (5th Cir. 1997)................................13

Reed v. Gardner,
986 F.2d 1122 (7th Cir. 1993)..............................12

TABLE OF AUTHORITIES—Continued

Page(s)

Rivera v. Houston Independent School District,
349 F.3d 244 (5th Cir. 2003)................................13

Sanford v. Stiles,
456 F.3d 298 (3d. Cir. 2006)....................19, 20, 33

Sauers v. Borough of Nesquehoning,
905 F.3d 711 (3d Cir. 2018).................................17

Schroder v. City of Fort Thomas,
412 F.3d 724 (6th Cir. 2005)..........................19, 30

Slaughter v. Mayor & City Council of Baltimore,
682 F.3d 317 (4th Cir. 2012)................................18

Turner v. Thomas,
930 F.3d 640 (4th Cir. 2019)................................18

Uhlrig v. Harder,
64 F.3d 567 (10th Cir. 1995)................................12

Veléz Díaz v. Vega-Irizarry,
421 F.3d 71 (1st Cir. 2005)..................................15

Weiland v. Loomis,
938 F.3d 917 (7th Cir. 2019)................................27

Welch v. City of Biddeford Police Department,
12 F.4th 70 (1st Cir. 2021)...................................21

Whitley v. Hanna,
726 F.3d 631 (5th Cir. 2013)................................13

TABLE OF AUTHORITIES—Continued

Page(s)

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989)................................12

Wyke v. Polk County School Board,
129 F.3d 560 (11th Cir. 1997)..............................12

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend XIV, § 1 ....4, 23

28 U.S.C. § 1254(1)..1

Cal. Gov't Code §§ 814-895.8 33

OTHER AUTHORITIES

Dale Margolin Cecka, *It's Time for the Fourth Circuit to Rethink* DeShaney,
67 S.C. L. Rev. 679 (2016) 15

Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1
(2007)..15

Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*,
13 Wm. & Mary Bill Rts. J. 1165 (2005).............15

Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process First Principles*, 74 Rutgers U. L. Rev.
161 (2021)..15, 29, 32

PETITION FOR A WRIT OF CERTIORARI

Petitioners County of Tulare, City of Tulare, Roxanna Torres, Sergeant Cerda, Deputy Lewis, and Sergeant Garcia respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 61 F.4th 1096 (9th Cir. 2023). App. 1a-59a. The order denying rehearing en banc is reported at 73 F.4th 1103. App. 95a-126a. The district court's opinion is available at 2021 WL 4503055 (E.D. Cal. signed Sept. 30, 2021, and entered Oct. 1, 2021). App. 60a-94a.

JURISDICTION

The court of appeals entered judgment on March 14, 2023 (App. 1a-59a) and denied petitioners' petition for rehearing en banc on July 18, 2023 (App. 95a-126a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this petition (App. 127a-28a).

INTRODUCTION

Close to 35 years ago, this Court held that "[a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). As Chief Justice Rehnquist explained for the Court, this conclusion flows from the text of the Due Process Clause, which "is phrased as a limitation on the State's power to act." *Id.* at 195. It also tracks the history of the Clause—which "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Id.* at 196 (alteration in original). And it is consistent with this Court's precedents, which "have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure" interests "of which the government itself may not deprive the individual." *Id.*

Notwithstanding *DeShaney's* core holding, an entrenched (and widely acknowledged) circuit split has emerged as to whether state action violates substantive due process when it somehow enhances the risk that a private person will be harmed by another private person—even when the State itself exercises no coercion and inflicts no harm on the victim. Ten Circuits, including the Ninth, have answered *yes*. Misreading a sentence in *DeShaney*, they have unilaterally grafted this additional constitutional protection—the so-called "state-created danger exception"—onto the Due Process Clause. The Fifth Circuit, by contrast, has repeatedly refused to recognize this "judicial enlargement of liability." *Doe ex rel. Magee v. Covington Cnty. Sch.*

Dist. ex rel. Keys, 675 F.3d 849, 874 (5th Cir. 2012) (en banc) (Higginson, J., concurring in the judgment).

Major disagreements divide the circuits that recognize the state-created danger doctrine. Most importantly, those circuits are split over (1) whether the shocks-the-conscience test constraining substantive due process liability in other contexts applies to state-created danger cases, (2) how egregious and morally culpable the state actor's conduct must be, and (3) how much the state actor must increase the danger to the private party to trigger constitutional liability. On each of these questions, the Ninth Circuit has staked out an extreme position at odds with constitutional first principles, *DeShaney*, and this Court's other substantive due process precedents. This has created perverse and confusing incentives for law enforcement trying to follow the law, upending the traditional balance of state and federal power in the process.

This petition presents an opportunity to realign the law with the Constitution's text and history and with this Court's decisions. As Judge Bumatay noted below, the state-created danger doctrine is "an atextual and ahistorical expansion of substantive due process rights." App. 107a (dissenting from denial of rehearing en banc). And the Ninth Circuit's decision below marks yet another "expansion" of the doctrine, catapulting it a "step farther away from our Constitution's text and [this Court's] instructions." *Id.* at 115a. By granting certiorari, the Court can reverse this trend, resolve the extensive inter-circuit disagreement, and restore fidelity to the original meaning of the Due Process Clause.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

This case centers on the tragic death of two young children at the hands of their mentally disturbed mother. Respondents seek money damages from petitioners—employees of the City and County of Tulare, as well as the City and County themselves—on the theory that the state-created danger doctrine makes them responsible for the killing.

A. *DeShaney* And The State-Created Danger Doctrine

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. On the most basic level, it provides "a guarantee of fair procedure in connection with any deprivation of life, liberty or property by a State." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). But this Court has also identified a "substantive component" to the Clause, which proscribes "'certain government actions regardless of the fairness of the procedures used to implement them.'" *Id.*

In *DeShaney*, the Court assessed a substantive due process claim challenging government failure to protect a young boy from his father. 489 U.S. at 191. There, a young boy, Joshua DeShaney, was "beaten and permanently injured by his father." *Id.* The defendants—social workers and other local officials—had "reason to believe" that Joshua's father was abusing him, yet physically returned him to his father after a period of state custody. *Id.* The question presented was whether the State violated Joshua's substantive due process rights "by failing to intervene to protect him" from his father *Id.* at 193. Chief

Justice Rehnquist's opinion for the Court rejected Joshua's claim, holding that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

DeShaney recognized a single potential exception to this rule, under which failure to protect an individual *in state custody* against private violence might violate the Constitution. *Id.* at 199-200. The Court explained that in that situation—when the State "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs"—"it transgresses the substantive limits on state action." *Id.* at 200. In such circumstances, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf" which is "the 'deprivation of liberty' triggering the protections of the Due Process Clause." *Id.*

In a sentence explaining why this custodial exception did not apply in *DeShaney*, the Court noted that the State "played no part in the[] creation" of the dangers Joshua faced "nor did it do anything to render him more vulnerable to them." *Id.* at 201. Since *DeShaney*, many circuits have seized on this sentence to create an expansive "state-created danger" exception to the Court's core holding that failure to protect an individual against private violence does not constitute a constitutional violation. Although the circuits vary widely on how they apply their new exception, they agree that a State can violate the Constitution when it commits an affirmative act that increases the risk that a person will be harmed by a private party, even if the victim is not in state custody or subjected to state coercion. *See infra* at 12-13.

B. Factual Background[1]

In early December 2018, Tulare County deputies twice responded to calls from respondent Jose Murguia seeking mental health assistance for his ex-wife Heather Langdon. App. 5a-6a. At the time, Langdon—who lived with Murguia and their five young sons—was experiencing "an ongoing and escalating mental health crisis." *Id.* at 62a, 4a-5a. Petitioners Lewis and Cerda were among those who responded to the second call. *Id.* at 6a.

After assessing the situation, Lewis and Cerda decided not to take Langdon to the hospital. Instead, they agreed to let Langdon go with her neighbor Rosa—who worked at a hospital and had experience dealing with psychiatric patients—to the First Assembly Church. *Id.* at 8a-9a. Langdon insisted on bringing her 10-month-old twin sons, over Murguia's protestations. *Id.* at 9a.

At the church, Rosa was assured that the twins were in "good hands" and that the pastor would take "good care" of Langdon. *Id* at 10a. After Rosa left, Langdon met with the pastor and expressed a desire for mental health treatment. *Id.* In response, the pastor called the Visalia Police Department. *Id.* Police arrived at the church and drove Langdon and the twins to a women's shelter. *Id.*

There, Langdon displayed erratic behavior to staff, who refused to admit her. *Id.* at 11a, 62a. When it was suggested that the twins stay behind while she went to the hospital, Langdon became angry, prompting a call to the City of Tulare Police

[1] The facts below reflect allegations in respondents' complaint, and are not conceded by petitioners to be true.

Department. *Id.* Officers responded but left when things appeared to calm down. *Id.* at 11a-12a. When Langdon resumed her disruptive behavior, shelter staff again called the police. *Id.* at 12a. The Department deployed petitioner Garcia, a Crisis Intervention Team Officer, to the scene. *Id.*

To help resolve the situation, Garcia called petitioner Roxanne Torres, a social worker with County of Tulare Child Welfare Services (CWS). *Id.* at 13a. According to respondents, Torres incorrectly told Garcia that CWS "'had no history of Langdon in its system'"—even though she had a history of child abuse and at least one open case with CWS—and that Langdon was homeless. *Id.* According to respondents, Garcia incorrectly told Torres that "'Langdon had been evaluated at a hospital' and did not meet the criteria for involuntary commitment" and that she had everything she needed to care for the twins. *Id.*

Torres told Garcia that CWS could take custody of the twins, but only if Garcia took Langdon into custody. *Id.* Garcia responded that he did not want to separate Langdon from her young children. *Id.* Following her discussion with Garcia, Torres concluded that Langdon "did not present an immediate danger to the twins," scheduling an investigative follow-up visit for ten days later. *Id* at 14a.

Because the shelter refused to admit Langdon, Garcia and other City of Tulare officers arranged free lodging at a motel for Langdon and the twins. *Id.* Langdon agreed, and Garcia drove her and the twins to the motel, where they stayed the night. *Id.*

The next morning, a bystander heard Langdon screaming and called 911. *Id.* Paramedics found the twins dead. *Id.* Langdon was later prosecuted for murder but found not guilty by reason of insanity. *Id.*

C. Procedural History

1. In July 2019, Murguia filed this case on behalf of himself and the twins' estates. As relevant here, he brought Section 1983 claims against petitioners, alleging that they had violated the twins' substantive due process rights under the state-created danger doctrine through various acts that increased the danger to the twins. Specifically, Murguia alleged that (1) Lewis and Cerda prevented him from following Langdon and the twins to the church; (2) Torres lied to Garcia about Langdon's circumstances and history of abuse; and (3) Garcia arranged a motel room for Langdon and the twins and transported them there. App. 28a, 35a, 31a. Murguia also brought Section 1983 claims against petitioners City of Tulare and County of Tulare under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). *Id.* at 15a.[2]

The district court granted defendants' motions to dismiss the state-created danger claims, with prejudice. *Id.* at 60a, 94a. The court concluded that because the twins had always remained in their mother's custody, the state actors had not increased the danger to them. *Id.* at 78a, 80a, 88a. The district

[2] Murguia also alleged federal claims against other defendants, but those are not at issue here. The complaint also alleged various state-law tort claims against petitioners and other defendants. The only question regarding these claims at issue here is whether the district court erred in not exercising supplemental jurisdiction.

court dismissed the *Monell* claims for lack of a predicate constitutional violation. *Id.* at 90a.

2. In March 2023, a divided panel of the Ninth Circuit reversed the district court's order in various respects. *Id.* at 1a-59a. In doing so, the panel applied the Ninth Circuit's expansive version of the state-created danger doctrine.

The panel held that respondents had adequately stated a state-created danger claim against Torres and Garcia. *Id.* at 31a, 35a. As to Torres, it concluded that "[w]hen [she] provided Garcia with false information"—i.e., that Langdon was homeless and had no history with CWS—"she rendered the twins more vulnerable to physical injury by Langdon by eliminating the most obvious solution to ensuring the twins' safety: returning them to [their father's] custody." *Id.* at 35a-36a. As to Garcia, the panel concluded that he had increased the risk of harm to the twins by arranging a motel room and transporting Langdon and the twins there. *Id.* at 31a.

The panel also overturned the district court's with-prejudice dismissal of the claims against Lewis and Cerda. *Id.* Although it agreed that respondents had not adequately stated a claim against these defendants, it directed the district court to grant respondents leave to amend. *Id.* at 30a-31a. It further directed the court to adjudicate an amended complaint by addressing "whether the twins were rendered more vulnerable by Lewis's and Cerda's actions." *Id.* at 31a.

Given these rulings, the panel also reversed and remanded the dismissal of the *Monell* claims against the County and City of Tulare. *Id.* at 45a.

Judge Ikuta dissented. In her view, the panel opinion made "three mistakes that conflict" with Supreme Court doctrine: (1) "find[ing] a substantive due process violation in the absence of any abusive exercise of state authority"; (2) "indicat[ing] that officials may be liable for failing to take affirmative actions to protect children from a dangerous parent"; and (3) "impos[ing] liability for substantive due process violations when the plaintiffs' allegations amount to mere negligence." *Id.* at 58a-59a. The majority had thus "erod[ed] '[t]he guarantee of due process' into a "guarantee [of] due care,"' by "jettison[ing]" whatever "meager limits" had previously existed in the "[Ninth Circuit's] state-created danger doctrine." *Id.* at 59a, 54a.

3. In July 2023, the Ninth Circuit denied petitioners' request for rehearing en banc. *Id.* at 95a-96a. Judge Bumatay dissented, joined by Judges Callahan, Ikuta, and Nelson. *Id.* at 96a-126a

Judge Bumatay's dissent explained that the state-created danger doctrine "finds no support in the text of the Constitution, the historical understanding of the 'due process of law,' or even Supreme Court precedent." *Id.* at 97a; *see also id.* at 107a-11a. Rather, a misreading of a single sentence in *DeShaney* had misled courts into "fashion[ing] a brand new substantive due process right," *id.* at 108a, "out of whole cloth," *id.* at 111a. In particular, Judge Bumatay criticized the Ninth Circuit's application of the doctrine in this case to "commonplace actions" that do not involve coercion—"like providing a ride, booking a motel room, or telling a lie"—just because those activities were "done by a State actor." *Id.* at 98a.

Judge Bumatay also highlighted how appellate courts "have varied wildly on how to apply" the doctrine, noting that "[p]ractically every circuit . . . has come up with a different test." *Id.* at 110a, 115a. His dissent included a chart illustrating the "Lack of Uniformity" across the circuits, with every court embracing the doctrine applying a distinct multi-prong legal standard. *Id.* at 115a-18a. Given these concerns, Judge Bumatay called for a "serious course correction" to reinstate the "strict limits" on due process liability imposed by the Constitution and *DeShaney*. *Id.* at 119a.

REASONS FOR GRANTING THE WRIT

In *DeShaney v. Winnebago County Department of Social Services*, this Court granted certiorari because of the "inconsistent approaches taken by the lower courts" and the "importance of the [Due Process Clause] issue to the administration of state and local governments." 489 U.S. 189, 194 (1989). Those same considerations strongly favor review here. Despite *DeShaney*'s emphatic limits on substantive due process liability, many circuit courts—led by the Ninth Circuit—have embraced expansive versions of the state-created danger doctrine that do not square with the Constitution's text or history. The judicially invented doctrine that has emerged is confusing and varies by circuit. It also creates perverse incentives for police and other state actors trying to protect public safety without violating the Constitution. Review is needed to reaffirm *DeShaney* and establish a uniform rule of federal constitutional law.

I. The Circuits Are Intractably Divided Over The State-Created Danger Doctrine

The state-created danger doctrine was fashioned by the courts of appeals from one sentence in *DeShaney*. *See supra* at 5*; infra* at 13, 25. The question of how to interpret that sentence has given rise to a series of circuit splits encompassing both (1) whether the state-created doctrine exists at all, and (2) if so, what legal test governs its application. These splits are widely acknowledged, deeply entrenched, and should be resolved in this case.

A. The Circuits Are Split Over Whether The State-Created Danger Doctrine Is A Valid Substantive Due Process Theory

Since *DeShaney*, eleven circuits have recognized the state-created danger doctrine—in some form—as a valid interpretation of the Due Process Clause. *See Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1125-26 (7th Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989); *Uhlrig v. Harder*, 64 F.3d 567, 572-73 (10th Cir. 1995); *Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997); *Butera v. District of Columbia*, 235 F.3d 637, 647-48 (D.C. Cir. 2001).[3]

---

[3] Although the Fourth Circuit formally adopted the doctrine close to 30 years ago, it has never "recogniz[ed] a successful

Each of these courts has based its version of the doctrine on a single sentence in *DeShaney* noting that the State "played no part" in creating the danger to Joshua DeShaney and did nothing "to render [him] more vulnerable to those dangers." *See supra* at 5; *infra* at 13, 25. From that sentence, these courts have inferred that substantive due process liability attaches—even outside the custodial context—if a state actor plays some role in rendering the victim more vulnerable to danger. *See, e.g., Irish*, 979 F.3d at 73; *Dwares*, 985 F.2d at 98-99. Accordingly, each of these circuits allows state actors to be held constitutionally liable for failing to protect an individual against private violence where the state actor's affirmative acts create or increase the danger to the plaintiff.

Unlike the other circuits, the Fifth Circuit has "repeatedly *declined* to recognize" the state-created danger doctrine. *Joiner v. United States,* 955 F.3d 399, 407 (5th Cir. 2020) (emphasis added).[4] That

---

state-created danger claim" in a "published opinion." *Callahan v. N.C. Dep't of Pub. Safety*, 18 F.4th 142, 147 (4th Cir. 2021) (citation omitted).

[4] *See, e.g.*, *Fisher v. Moore*, 73 F.4th 367, 376 (5th Cir. 2023) (en banc); *Cook v. Hopkins*, 795 F. App'x 906, 913-14 (5th Cir. 2019); *Whitley v. Hanna*, 726 F.3d 631, 639 n.5 (5th Cir. 2013); *Estate of C.A. v. Castro*, 547 F. App'x 621, 626 (5th Cir. 2013); *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc); *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 & n.47 (5th Cir. 2010); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004); *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003); *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (en banc); *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001); *Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997).

court has "consistently refused" to recognize the doctrine "even where the question of the theory's viability has been squarely presented." *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004).

Just recently, in *Fisher v. Moore*, the Fifth Circuit declined yet another opportunity to adopt the doctrine. 73 F.4th 367 (5th Cir. 2023). The court denied a petition for rehearing en banc even though the case "yet again squarely present[ed] the issue of whether a plaintiff may state a claim" under the state-created danger doctrine. *Id.* at 375-76 (Higginson, J., dissenting from denial of rehearing en banc).

In refusing to apply the doctrine, the Fifth Circuit emphasized that "the Supreme Court has recently—and forcefully—underscored that substantive due process is a disfavored doctrine prone to judicial improvisation." *Id.* at 373. That rationale is fully consistent with Judge Higginson's observation over a decade ago that the Fifth Circuit has "avoided" adopting this "judicial enlargement of liability" because it rests on a "loose articulation" of the Constitution that "was not the result of the lawmaking process." *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. Ex rel. Keys*, 675 F.3d 849, 874 (5th Cir. 2012) (en banc) (concurring in the judgment).

To be sure, *Fisher* noted that—despite the Fifth Circuit's myriad refusals to embrace the state-created danger theory—the court had "not *categorically* ruled [it] out." 73 F.4th at 372 (emphasis altered). But the Fifth Circuit's repeated refusals to recognize the doctrine, along with its periodic explanations for those refusals, make clear that it does not consider state-created danger to be a viable theory of constitutional liability. Indeed, one member of that

court has "acknowledge[d]" that its unwillingness to recognize the doctrine is entrenched and could be overturned only "by taking [a] case en banc." *Id.* at 375 (Wiener, Jr., J., concurring).

The Fifth Circuit's fundamental divergence from the other circuits is widely acknowledged. Below, Judge Bumatay identified the Fifth Circuit as the only circuit in which the "[s]tate-created danger exception" is "not recognized." App. 117a. The First Circuit has described the Fifth Circuit as having "flatly rejected the 'state-created danger' theory of liability." *Veléz Díaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005). And scholars agree that there is a "radical difference between the law in the Ninth Circuit in this area and the law in the Fifth Circuit." Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1, 26 (2007).[5]

B. The Circuits Are Split Over The Legal Test For The State-Created Danger Doctrine

The courts embracing the state-created danger doctrine are also deeply divided. As Judge Bumatay noted below, "[p]ractically every circuit that's endorsed [this doctrine] has come up with a different test for when it should apply." App. 115a. Among other things, the courts are split over (1) whether the state defendant's conduct must "shock the conscience" under the test for substantive due process liability set

---

[5] *See also* Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process First Principles*, 74 Rutgers U. L. Rev. 161, 173 (2021); Dale Margolin Cecka, *It's Time for the Fourth Circuit to Rethink* DeShaney, 67 S.C. L. Rev. 679, 688 (2016); Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165, 1173 (2005).

forth in *County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998); (2) whether deliberate indifference suffices to impose liability; and (3) how much the state action must increase the risk of harm to the victim. On these issues, the Ninth Circuit has stretched the doctrine far beyond the limits imposed by other circuits.

1. "Shocks The Conscience"

"Historically, [the Fourteenth Amendment's] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In *Lewis*, this Court addressed whether "a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase." 523 U.S. at 836.

The Court's answer was *no*. After reiterating that "only the most egregious official conduct" can rise to the level of a substantive due process violation, the Court concluded that "the cognizable level of executive abuse of power" is "that which *shocks the conscience*." *Id.* at 846 (emphasis added). The Court explained that although "deliberate indifference can rise to a constitutionally shocking level" when the victim is in state custody, it is not sufficient in the context of a high-speed chase, where police have neither "time to make unhurried judgments," nor "the chance for repeated reflection." *Id.* at 852-53.

The circuits disagree whether *Lewis*'s conscience-shocking standard governs state-created danger claims. App. 116a-18a (Bumatay, J., dissenting); *Fisher*, 73 F.4th at 368 n.32. Most courts—

specifically, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits—apply *Lewis* and hold that to make out a state-created danger claim, the plaintiff must identify state action that shocks the conscience.[6]

Only the Ninth Circuit dissents. In *Kennedy v. City of Ridgefield*, that court rejected the shocks-the-conscience test as a requirement for state-created danger liability. 439 F.3d 1055, 1064-65 (9th Cir. 2006). Instead, it held that a mental state of deliberate indifference alone "is enough" to state a claim. *Id.* at 1064. The court "refuse[d] to parse" the culpability inquiry "further" by engaging in a shocks-the-conscience analysis because, in its view, "'subjective epithets'" such as "'shocking' shed[] more heat than light.'" *Id.* at 1064-65. The Ninth Circuit's outlier approach directly conflicts not only with *Lewis*, *see infra* at 29-30, but also with the other circuits. In doing so, it allows sweeping liability for state action that does not come close to the sort of "egregious" "executive abuse of power" identified as a substantive due process violation in *Lewis*. 523 U.S. at 846.

---

[6] *See Irish*, 979 F.3d at 75; *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 431 (2d Cir. 2009); *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018); *Callahan*, 18 F.4th at 149 n.5; *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019); *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 (7th Cir. 2007); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003); *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1330-31 (11th Cir. 2020); *Butera*, 235 F.3d at 651.

2. Deliberate Indifference

The circuits also disagree about whether and when deliberate indifference supports a state-created danger claim outside the custodial context. As mentioned, the Ninth Circuit does not require conscience-shocking behavior and maintains that deliberate indifference is *always* enough. *Kennedy*, 439 F.3d at 1064. But even the circuits that apply *Lewis*'s shocks-the-conscience test substantially diverge as to deliberate indifference.

On one end of the spectrum, the Fourth Circuit holds that deliberate indifference can *never* rise to the level of conscience-shocking outside the custodial context. In its view, only "conduct *intended to injure* in some way unjustifiable by any government interest" can shock the conscience in such situations. *Slaughter v. Mayor & City Council of Balt.*, 682 F.3d 317, 321 (4th Cir. 2012) (emphasis added) (quoting *Lewis*, 523 U.S. at 849); *see Turner v. Thomas*, 930 F.3d 640, 647 n.2 (4th Cir. 2019).

The Eleventh Circuit has likewise "been explicit in stating that 'deliberate indifference' is insufficient to constitute a due-process violation in a non-custodial setting." *Nix v. Franklin Cnty. Sch. Dist.*, 311 F.3d 1373, 1377 (11th Cir. 2002); *see also L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1330 (11th Cir. 2020) (Pryor, J.) ("We doubt that deliberate indifference can ever be 'arbitrary' or 'conscience shocking' in a non-custodial setting."). And although the Sixth Circuit has been inconsistent on this point, its better-reasoned precedent notes that "where a plaintiff claims that a non-custodial substantive due process violation has occurred because of the government's deliberate indifference, *something more*

must be shown"—such as "callous disregard" for the victim or an "intent to injure"—to satisfy *Lewis*. *Schroder v. City of Fort Thomas,* 412 F.3d 724, 730 (6th Cir. 2005) (Sutton, J.) (emphasis added).

The remaining circuits—drawing from different parts of *Lewis*—appear to apply some version of either a sliding scale or case-by-case approach that varies depending on the amount of time the state actor has to deliberate. The Third, Seventh, and Eighth Circuits maintain that whenever a state actor has time to make an "unhurried judgment," deliberate indifference is automatically conscience-shocking. *Sanford v. Stiles*, 456 F.3d 298, 309 (3d. Cir. 2006); *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007); *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005).[7] But where the state actor must instead make a split-second judgment, these courts require a heightened showing of intent.

The Tenth and First Circuits agree that deliberate indifference can sometimes be enough, but apply a more nuanced, case-by-case approach. The Tenth Circuit has held that the "length of deliberation *may* be *a factor* in a conscience-shocking analysis" but it is by no means determinative. *Green v. Post*, 574 F.3d 1294, 1303 (10th Cir. 2009) (emphasis added) (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1041 n.1 (10th Cir. 2006)). That court also considers whether the state actor has had an opportunity for "repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* (citation omitted). The First Circuit applies a similar, contextual approach.

[7] *See also M.J. ex rel. S.J. v. Akron City Sch. Dist. Bd. of Educ.*, 1 F.4th 436, 449-50 (6th Cir. 2021) (applying this test).

As that court has explained, "[w]here officials have the opportunity to make unhurried judgments, deliberate indifference *may* shock the conscience, particularly where the state official performs *multiple acts of indifference.*" *Irish*, 979 F.3d at 75 (emphasis added).[8]

3. Magnitude Of State-Created Danger

Finally, the circuits also disagree about *how much* the State must increase the danger to a private party before the victim can bring a state-created danger claim. *DeShaney*—the purported source of the doctrine—is silent on this point. It is therefore unsurprising that there has been "little consistency" in this area. *Butera*, 235 F.3d at 653 (citing *Freeman*, 911 F.2d at 55); *McClendon v. City of Columbia*, 305 F.3d 314, 331 (5th Cir. 2002) (similar); *see also Anderson ex rel. Anderson v. City of Minneapolis*, 934 F.3d 876, 882 (8th Cir. 2019).

The Sixth Circuit holds that because the state-created danger doctrine applies only to the most egregious state action, it is limited to situations in which "the state causes or *greatly increases* the risk of harm to its citizens." *Peete v. Metro. Gov't of Nashville & Davidson Cnty.*, 486 F.3d 217, 223 (6th Cir. 2007) (emphasis added); *see Barber v. Overton*, 496 F.3d 449, 453-54 (6th Cir. 2007). The Seventh, Eighth, and Tenth Circuits have all endorsed a similar test. *Est. of Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th. Cir. 1997) (requiring that State "*greatly*

[8] Unsurprisingly, courts that apply the vague "unhurried judgment" standard are also divided as to what that standard means. *Compare Irish*, 979 F.3d at 75 (1st Cir.) (more than "seconds or minutes"), *with Sanford*, 456 F.3d at 309-10 (3d Cir.) ("hours or minutes").

increased the danger" (emphasis added)); *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011) ("*significant* risk of serious, immediate, and proximate harm" (emphasis added) (citation omitted)); *Matthews v. Bergdorf*, 889 F.3d 1136, 1150 (10th Cir. 2018) ("*substantial* risk of serious, immediate, and proximate harm" (emphasis added)).

By contrast, the Ninth Circuit's position is that *any* marginal increase in danger attributed to the State can establish a substantive due process violation under the state-created danger theory. The court simply asks "whether the officers left the person in a situation that was *more dangerous* than the one in which they found him." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) (emphasis added). Here, for example, the Ninth Circuit reprimanded the district court for applying "the wrong standard," explaining that the court should have assessed "whether the twins were rendered more vulnerable by [the officer's] actions." App. 31a; *see also id.* at 34a-35a (reversing as to Garcia and Torres because their actions left twins "more vulnerable" and in a situation that was "more dangerous").

The First Circuit takes the same permissive approach to liability. In *Welch v. City of Biddeford Police Department*, it reversed the district court for requiring that the state action "greatly" increase the danger to the plaintiff. 12 F.4th 70, 76 (1st Cir. 2021). In its view, to trigger the state-created danger doctrine, an affirmative act must "simply '*enhance*' the danger" to the plaintiff, rather than "'greatly' enhance [it]." *Id.* (emphasis added).

* * *

DeShaney's dicta has thus led to decades of "circuit (and intra-circuit) disharmony," resulting in "uncertain guidance to litigants and courts, as well as public officials." *Magee*, 675 F.3d at 871 (Higginson, J. concurring in the judgment).[9] And these circuit splits directly affect outcomes. Under the permissive standards applied by the Ninth and Second Circuits, for example, state-created danger claims can go forward based on as little as referring to alleged abusers as "good people," *Martinez v. City of Clovis*, 943 F.3d 1260, 1273 (9th Cir. 2019), or "implicitly encourag[ing]" driving under the influence of alcohol, *Pena v. DePrisco*, 432 F.3d 98, 102 (2d Cir. 2005), or providing erroneous information to another state actor about a citizen's history of mental disturbance, App. 35a-36a.

Meanwhile, other circuits—including the Fourth and the Eleventh—would reject such claims because they plainly do not involve an intent to injure or other conscience-shocking behavior. *See supra* at 18-19. And the Fifth Circuit would likely reject *any* state-created danger claim at the threshold.

This sort of inconsistency and confusion is intolerable in the realm of constitutional rights,

---

[9] Beyond the circuits splits described above, courts are also divided over (1) whether a state-created danger plaintiff must allege but-for causation, *compare, e.g., Kaucher v. County of Bucks*, 455 F.3d 418, 433 (3d Cir. 2006) (yes), *with Barber*, 496 F.3d at 454 (no, only proximate causation); *see also Kennedy*, 439 F.3d at 1074 (Bybee, J., dissenting) (acknowledging split); and (2) whether the state action needs to have increased danger to an identifiable victim or group of victims, as distinct from the public at large, c*ompare, e.g., Jones v. Reynolds*, 438 F.3d 685, 696 (6th Cir. 2006) (yes), *with Pena v. DePrisco*, 432 F.3d 98, 114 (2d Cir. 2005) (no).

where uniform, nationwide rules are particularly important. This Court should resolve the splits and ensure that the Due Process Clause means the same thing across the country.

II. The Ninth Circuit's Version Of The State-Created Danger Doctrine Is Wrong

The Ninth Circuit's approach to the state-created danger doctrine is profoundly flawed. Most fundamentally, the Ninth Circuit (and most other circuits) are wrong to recognize the doctrine at all. But even if the doctrine were valid in some form, the Ninth Circuit's version goes way too far. This Court should abrogate—or, at a minimum, circumscribe—the state-created danger theory of substantive due process liability.

A. The State-Created Danger Doctrine Lacks Constitutional Grounding

The state-created danger doctrine has no basis in the Due Process Clause's text or history and rests on an erroneous interpretation of *DeShaney*. When the State does not *itself* deprive the victim of life, liberty, or property, the Due Process Clause does not apply.

1. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As Chief Justice Rehnquist explained for the Court in *DeShaney*, the Clause is "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. In other words, the Constitution proscribes *state* deprivation of life, liberty, and property. Accordingly, "nothing in the language of the Due Process Clause itself requires the

State to protect the life, liberty, and property of its citizens against" deprivation by private actors. *Id.*

History confirms that the Clause's purpose was to "prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Id.* at 196 (alteration in original) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). "[L]ike its forebear in the Magna Carta," the Clause "was 'intended to secure the individual from the arbitrary exercise *of the powers of government*.'" *Daniels*, 474 U.S. at 331 (emphasis added) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

As applied to substantive due process, this means the Clause was intended "to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 196. "[B]y barring certain government actions regardless of the fairness of the procedures used to implement them," substantive due process "prevent[s] *governmental power* from being 'used for purposes of oppression.'" *Daniels*, 474 U.S. at 331-32 (emphasis added).

The state-created danger doctrine flouts these principles. Its whole purpose is to impose constitutional liability for harms inflicted on victims by private parties. But when a person falls victim to such private violence, it is the private violence that has deprived life or liberty, *not* the State. That is true even if the State somehow increased the risk of that violence.

Ultimately, the state-created danger doctrine "indulges the legal fiction that an act of private violence may deprive the victim of th[e] constitutional guarantee [promised by the Fourteenth Amendment]." *Gray v. Univ. of Colo. Hosp. Auth.*, 672

F.3d 909, 927 (10th Cir. 2012). In doing so, it creates an atextual and ahistorical "anomaly," because the Fourteenth Amendment does not "regulate[] private actors." *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491 (6th Cir. 2019). The doctrine departs from the Constitution's original meaning.

2. The doctrine also contradicts *DeShaney*, which fully embraced the textual and historical analysis above. There, the Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197. The Court thereby rejected a substantive due process claim based on the failure of state employees to protect Joshua from his abusive father. *Id.* at 197-201. Those claims are materially indistinguishable from the claims here, which likewise charge that petitioners failed to protect the Murguia twins from their mother. *Supra* at 8.

As noted, the lower courts have extrapolated the state-created danger doctrine from one sentence in *DeShaney*, 489 U.S. at 201. But that sentence must be understood correctly and in context. It appeared as part of the Court's lengthy rejection of the plaintiffs' argument that the *DeShaney* defendants had a "special relationship" with Joshua because they knew that his father was abusive and had "specifically proclaimed" their "intention to protect him against that danger." *Id.* at 197-202. The Court rejected such liability based on its core holding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195.

In doing so, the Court acknowledged a line of precedent holding that in various settings where the victim was *involuntarily* held in state *custody*—such as in prison or a state mental hospital—the State *did* "assume some responsibility for his safety and well-being" giving rise to a constitutional "duty to protect" against third-party violence. *Id.* at 199-200. But it then made clear why this precedent did not apply to Joshua's case:

> Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. *While 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 (emphasis added).

Courts recognizing the state-created danger doctrine take the italicized sentence to mean that the Due Process Clause requires state actors to protect private citizens against third-party violence in circumstances where the State renders the private citizen more vulnerable to the harm. But that "overreads[s]" the sentence. *Est. of Romain*, 935 F.3d at 493 (Murphy, J., concurring, joined by Kethledge & McKeague, JJ.). Far from "proposing a new exception" to *DeShaney's* core holding, "the Court was merely providing further explanation why the custody-based special relationship exception did not apply" in Joshua's particular case. App. 111a

(Bumatay, J., dissenting); *see Est. of Romain*, 935 F.3d at 493 (Murphy, J., concurring) (similar).

Any other interpretation of the *DeShaney* sentence is implausible. As Judge Bumatay noted, "it's doubtful that the Supreme Court meant to fashion a novel theory of substantive due process liability through such incidental language." App. 110a. Indeed, using the sentence to justify the state-created danger doctrine "runs counter to the opinion's general thrust—that the Due Process Clause is ill-suited for claims seeking state protection from private violence," *Est. of Romain*, 935 F.3d at 494 (Murphy, J., concurring), and thus "turn[s] *DeShaney* on its head," App. 110a (Bumatay, J.). It is also at odds with this Court' general "reluctan[ce] to expand the concept of substantive due process"—a notoriously slippery doctrine where the "guideposts for responsible decisionmaking" are "scarce and open-ended." *Collins*, 503 U.S. at 125.

3. Given all this, a growing chorus of judges has criticized the state-created danger doctrine as unsupported and unprincipled. Below, for example, Judge Bumatay and his fellow dissenters criticized the doctrine as "an atextual and ahistorical expansion of substantive due process rights." App. 107a. A few years ago, Judge Matey and Judge Porter decried the doctrine as "not 'stemm[ing] from the text of the Constitution or any other positive law'" and "a 'troubling' expansion of substantive due process." *Johnson v. City of Philadelphia*, 975 F.3d 394, 404 (3d Cir. 2020) (Matey, J., concurring) (citations omitted); *see also id.* at 405 (Porter, J., concurring). Many others have criticized the doctrine as well. *See Est. of Romain*, 935 F.3d at 492-95 (Murphy, J., concurring, joined by Kethledge & McKeague, JJ.)); *Weiland v.*

Loomis, 938 F.3d 917, 919-21 (7th Cir. 2019) (Easterbrook, J.); *Pinder v. Johnson*, 54 F.3d 1169, 1175-79 (4th Cir. 1995) (en banc) (Wilkinson, J., joined by Hall, Wilkins, Niemeyer, Williams & Widener, JJ.).

These critics are right. The Court should reject the state-created danger doctrine as inconsistent with the Constitution and *DeShaney*.

B. The Ninth Circuit's Version Of The State-Created Danger Doctrine Is Far Too Broad

The Ninth Circuit has adopted an exceptionally broad version of the state-created danger doctrine. Even if some version of the doctrine is valid, it must be narrowly cabined to situations involving state-imposed constraints on individual liberty—the Due Process Clause's core concern. It must also incorporate additional guardrails that limit the doctrine to the most egregious state action, including requirements that the state conduct be conscience-shocking, involve an intent to injure, and greatly increase the danger that a private party will injure the victim. These limits are essential to avoid "mak[ing] the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

1. The Ninth Circuit overreaches by authorizing liability under the state-created danger doctrine even in situations that do not involve the coercive use of state power to restrain liberty. *See supra* at 8, 10.

Because the Due Process Clause is primarily concerned with oppressive government conduct, any plausible state-created danger doctrine must be

limited to state action involving the "use of the 'exclusive sovereign prerogative to coerce or restrain action.'" App. 104a-05a (Bumatay, J., dissenting) (quoting Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process* First Principles, 74 Rutgers U. L. Rev. 161, 192 (2021)). Such coercive use of sovereign authority might include, for example, forcibly transporting a citizen to a dangerous place or handing her over to violent third parties—in other words "throw[ing] [her] to the lions." *Pinder*, 54 F.3d at 1177; *see also* App. 52a-53a (Ikuta, J., dissenting in part) (citing cases). But it does not include state action that increases risks without directly interfering with anyone's liberty.

The Ninth Circuit's version of the state-created danger doctrine does not require anything close to state coercion. Here, for example, the Ninth Circuit held that respondents adequately stated a state-created danger claim against Torres, who merely provided Garcia with incorrect information about Langdon. *Supra* at 8. Recognizing state-created danger claims in these non-coercive circumstances—which involve no state deprivation of the victim's life, liberty, or property—stretches substantive due process beyond its breaking point.

2. Any potentially defensible version of the state-created danger doctrine must also embrace robust standards for culpability. Most fundamentally, it must be limited to behavior that "shocks the conscience" under *Lewis*. That test implements the core substantive-due-process principle that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846. The prototypical example of this is "when a state official

engage[s] in 'conduct *intended* to injure in some way unjustifiable by any government interest.'" App. 48a (Ikuta, J., dissenting in part).

The Ninth Circuit is wrong to break with other circuits and refuse to apply *Lewis* to state-created danger claims. *See supra* at 16-17. Doing so evaluates state-created danger claims under a *less demanding* standard than applies to claims where—as in *Lewis*—the state itself is accused of directly harming the victim. That turns things upside down.

The Ninth Circuit further errs by insisting that mere deliberate indifference by a state actor is always enough to state a state-created danger claim. *See supra* at 17. The Supreme Court has never found a substantive due process violation for mere deliberate indifference outside the custodial setting—and for good reason. As the Fourth, Sixth, and Eleventh Circuits have recognized, in that context "something more" than deliberate indifference "must be shown." *Schroder,* 412 F.3d at 730; *supra* at 18-19. At a minimum, such claims should require an actual intent to injure the victim. *See id.*; App. 48a (Ikuta, J., dissenting).

Finally, the Ninth Circuit is wrong to accept *any* increase in danger to the plaintiff as sufficient for a state-created danger claim. *Supra* at 21. A more sensible version of the doctrine would be limited to state actions that *greatly* or *substantially* increase the danger to the plaintiff, as several circuits have held. *Supra* at 20. Such a requirement is essential to limit the doctrine to truly extreme, conscience-shocking scenarios—and avoid imposing constitutional liability on a wide range of official conduct simply because it marginally increases some risks to some members of the public.

3. The Ninth Circuit's expansive view of the state-created danger doctrine has produced absurd results, in which run-of-the-mill mistakes in police or government conduct are treated as violations of the Constitution.

In *City of Clovis*, for example, the court held that the victim had properly alleged a state-created danger claim against a police officer whose purported violation of the Constitution consisted of making "positive remarks" about an abuser and his father (both police officers) while responding to a domestic violence call. 943 F.3d at 1273. In *Kennedy*, the Ninth Circuit upheld a state-created danger claim against an officer for informing a domestic abuse suspect that he had been accused of assault by his wife. 439 F.3d at 1063. In *Polanco v. Diaz*, the court held that California prison officials could be held liable for failing to implement social distancing and other measures to protect them from inmates infected with the COVID-19 virus. 76 F.4th 918, 925-29 (9th Cir. 2023). And here, the Ninth Circuit upheld potential state-created danger liability for police officers and a social worker for their shortcomings in dealing with Langdon's mental disturbance.

Each of these examples involves ineffective (and perhaps arguably tortious) government conduct leading to harmful consequences. But none implicates the sort of extraordinary abuses of state power capable of triggering substantive due process liability. The Ninth Circuit's willingness to recognize liability in these circumstances shows just how far the state-created danger doctrine has strayed from the Constitution.

III. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving It

1. This case raises an important and oft-litigated issue of constitutional law. Since 2018, over 2,000 federal complaints—over 300 in the Ninth Circuit alone—have mentioned "state-created danger."[10] States and municipalities are forced to expend substantial resources defending these types of cases, which often result in protracted litigation. This case alone, which involved multiple governmental entities, has dragged on for more than four years.

More generally, imposing state-created danger liability—especially under the Ninth Circuit's uniquely expansive approach—creates perverse incentives for state actors. The most obvious consequences are for police. On the one hand, once police get involved in fraught situations, they may be incentivized to intervene more aggressively and intrusively in order to avoid liability. *See* Pritchard, *supra*, at 207-08; *Pinder*, 54 F.3d at 1178. On the other hand, overzealous application of the state-created danger doctrine can perversely incentivize *in*action. Because the doctrine is triggered by affirmative conduct by a state actor, police may abstain from offering certain services and protections in the first place. For instance, police may be tempted to avoid fraught situations involving the homeless or people suffering from mental health issues—precisely those who are most in need of police intervention. Or

---

[10] These figures were derived from a search in the Lex Machina database for federal district court case documents marked with the "Complaint" document tag and containing the terms "state-created danger" and "42 U.S.C. § 1983."

police may decide it is too risky to get involved in domestic disputes, which often involve competing interests and demand complex, quick judgments with imperfect information.

Expansive state-created danger liability can also distort the provision of other public services.[11] Judge Wilkinson made this point in arguing against extending the "special relationship" exception to children in foster homes. *See Doe*, 597 F.3d at 180 (concurring in the judgment). If a constitutional duty to protect was imposed in such a situation, he explained, then "rational state actors" would be inclined to "allow [a] child to continue to suffer," instead of intervening and subjecting themselves to the possibility of onerous lawsuits. *Id.* at 181. Thus, Judge Wilkinson concluded, "[t]he 'duty to protect' may well discourage protection, and ultimately, encourage harm." *Id.* at 180.

The scope of the state-created danger doctrine is also important because it "trespasses on the most traditional of state roles." *Id.* at 184. In general, the Constitution leaves the regulation of torts—even those committed by "someone cloaked with state authority"—to the States. *Lewis*, 523 U.S. at 848. Here, for example, California law has a carefully reticulated tort scheme detailing when public employees can—and cannot not—be held liable. *See* Cal. Gov't Code §§ 814-895.8; Am. Compl. ¶¶ 340-464

---

[11] *See Currier v. Doran*, 242 F.3d 905, 908 (10th Cir. 2001), and *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 166 (4th Cir. 2010) (social workers involved with child placement); *Gray*, 672 F.3d at 909 (state hospital employees caring for epilepsy patient); *Sanford*, 456 F.3d at 301 (high school guidance counselor); *Johnson*, 975 F.3d at 397 (fire department dispatcher).

Murguia v. Langdon, No. 1:19-cv-00942 (E.D. Cal. July 30, 2020), ECF No. 36 (asserting 18 state statutory tort claims against petitioners).

Determining the scope of tort liability involves "a host of policy choices" that require "account[ing]" for "competing social, political, and economic forces." *Collins*, 503 U.S. at 128-29. Our Constitution assumes that states and local governments are better equipped to make these tradeoffs. An overzealous state-created danger doctrine flouts fundamental federalism principles.

2. This case is the ideal vehicle for this Court to impose order on this muddled area of law. The core issues were squarely presented below, where the state-created danger exception was the centerpiece of the district court's ruling for petitioners, the Ninth Circuit's reversal, and Judge Bumatay's comprehensive dissent. *See* App. 25a-39a, 77a-80a, 85a-88a, 104a-26a.

Moreover, this case presents the issues in a rich factual context—involving not only police officers (petitioners Cerda, Lewis, and Garcia) who came in direct contact with the victims and perpetrator, but also a social worker (petitioner Torres) whose only involvement arose through over-the-phone consultations with Garcia. The range of defendants here will help the Court best assess whether and how the state-created danger doctrine might apply to a variety of state employees and circumstances.

This case also squarely implicates each of the circuit splits and merits arguments described above. If petitioners are right that the state-created danger doctrine misinterprets the Due Process Clause and *DeShaney*, then respondents' case easily fails at the

threshold. But even if this Court prefers to rein in—instead of abrogate—the doctrine, petitioners will still prevail on each of the alternative points argued above. Respondents' claims do not involve coercion by petitioners, and none of the conduct described in the complaint (1) "shocks the conscience" under *Lewis*, (2) was intended to injure the Murguia twins, or (3) meaningfully increased the risk of harm they faced from their mother. *Supra* at 8, 10.

In short, this case will allow the Court to resolve the full panoply of disputes over whether and how the state-created danger doctrine applies. The Court should seize this opportunity to clarify the law and confirm *DeShaney*'s interpretation of the Due Process Clause.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROMAN MARTINEZ
Counsel of Record
BRITTANY M.J. RECORD
URIEL HINBERG
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

JENNIFER M. FLORES
KATHLEEN A. TAYLOR
AMY I. MYERS
THE OFFICE OF TULARE COUNTY COUNSEL
2900 West Burrel Avenue
County Civic Center
Visalia, CA 93291

BRUCE D. PRAET
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, CA 92705

GEORGE E. MURPHY
GEORGE MURPHY LEGAL SERVICES, PC
13341 W. U.S. Highway 290
Building 2
Austin, TX 78737

Counsel for Petitioners

September 15, 2023

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *Murguia v. Langdon*, 61 F.4th 1096 (9th Cir. 2023) 1a

Order of the United States District Court for the Eastern District of California Granting Defendants' Motions to Dismiss, *Murguia v. Langdon*, No. 1:19-cv-00942-DAD-BAM, 2021 WL 4503055 (E.D. Cal. signed Sept. 30, 2021, and entered Oct. 1, 2021) 60a

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rehearing En Banc, *Murguia v. Langdon*, 73 F.4th 1103 (9th Cir. 2023)...95a

U.S. Const. amend. XIV, § 1 ....127a

42 U.S.C. § 1983 ....128a

[61 F.4th 1096]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jose MURGUIA, for himself and for the Estates of Mason and Maddox Murguia, Plaintiff-Appellant,

v.

Heather LANGDON; County of Tulare; Lewis, Deputy at Tulare County Sheriff Department; Roxanna Torres, Social Worker at the Child Welfare Service; City of Tulare; Garcia, Sergeant at Tulare Police Department; First Assembly of God of Visalia; Cerda, Defendants-Appellees.

No. 21-16709

Argued and Submitted December 6, 2022
Pasadena, California

Filed March 14, 2023

Before: CARLOS T. BEA, SANDRA S. IKUTA, and MORGAN CHRISTEN, Circuit Judges.

Opinion by Judge BEA;

Partial Dissent by Judge IKUTA

OPINION

BEA, Circuit Judge:

This case concerns the application of the "state-created danger" doctrine of 42 U.S.C. § 1983 liability in the context of a welfare check gone wrong. According to Plaintiffs' First Amended Complaint

("FAC"),[1] on December 5, 2018, Heather Langdon experienced a mental health crisis. Jose Murguia, with whom Langdon lived and had five children, called 911 seeking emergency mental health assistance for Langdon. This call set in motion a chain of events that ultimately led to the death of Langdon's and Jose's ten-month-old twin sons, Mason and Maddox, at Langdon's own hand.

Over the course of that day, Langdon interacted with three groups of law enforcement officers. First, deputies from the County of Tulare arrived at the Murguia home where they separated Jose from Langdon, leaving her with the twins; the deputies then allowed Langdon and a neighbor (Rosa) to take the twins to a church and prevented Jose from following. Second, a City of Visalia police officer drove Langdon and the twins from the church to a women's shelter. Third, City of Tulare police officers, acting in part based on information provided by a County of Tulare social worker, transported Langdon and the twins from the shelter to a motel to spend the night. Left unsupervised at the motel where she continued to suffer from a mental health crisis, Langdon drowned the twins.

Jose, on behalf of himself and the estates of twins Mason and Maddox, brought this § 1983 action against the state actors who interacted with Langdon on December 5, 2018: Deputy Lewis and Sergeant Cerda of County of Tulare's Sheriff's Department, Social Worker Torres of County of Tulare's Child Welfare Services, and Sergeant Garcia of City of

---

[1] These facts are taken from the First Amended Complaint ("FAC") and are accepted as true for this appeal. *See Nguyen v. Endologix, Inc.*, 962 F.3d 405, 408 (9th Cir. 2020).

Tulare's Police Department. This court must decide whether Plaintiffs have properly stated claims for § 1983 relief against each of these state actors based on their roles in creating the circumstances that caused the twins' deaths

I. FACTS

a. Langdon's background of child abuse and erratic behavior

Jose Murguia and Heather Langdon met in or about 2004. They married and, prior to the birth of the twins, had three sons: Jayden, Josiah, and Kaze. The couple had a turbulent relationship, which was well documented due to multiple encounters with the legal system and County of Tulare's Child Welfare Services ("CWS").

As early as June 2011, CWS was aware that Langdon had committed domestic violence against Jose. On January 5, 2015, a court ordered sole physical and legal custody of the three sons to Jose, with monitored visits for Langdon; the court issued a Temporary Restraining Order ("TRO") against Langdon, which included a stay away order and required her to undergo a mental health evaluation. In April 2015, the marriage ended. The court awarded sole physical and legal custody of the three children to Jose, with monitored visits for Langdon.

On January 22, 2016, Langdon was arrested for drunk driving and willful cruelty to a child. She pleaded guilty to both counts. On October 24, 2016, Langdon was arrested for willful cruelty to a child and inflicting injury on a child. She pleaded guilty to both

counts.[2] On November 1, 2016, the court awarded sole legal and physical custody of the three children to Jose, with no visitation to Langdon.

Jose and Langdon rekindled their relationship in Spring 2017, and Langdon soon became pregnant with twins. On May 1, 2017, CWS opened a case against Langdon for child abuse of her oldest son, Jayden. On August 4, 2017, Langdon was convicted of battery against Jose. As of December 6, 2018 (the date of the twins' death), CWS had at least one open case against Langdon, although it is not clear from the FAC what this open case involved.

On January 12, 2018, Langdon gave birth to twin sons: Mason and Maddox. There was no formal custody order for the twins. The family's living arrangement at this time is unclear, but the complaint implies that Langdon and the twins lived together in a separate home from Jose and the three older sons.

In February 2018, Jose reported to CWS that he observed Langdon drunk while in charge of the twins in her own apartment. In March 2018, two of Langdon's friends, Rosa and Brittany, reported to CWS that they observed Langdon drunk while in charge of the twins.

In May 2018, Langdon told Jose that the twins were too much work for her and asked Jose to take custody of all five children. Jose agreed. Between August 2018 and early December 2018, Langdon and the twins moved back into Jose's home. As of

---

[2] The FAC does not specify whether the January 22, 2016, and October 24, 2016, incidents involved Langdon's own children.

December 5, 2018, Langdon and Jose lived together with all five children at Jose's home.

Langdon's erratic behavior began to escalate in late November 2018. She told Jayden—her oldest son at 14 years-old—that she and he were special in the eyes of God, that these were "End Times" because a fire had destroyed the town of Paradise,[3] and that she was "thinking at a higher power."

On December 3 or 4, 2018, Langdon called her church, First Assembly of God of Visalia ("Church"), and reported that Jayden had threatened to shoot up an elementary school. The Church reported the call to Tulare County Sheriff's Department ("TCSD"), which investigated the threat and concluded that Langdon had made a false report.

b. TCSD deputies respond at the Murguia home

On December 4, 2018, Jose got home from work at around 6:30 p.m. When he arrived home, Langdon told him to get ready for jail because the police were coming to arrest him. Langdon was "erratic" and repeatedly shouted "I refute you Satan." Jose called 911, described Langdon's behavior, and requested mental health assistance for Langdon.

In response to Jose's call, TCSD Deputy Lewis and an unnamed TCSD deputy went to the Murguia home. As stated in the FAC, "Jose reported Langdon's history to the deputies," although it is unclear exactly what "history" Jose reported (e.g., whether Jose told the deputies that Langdon had a history of child

---

[3] It is unclear from the FAC whether Langdon was referring to the town of Paradise, California, which was devastated by a fire in November 2018, or to "Paradise" in the sense used by Dante in his *Divine Comedy*.

cruelty resulting in multiple convictions and child abuse against her own son). Jose asked the deputies to get professional help for Langdon. The deputies refused to assist in obtaining psychological help or a mental health evaluation for Langdon that night. They told Jose to call back if Langdon threatened herself or anyone else, in which case the deputies would take Langdon into custody on an involuntary psychiatric hold.

The next morning, December 5, 2018, Langdon woke up at 4:00 a.m. and began "behaving erratically and bizarrely." She held one of the baby twins up high towards the ceiling fan, shouting "haneeshewa." She bathed and put on makeup three times in a row. At around 11:00 a.m., she told Jose that Jesus told her to drink bleach and vinegar to cleanse the demons in her soul. She told Jose that she had already drunk some bleach; Jose saw her drinking vinegar. Jose called 911, reported what Langdon said about drinking bleach and vinegar, and again asked for assistance in getting psychological help for Langdon.

Several TCSD deputies[4] and EMTs arrived at the Murguia home in response to Jose's call. Among them were Deputy Lewis and Sergeant Cerda. The FAC states, "Before arriving at Jose's home, Lewis and Cerda *knew or should have known* that Langdon had a history of mental illness, attempting suicide, and violence towards children, that Langdon had falsely reported a school shooting threat two days earlier and Langdon had behaved bizarrely the prior evening and that she had an open CWS case." (emphasis added).

---

[4] We refer to the TCSD deputies collectively, including Deputy Lewis and Sergeant Cerda, as "Deputies."

When the Deputies arrived at the Murguia home, they "took command of the scene." Lewis, with Cerda's approval, ordered Jose to step outside, away from the twins. An unnamed deputy took Jose's driver's license and checked him against the California Law Enforcement Telecommunications System ("CLETS") "and then *knew or should have known* of Langdon's history of mental illness, cruelty to children and CWS history." (emphasis added). The FAC does not specify whether the deputy then communicated this information to Lewis, Cerda, or any other individuals present.

According to the FAC, "Lewis and Cerda observed and knew that Langdon was gravely disabled, based on her language, behavior and information from Jose and a neighbor Rosa." The FAC alleges that Jose told the Deputies about Langdon's bizarre behavior that morning, but does not otherwise specify what information Jose and Rosa provided about Langdon's present condition, past experiences with mental illness, or past violent behavior. A County of Tulare fireman who was present at the Murguia home asked Langdon, in the presence of Lewis and Cerda, if she had any medical problems. Langdon answered, "yeah, I'm crazy. I'm crazy. Everyone thinks I'm crazy." Lewis responded, "who cares what everyone thinks?" Langdon replied, "No, I really want to go see a doctor."

Langdon told Lewis and Cerda that she sees dead people and demons, that she talks to God, and that she was going into another realm. She said that Jose was a devil worshipper but did not realize it. She claimed to have another husband waiting for her. In addition to making these bizarre statements, she "showed rage, anger, and agitation." Langdon also

said she had been awake for days and wanted to see a doctor so she could go back to her "normal life." She asked Lewis and Cerda to take her to see a doctor.

Jose told the Deputies "that Langdon was not okay and that she needed to be evaluated professionally" and told them "about Langdon drinking bleach and vinegar, her multiple baths, and the other bizarre behavior." Jose told the Deputies that he wanted to take Langdon to the hospital for a mental evaluation, but the Deputies did not permit him to do so. He reminded the Deputies of the previous night's call, in which Lewis and the other deputy had promised to get Langdon a psychiatric evaluation if she threatened to harm herself or others.

The Deputies continued to keep Jose out of his house, away from Langdon and the twins. Jose walked to the home of Rosa, a friend of Langdon and neighbor of the Murguias. He asked Rosa to come to the Murguia home to talk to Langdon "because Langdon had been talking crazy." When Rosa arrived at the Murguia home, an unnamed deputy allowed Rosa to go inside and again told Jose to stay outside.

Rosa worked at a hospital and had supervised people on involuntary psychiatric holds. On December 5, 2018, Rosa believed that the Deputies should take Langdon for mental health help on an involuntary hold. She "told the [Deputies] that Langdon needed professional help, and that Langdon should not have charge of the twins."[5] In response, an unnamed deputy told Rosa that Langdon had

---

[5] It is unclear from the FAC what the Deputies knew about Rosa, e.g., whether they knew that Rosa worked at a hospital and therefore had specialized knowledge regarding Langdon's condition.

agreed to go to the hospital and was waiting for Rosa to take her. According to the FAC, "Neither Rosa nor the [Deputies] believed the babies were safe with Langdon."

Rosa told Langdon that she would take her to the hospital, but Langdon replied, "No we're taking the babies to Church." Langdon told Rosa that Jose's house was hexed. The Deputies overheard this conversation, and an unspecified deputy told Langdon, "This is a new deal. You said you were going to the hospital."

In preparation for going to the Church, Langdon packed a bag containing only nail polish. Rosa told Langdon, "Okay, let's get it together," and pointed out that Langdon had no food or water for the babies. Jayden supplied Rosa with water, diapers, and two cans of milk. Rosa and Langdon then walked to Rosa's house with the twins.

While Jose waited outside, an unnamed deputy asked him if Langdon was on any drugs. Jose answered that he did not know. The deputy told Jose, "You should know your wife better. You have been married longer than me and my wife and I would know this about my wife." Jose asked the Deputies to prevent Langdon from leaving with the twins and to let him have custody of the twins. He "told the [Deputies] the twins were not safe with Langdon and asked the [Deputies] to stop Langdon from taking the twins." The Deputies told Jose that they were going to let Langdon leave with Rosa. An unnamed deputy told Jose to "just let her go."

After Langdon and Rosa left with the twins, the Deputies stayed parked outside of the Murguia home for 30 minutes, "watching Jose and affirmatively

showing their authority and restricting Jose's movement, causing Jose [to] fear that if he followed the twins, the [Deputies] would arrest him."

c. City of Visalia officer responds at the Church

Rosa took Langdon and the twins to Rosa's house, where Langdon continued to behave erratically. Langdon made odd comments such as "follow the bunnies" and said that the San Andreas Fault would destroy the world. Rosa took Langdon and the twins to the Church, where Rosa told the Church receptionists that the twins were in danger and asked for help getting the twins away from Langdon. One of the receptionists told Rosa not to worry because the Pastor would take good care of Langdon and the twins were in good hands.

Meanwhile, Langdon told the Pastor that she was homeless and needed shelter, and that she needed mental health help. The Pastor said that he would help her find a place to stay. He asked Langdon if she would like to go to a mental health center for an evaluation, and she said "yes." The Pastor called the police, and a Visalia Police Department officer arrived at the Church in response. The officer drove Langdon and the twins from the Church to Lighthouse, a women's shelter. The officer did not provide the Lighthouse staff with information about Langdon's prior requests for mental health help, Langdon's willingness to go to a mental health clinic, Langdon's criminal history, Langdon's "bizarre" behavior, or Rosa's concerns about the safety of the twins. Rosa did not accompany Langdon and the twins to Lighthouse.

d. Tulare Police Department officers respond at Lighthouse

Langdon continued to act "bizarrely" at Lighthouse. The director of Lighthouse and the office manager conducted an intake interview of Langdon and thought that she was "crazy." Langdon told the Lighthouse staff that the door chimes would "happen as long as I am here." She told the staff that she controlled the office manager's computer. She was "argumentative" and told one of the interviewers, "I don't like your spirit."

Langdon told the Lighthouse office manager that she had been raped the night before and needed to go to the hospital to have an emergency abortion. The Lighthouse staff called an ambulance. EMTs arrived and informed Langdon that they could take her to the hospital but could not take the twins. Langdon became angry. Lighthouse staff then called City of Tulare's Police Department ("TPD"). When the TPD officers arrived, they dismissed the EMTs and the ambulance.

Langdon yelled at the TPD officers, and the officers also observed her yelling at the Lighthouse staff. The officers described her as "loud and belligerent." Langdon said she "felt" pregnant. An officer asked Langdon if she had taken a pregnancy test. Langdon became even angrier. She yelled at the officer and told him he needed to read the Bible, that he was not in charge of the situation, and that her "Father" was going to take care of her and her kids. She refused to go to a hospital for a mental health evaluation. The Lighthouse manager told Langdon that she would be forced to leave if she did not stop creating a disturbance. Eventually, the TPD officers

left without having obtained psychological help or an evaluation for Langdon.

Langdon continued to yell at the Lighthouse personnel, who again called the police. The same TPD officers were dispatched to Lighthouse a second time approximately 40 minutes after they had left. When they arrived at Lighthouse, the Lighthouse staff told them "Langdon was being uncooperative, loud, and disruptive, and was talking 'crazy.'" The Lighthouse staff also told the officers "that the twins looked like they had not been fed, and Langdon did not have a diaper bag, diapers, changes of clothing or baby bottles."

Langdon tried to go outside to pray. An officer told Langdon that she had to remain in Lighthouse's dining area. Langdon then collapsed on the floor, yelling that she was having contractions. She repeated "Yeshua, Yeshua, Yeshua!" and tried to scoot towards the door while sitting down.

A TPD officer called for Sergeant Garcia—TPD's Crisis Intervention Technician Officer—to come to Lighthouse and updated Garcia on the calls. After Sergeant Garcia was called to Lighthouse, Langdon again collapsed on the floor, claiming to be in labor. She got up several minutes later and began sifting through her makeup bag, then asked another female at Lighthouse if she wanted to have her nails done. Garcia repeatedly attempted to communicate with Langdon, but she did not provide much information to assist the officers.

According to the FAC, "[the] TPD officers observed and knew that Langdon was unable to care properly for the twins. Langdon had no baby food, diapers, or other baby supplies and her behaviors presented an

immediate threat to the children's health and safety because the twins were functionally unattended."

Garcia called CWS and spoke to Emergency Response Social Worker Torres. Garcia told Torres that he was not requesting immediate assistance and was thinking only of arresting Langdon for disturbing the peace. Torres offered to come to Lighthouse to take custody of the twins but said that TPD would have to take Langdon into custody.

According to the FAC, Garcia and Torres each provided the other with incorrect information about Langdon and her situation. Torres "falsely reported to Garcia that CWS had no history of Langdon in its system." In addition, "CWS falsely stated [to Garcia] that Langdon was homeless. CWS falsely stated that Langdon had no history of child abuse, even though CWS [k]new of three criminal convictions for child cruelty and prior cases including one open case against Langdon." Garcia told Torres that he did not want to separate Langdon from the twins. Garcia "falsely stated that Langdon had been evaluated at a hospital" and did not meet the criteria for involuntary commitment. He also "falsely stated that Langdon had everything she needed for the kids, meaning food, diapers, and baby supplies." Neither Torres nor Garcia informed the other that Jose was an available parent and could take custody of the twins.[6]

---

[6] The FAC seemingly contradicts itself regarding what Garcia and Torres knew about Jose's availability to take custody of the twins. First it states that, during his phone call with Torres, "Garcia concealed information about Jose's availability to take the twins." This allegation implies that Garcia—but not Torres—knew that Jose was an available parent who could take custody of the twins. But the FAC then states, "Ms. Torres failed to inform Sgt. Garcia that Jose was an available parent who

Torres concluded that Langdon did not present an immediate danger to the twins. She set CWS's investigative response time for 10 days from the call, and CWS did not conduct an immediate in-person investigation at Lighthouse. Torres and her supervisor later "did a further risk assessment 'because the mother sounded delusional and might be a threat to the children.' The matter was then reclassified for immediate in-person investigation because 'the caregivers' behavior [wa]s bizarre and dangerous to the emotional health of the children.'" The FAC is unclear as to when this "further risk assessment" occurred, whether it occurred on the same night as Torres's call with Garcia, and what prompted the further assessment. No CWS investigator was assigned to Langdon and the twins between December 5 and December 6, 2018.

After Garcia's phone call with Torres, Garcia and two TPD officers arranged for a motel to provide Langdon with free lodging and drove Langdon and the twins from Lighthouse to the motel. Early the next morning, Langdon's screaming led a bystander at the motel to call 911. Paramedics arrived at the motel and found the babies drowned and naked on a bed at the motel

Langdon was eventually prosecuted for murder of the twins. She was found not guilty by reason of insanity.

II. PROCEDURAL HISTORY

In July 2019, Plaintiffs filed a complaint in the Eastern District of California, bringing 54 federal and state claims against 22 named and unnamed

---

could take custody of the twins." This allegation implies that Torres—but not Garcia—knew about Jose's availability.

defendants, including Langdon, the deputies and officers who intervened on December 5, 2018, and several municipalities. The complaint included § 1983 claims against the individual state actors as well as *Monell*[7] claims against the County of Tulare and the City of Tulare. The district court granted dismissal without prejudice under Federal Rule of Civil Procedure 12(b)(6). In July 2020, Plaintiffs filed the FAC, listing 36 federal and state claims. In October 2021, the district court granted dismissal with prejudice, finding that Plaintiffs failed to state any federal claims and declining to exercise supplemental jurisdiction over the state law claims. Plaintiffs appealed.

After voluntarily dismissing some defendants, Plaintiffs continued to press claims against four remaining individuals ("Individual Defendants"): TCSD Deputy Lewis, TCSD Sergeant Cerda, TPD Sergeant Garcia, and CWS Social Worker Torres; two governmental entities: the County of Tulare and the City of Tulare; and First Assembly of God of Visalia.[8] Although Plaintiffs also initially appealed the dismissal of claims against Officer Hernandez of the City of Visalia Police Department, TPD Officers Davis and Valencia, and the City of Visalia, these claims have since been dismissed with prejudice per Plaintiffs' requests.

III. STANDARD OF REVIEW

The court reviews de novo a district court's dismissal of a complaint for failure to state a claim.

---

[7] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[8] Plaintiffs alleged only state law claims against the Church.

Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 772 (9th Cir. 2002). In assessing a Rule 12(b)(6) motion to dismiss, the court must take all factual allegations as true and draw all reasonable inferences in favor of the nonmoving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). To survive a 12(b)(6) motion, the facts alleged must "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

IV. LEGAL FRAMEWORK

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011). Here, Plaintiffs alleged that Defendants deprived them of constitutional rights under the First Amendment right to familial association, the Fourth Amendment right to be free from unreasonable seizure, and the Due Process Clause of the Fourteenth Amendment.

Plaintiffs' claims are rooted in the substantive component of the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause is a *limitation* on state action rather than a *guarantee of minimum levels* of state protections, so the state's failure to prevent acts of private parties is typically insufficient to establish liability under the Due Process Clause. *Martinez v. City of Clovis*, 943 F.3d

1260, 1271 (9th Cir. 2019). However, this circuit has recognized two exceptions to this rule: (1) "when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-created danger exception)"; and (2) "when a special relationship exists between the plaintiff and the state (the special-relationship exception)." *Patel*, 648 F.3d at 971–72 (internal quotation marks omitted).

Plaintiffs urge the court to recognize a third exception to the general rule against § 1983 liability based on a state's failure to act—a *legal requirement* exception. Plaintiffs direct the court to *Preschooler II v. Clark County School Board of Trustees*, in which we stated: "a person 'subjects' another to the deprivation of a constitutional right, within the meaning of §1983, 'if he does an affirmative act, participates in another's affirmative act, or *omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.*'" 479 F.3d 1175, 1183 (9th Cir. 2007) (emphasis added) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Plaintiffs contend that *Preschooler II* and *Johnson v. Duffy*—from which *Preschooler II* quotes—establish that "a state actor commits a [§ 1983] deprivation when he fails to perform an act he is legally required to do." We reject this argument—neither *Johnson* nor *Preschooler II* supports this theory of liability for a substantive due process claim.

In *Johnson*, the court held that a county sheriff deprived the incarcerated plaintiff of his property without due process by failing to satisfy the procedural requirements of a state statute prior to forfeiting the plaintiff's accumulated earnings from work performed at an honor camp. *Johnson*, 588 F.2d

at 742–44. The relevant statute provided that honor camp earnings are forfeited when (1) the superintendent of an honor camp reports to a "Classification Committee" that the prisoner refused to abide by camp rules; (2) the Classification Committee makes an order transferring the prisoner to jail; and (3) the earnings in the prisoner's account have not been ordered paid to someone dependent on the prisoner. *Id.* at 742–43. A related statute required the county sheriff to appoint members of the Classification Committee, which would then be required to meet at least once a week. *Id.* at 743. The county sheriff admitted that the Classification Committee never met or acted upon the plaintiff's transfer as required by the statute as a prerequisite for forfeiture, but the county sheriff argued that he could not be held liable under § 1983 for this deficiency because he never took any affirmative actions—he merely failed to act. *Id.* The court rejected this argument, finding that "personal participation" is not strictly required for § 1983 liability. *Id.* The court reasoned:

> A person "subjects" another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, *or omits to perform an act which he is legally required to do* that causes the deprivation of which complaint is made. Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the

> deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Id. at 743–44 (emphasis added) (citations omitted). The court concluded that, "[the sheriff's] omission to act, in violation of the duties imposed upon him by statute and by regulations, thus may subject him to liability under section 1983." *Id.* at 744.

Plaintiff brings claims for deprivation of substantive due process. *Johnson* is easily distinguished because it relied on the plaintiff's *procedural* due process claim, not on a *substantive* due process claim. *Id.* at 742. The requirements for substantive due process claims differ from the requirements for procedural due process claims. Where a person is entitled to certain process, the failure to provide it can deprive the individual of a procedural due process right, *see, e.g.*, *Armstrong v. Reynolds*, 22 F.4th 1058, 1066–67 (9th Cir. 2022), but a failure to act to protect an individual from private violence does not deprive an individual of substantive due process, except in narrow circumstances. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Patel*, 648 F.3d at 971–72. *DeShaney* held that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199–200, 109 S.Ct. 998. The plaintiff in *DeShaney* was not in custody at the time he was harmed and the Court explained that "[w]hile the State may have been aware of the dangers [the plaintiff] faced . . . , it played no part in their creation,

nor did it do anything to render him any more vulnerable to them." *Id.* at 201, 109 S.Ct. 998.

Preschooler II is similarly unhelpful to Plaintiffs. That case involved a supervisory liability claim arising from the alleged abuse of a non-verbal and severely disabled four-year-old child by his teacher in a public-school setting. 479 F.3d at 1177, 1182. After finding that the complaint alleged the teacher committed a constitutional violation by abusing the child on several occasions over a period of several months, including slapping his hands, hitting his head and face, and body slamming him, *id.* at 1180, the court was tasked with determining whether the complaint alleged sufficient facts to state a § 1983 claim against the teacher's supervisors. *Id.* at 1182–83. The complaint alleged the supervisory officials knew of the teacher's abuse of the child yet permitted the teacher to continue to work with the child and did not report the abuse or put a stop to it. *Id.* at 1182. *Preschooler II* reiterated that respondeat superior did not exist for these claims, reaffirmed our circuit's "limited supervisory liability doctrine," and decided the complaint survived the motion to dismiss because the supervisory defendants' own conduct included failing to discipline the teacher or report the abuse. *Id.* at 1182–83.

Preschooler II did not establish that the mere failure to perform a legally required act is grounds for § 1983 liability based on a substantive due process violation, as Plaintiffs suggest, and the defendants here are officers being sued for their own actions and failures to act, rather than state officials being sued

for their supervisory roles in the actions or failures to act of others.[9]

Neither *Johnson* nor *Preschooler II* held that the failure to comply with a legally required duty, without more, can give rise to a substantive due process claim. Indeed, such a conclusion is foreclosed by *DeShaney*. In keeping with our well-established case law, we make clear that the only two exceptions to the general rule against failure-to-act liability for § 1983 claims presently recognized by this court are the special-relationship exception and the state-created danger exception. *See, e.g.*, *Patel*, 648 F.3d at 971–72; *Martinez*, 943 F.3d at 1271; *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). We discuss the special-relationship exception and the state-created danger exception in turn.

V. SPECIAL-RELATIONSHIP EXCEPTION

The special-relationship exception "applies when [the] state 'takes a person into its custody and holds him there against his will.'" *Patel*, 648 F.3d at 972 (quoting *DeShaney*, 489 U.S. at 199–200, 109 S.Ct. 998). Examples of custody include "incarceration, institutionalization, or other similar restraint[s] of personal liberty." *DeShaney*, 489 U.S. at 200, 109 S.Ct. 998. "When a person is placed in these types of custody, we allow due process claims against the state for a fairly simple reason: a state cannot restrain a

---

[9] Plaintiffs argue that Garcia has supervisory liability because he saw "TPD officers violating TPD policies and did nothing to enforce policies or correct the officers' errors." Plaintiffs cite no authority for the proposition that the failure to comply with police department policies is enough to state an underlying substantive due process claim against the officers, and we know of none.

person's liberty without also assuming some responsibility for the person's safety and well-being." *Patel*, 648 F.3d at 972. "In the case of a minor child, custody does not exist until the state has so restrained the child's liberty that the parents cannot care for the child's basic needs." *Id.* at 974.

The district court correctly held that the special-relationship exception does not apply here because Defendants did not have custody of the twins. *Murguia v. Langdon*, 2021 WL 4503055, at *6, 11 (E.D. Cal. Oct. 1, 2021). In reaching this conclusion, the district court reasoned that the twins were always in the custody of Langdon and that "merely alleging in conclusory fashion that the decedents were in *de facto* custody is not sufficient to negate [P]laintiff's factual allegations showing that Langdon always maintained custody of the children." *Id.* at *6. Plaintiffs argue that the district court erred by failing to "address th[e] issue of who has custody when the available parent cannot care for the children."

Plaintiffs rely on three sources of authority for their argument that the peace officers had de facto custody of the twins. First, Plaintiffs quote *Schall v. Martin*, a United States Supreme Court case regarding the constitutionality of a New York state law, for the proposition that children "are always in some form of custody" and "by definition, are not assumed to have the capacity to take care of themselves." 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Next, Plaintiffs cite California Welfare and Institutions Code § 300(b)(1)[10] and California Family Code § 3010(b) together for the

---

[10] Plaintiffs cite section "300b(b)(1)," which does not exist. The court assumes Plaintiffs meant to cite § 300(b)(1).

propositions that "[w]hen there is a temporary custody vacuum, a peace officer should take temporary custody and find a parent with capacity" and "[w]here a parent cannot care for a child, that child should be placed with a parent with capacity." Based on these authorities, Plaintiffs argue that "each peace officer as the only sane adults with the twins, had control and custody of the twins and a *special relationship* under *DeShaney*."

We reject Plaintiffs' argument. As an initial matter, the statutes cited do not adequately support Plaintiffs' argument that the state actors had de facto custody of the twins. California Welfare and Institutions Code § 300(b)(1) provides that a child "is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court" when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . [t]he failure or inability of the child's parent or guardian to adequately [sic] supervise or protect the child," including when the parent's inability is due to mental illness. California Family Code § 3010(b) provides, "If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child." These statutes pertain to the scope of the juvenile court's jurisdiction and the rights of parents to seek custody of a child under certain circumstances, including when one parent is incapable of taking care of the child. Neither statute provides that custody automatically transfers at the moment the parent becomes incapable of caring for the child. Neither statute imposes a mandatory duty on any state actor to take custody of a child if that officer discovers that a parent is incapable of

caring for the child. And neither statute discusses the rights or duties of *peace officers* in interfering with a parent's custody of the child.

Moreover, Plaintiffs' suggestion that the Defendants had "custody" of the twins under a tedious reading of the cited authorities is misguided. Regardless whether any Defendant had "custody" in some sense of the word, the facts of this case simply do not resemble those in which courts have found a custodial relationship for the purposes of imposing § 1983 liability. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (holding that the government has an obligation to provide medical care to incarcerated persons); *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (holding that involuntarily committed individuals have a constitutional right to safe conditions); *Henry A.*, 678 F.3d at 1000–01 (holding that the special-relationship exception applies to children in foster care and requires the state to respond to suspected abuse in a foster home).

The case law demonstrates that "custody" for the purposes of the special-relationship exception is a restriction on the plaintiff's liberty that limits the ability of the plaintiff (or the plaintiff's parents) to meet the plaintiff's basic needs (e.g., incarceration, institutionalization, foster care). *See Patel*, 648 F.3d at 972–74 (holding that mandatory school attendance did not give rise to the special-relationship exception when the child was at school because the student lived at home with her mother, who was her primary caretaker, and "unlike incarceration or institutionalization, compulsory school attendance does not restrict a student's liberty such that neither the student nor the parents can attend to the

student's basic needs"). Here, Individual Defendants never formally took the twins into custody; the twins remained with Langdon at all times, and the twins were not institutionalized or placed in foster care. Although Jose was temporarily physically separated from the twins, Jose and Langdon retained long-term responsibility for the care of the twins, as well as long-term control over decisions regarding the twins. The special-relationship exception therefore does not apply in this case.

VI. STATE-CREATED DANGER EXCEPTION

The state-created danger exception has its origins in *DeShaney*, in which the United States Supreme Court held that social workers and local officials were not liable under § 1983 on a failure-to-act theory for injuries inflicted on a child by his father. 489 U.S. at 191, 109 S.Ct. 998. The state actors had received complaints that the child was abused by his father but failed to remove the child from his father's custody. *Id.* The court reasoned that "[w]hile the State may have been aware of the dangers that [the child] 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, 109 S.Ct. 998 (emphasis added). The court acknowledged that the state once took temporary custody of the child and then returned him to his father, but reasoned that the state "placed [the child] in no worse position than that in which he would have been had it not acted at all[.]" *Id.* Given that the state actors did not create or enhance any danger to the child, the state did not have a constitutional duty to protect him from the private violence inflicted by his father. *Id.*

This court "ha[s] interpreted *DeShaney* to mean that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983." *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997). The state-created danger exception has two requirements.[11] "First, the exception applies only where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger.' Second, the exception applies only where the state acts with 'deliberate indifference' to a 'known or obvious danger.'" *Patel*, 648 F.3d at 974 (internal citation omitted) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) and then quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)).

To satisfy the first requirement, a plaintiff "must show that the officers' affirmative actions created or exposed [him] to an actual, particularized danger that [he] would not otherwise have faced." *Martinez*, 943 F.3d at 1271. "In examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him." *Munger*, 227 F.3d at 1086.

[11] This court has on occasion analyzed the state-created danger exception under a three-prong test by dividing the first requirement into two components: (1) affirmative conduct creating or enhancing a danger to the plaintiff, and (2) foreseeability. *See, e.g.*, *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019).

"The critical distinction is not . . . an indeterminate line between danger creation and enhancement, but rather the stark one between state action and inaction in placing an individual at risk." *Penilla*, 115 F.3d at 710. Furthermore, the plaintiff's ultimate injury must have been foreseeable to the defendant. *Martinez*, 943 F.3d at 1273. "This does not mean that the exact injury must be foreseeable. Rather, 'the state actor is liable for creating the foreseeable danger of injury given the particular circumstances.'" *Id.* at 1273–74 (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064 n.5 (9th Cir. 2006)).

As to the second requirement, "Deliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" *Patel*, 648 F.3d at 974 (*Bryan Cnty v. Brown*, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)). This standard is higher than gross negligence and requires a culpable mental state. *Id.* at 974. When assessing non-detainee failure-to-protect claims, we apply a purely subjective deliberate indifference test. *Herrera v. L.A. Unified Sch. Dist.*, 18 F.4th 1156, 1161 (9th Cir. 2021). "For a defendant to act with deliberate indifference, he must 'recognize[ ] the unreasonable risk and actually intend[ ] to expose the plaintiff to such risks without regard to the consequences to the plaintiff.'" *Id.* at 1158 (quoting *Grubbs*, 92 F.3d at 899). In other words, the state actor must "know[ ] that something *is* going to happen but ignore[ ] the risk and expose[ ] [the plaintiff] to it." *Grubbs*, 92 F.3d at 900 (emphasis in original). "The deliberate-indifference inquiry should go to the jury if any rational factfinder could find this requisite mental state." *Patel*, 648 F.3d at 974.

The district court held that Plaintiffs failed to allege affirmative conduct on the part of any of the Individual Defendants because "[t]he decedents were in their mother's custody before the officers arrived on the scene, and they remained in her custody after the officers intervened." *Murguia*, 2021 WL 4503055 at *7. The district court erred in limiting the analysis to whether Langdon had custody of the twins. Unlike the special-relationship exception, the state-created danger exception does not require that the state actor have custody of the plaintiffs. Furthermore, in limiting the analysis to whether Langdon had custody of the twins, the district court ignored other factors that affected the risk of physical harm that Langdon posed to the twins, including the presence of third parties. Rather than ask whether Langdon had custody of the twins prior to and after the intervention of each Individual Defendant, the district court should have asked more broadly "whether the officers left the [twins] in a situation that was more dangerous than the one in which they found [them]." *Munger*, 227 F.3d at 1086. We address this issue as to each of the Individual Defendants in turn.

a. Lewis and Cerda

Plaintiffs' state-created danger claim against Lewis and Cerda fails because Plaintiffs have failed to allege facts from which one can plausibly conclude that Lewis and Cerda created or enhanced any danger to the twins. Plaintiffs argue that Lewis and Cerda enhanced the vulnerability of the twins by allowing Langdon to remove the twins from their home and preventing Jose from following Langdon and the twins to the Church. Plaintiffs assert, "Lewis and Cerda increased the twins' danger by ignoring

[Langdon's] request [for mental health help], separating [the twins] from a sane father presumed by law to be more fit than Langdon, and entrusting them to their violent, deranged mother." This argument ignores the fact that Lewis and Cerda did not entrust the twins to Langdon alone. Rather, Lewis and Cerda entrusted Langdon and the twins to Rosa, Langdon's friend and neighbor, who herself had experience supervising people with mental health disorders.[12]

This court and other circuits have applied the state-created danger exception in situations where an officer abandoned the plaintiff in a dangerous situation, separated the plaintiff from a third-party who may have offered assistance, or prevented other individuals from rendering assistance to the plaintiff. *See Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) (holding that the plaintiff raised a triable issue of fact as to whether an officer placed the plaintiff in danger by arresting the driver of the car plaintiff was riding in, impounding the car, and leaving her alone in a high-crime area at 2:30 a.m.); *Penilla*, 115 F.3d at 710 (holding that officers increased the risk of harm to a gravely-ill individual by cancelling a 911 call and locking him in his home where it would be impossible for anyone to provide him with emergency care); *Kneipp v. Tedder*, 95 F.3d 1199, 1208–09 (3d

---

[12] The FAC alleges, "Rosa works at a hospital and has supervised people on [California Welfare and Institutions Code] § 5150 holds. Rosa is familiar with the standards for involuntary holds." Section 5150 establishes the circumstances under which certain state actors can take a person into custody for assessment or treatment regarding a mental health disorder. The FAC does not provide Rosa's job title or explain her role in "supervising" individuals on § 5150 holds.

Cir. 1996) (holding that officers increased the risk of harm to a severely intoxicated woman who was struggling to walk home with the assistance of her husband when the officers detained the plaintiff, let her husband leave, then sent the plaintiff to walk home unescorted in near-freezing conditions that resulted in hypothermia and brain damage). Under this case law, if Lewis and Cerda had left the ten-month-old twins alone with Langdon in her dangerous and unstable condition, such conduct would almost certainly have constituted affirmative action enhancing a risk of physical harm to the twins.

However, it is unclear given the vague allegations in the complaint that Lewis's and Cerda's conduct enhanced the twins' vulnerability to physical harm. The FAC alleges that these defendants separated Jose from the twins, thereby preventing him from exercising his custodial role and leaving Langdon and the twins to be supervised by Rosa. But the FAC does not include any factual allegations from which we could conclude that Rosa was incapable of supplementing Langdon's care of the twins or was likely to separate from Langdon and the twins after leaving the Murguia home. Given that Lewis and Cerda merely replaced one competent adult—Jose—with another competent adult—Rosa, we are not convinced that "the officers left the [twins] in a situation that was more dangerous than the one in which they found [them]." *Munger*, 227 F.3d at 1086.

However, Plaintiffs should have the opportunity to amend their complaint because we cannot say amendment would be futile given their vague allegations and because the district court applied the incorrect "custody" standard. The court reviews for abuse of discretion the district court's decision to

dismiss without leave to amend. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). "[T]he first step of [the] abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion." *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009). As discussed above, the district court used the wrong standard in applying the state-created danger exception by asking whether the twins were in Langdon's custody before and after Lewis and Cerda intervened rather than asking whether the twins were rendered more vulnerable by Lewis's and Cerda's actions. Accordingly, we vacate the district court's dismissal order with an instruction to allow Plaintiffs to amend their complaint.

b. Garcia

Plaintiffs have adequately stated their § 1983 claims against TPD Sergeant Garcia under the state-created danger exception. Plaintiffs argue that Garcia increased the risk of physical harm to the twins by arranging a room for them at a motel, transporting Langdon and the twins from Lighthouse to the motel, and leaving them there. We agree. When Garcia left Langdon and the twins at the motel, he removed them from the supervision of the Lighthouse staff and rendered the twins more vulnerable to physical injury by Langdon as a result of their isolation with her. *See Penilla*, 115 F.3d at 710.[13]

---

[13] Plaintiffs also argue that Garcia is liable under § 1983 for misrepresenting the situation at Lighthouse to Torres by telling her that: (1) Langdon had everything she needed to care

We further conclude that Plaintiffs have pleaded facts plausibly demonstrating that Garcia acted with deliberate indifference to the risk that Langdon would physically harm the twins. We admit that this is a close case. There are no allegations that Garcia was aware of Langdon's history of child cruelty, violence, or previous mental health difficulties. To the contrary, Torres affirmatively told Garcia that Langdon did *not* have any history of child abuse. Furthermore, Plaintiffs alleged that the City of Visalia officer who drove Langdon and the twins to Lighthouse did not provide Lighthouse with information about Langdon's prior requests for mental health help, Langdon's earlier bizarre behavior, or Rosa's concerns about the twins' safety. Thus, the complaint does not allege that Garcia knew about Langdon's worrisome behavior prior to her arrival at Lighthouse or that a friend of the family (Rosa) felt the twins were unsafe with Langdon.

But Plaintiffs allege that Garcia knew about the events that occurred at Lighthouse—those events he learned of from his colleagues as well as those he witnessed himself. Prior to Garcia's arrival at Lighthouse, Langdon was refused shelter at Lighthouse because she was acting "crazy," and the Lighthouse staff twice called the police for help in dealing with Langdon. Langdon told the Lighthouse staff that she had been raped the night before and

---

for the twins, and (2) Langdon had been evaluated and did not meet the criteria for involuntary commitment. Because we hold that Plaintiffs adequately alleged their § 1983 claims against Garcia under the state-created danger exception based on his action of transporting Langdon and the twins to the motel, we do not address whether Garcia's proffering of false statements also satisfies the state-created danger exception.

needed to go to the hospital for an emergency abortion. Langdon was argumentative, loud, and belligerent. For example, she yelled at an officer and told him he needed to read the Bible and shouted at him that he was not in charge of the situation and that God was. Langdon told the officers that her "Father" was going to take care of her and her children. When officers told Langdon that she could not exit Lighthouse to "go outside to pray," Langdon collapsed on the floor and yelled that she was having contractions. She repeated "Yeshua, Yeshua, Yeshua!" and tried to scoot towards the door while sitting down, claiming that something was "sucking her out" of the door. According to the FAC, making all reasonable inferences in favor of Plaintiffs, Garcia learned about the above events when a TPD officer updated Garcia on the call.

After Garcia arrived at Lighthouse, Langdon again collapsed on the floor and stated that she was going into labor. She got up only a few minutes later and began looking through her makeup bag, then asked another female at Lighthouse if she wanted a manicure. Langdon was unprepared to care for the twins, as she did not have a diaper bag, diapers, changes of clothing, or baby bottles; the FAC describes the twins as "functionally unattended." When Garcia attempted to communicate with Langdon, she refused or was unable to provide much information.

Based on these allegations, Garcia was aware that Langdon was undergoing a mental health crisis but was not aware that Langdon had a history of violent behavior. Given the extreme vulnerability of the ten-month-old twins, the complaint adequately alleges Garcia was aware that Langdon posed an obvious risk

of physical harm to the twins based on her worrisome behavior. If the twins had been teenagers at the time, our conclusion might differ. But the twins were ten months old and entirely dependent on the care of others for survival. At such a young age, the failure to provide care can be fatal, yet Garcia left the twins alone with Langdon in a motel room overnight. Whether the twins perished because they were left unattended in the bath tub, or because their mother drowned them as a tragic result of her mental health crisis, or because they succumbed to a different danger associated with their mother's failure to provide adequate care, the legal analysis does not change: Garcia can be charged with deliberate indifference for ignoring the obvious risk of leaving the babies unattended with Landon. The allegations that Langdon was incapable of caring for the twins to such an extent that they were left "functionally unattended" are sufficient to establish that Garcia was deliberately indifferent. We conclude that the complaint adequately alleges Garcia knew Langdon's mental health crisis posed a serious risk of physical harm to the twins but nonetheless disregarded this risk and left the twins in a situation that was more dangerous than how he found them.[14]

---

[14] The dissent insists that we expand the state-created danger exception to apply in cases of mere negligence. We strongly disagree. At the 12(b) stage, we accept as true the allegations in the complaint. The complaint alleges deliberate indifference. Garcia was not merely a taxi driver giving Langdon a lift as the dissent suggests. Garcia was aware that Langdon was undergoing a mental health crisis, yet arranged for Langdon to stay at a motel and left the babies alone with her there. In doing so, Garcia exercised his authority to force the twins into an obviously dangerous situation. This is not a case where it can

c. Torres

We similarly conclude that Plaintiffs adequately alleged a state-created danger claim against CWS Social Worker Torres. Plaintiffs alleged that Torres lied to Garcia about Langdon's circumstances and history of abuse. The FAC states, "CWS [Social Worker Torres] falsely stated that Langdon was homeless. CWS falsely stated that Langdon had no history of child abuse, even though CWS [k]new of three criminal convictions for child cruelty and prior cases including one open case against Langdon." Although Plaintiffs could have been more precise in their wording, we take these allegations to mean that Torres herself possessed the knowledge that Langdon had a history of child abuse, including abuse against her own son, and that CWS had an open case against Langdon.[15]

When Torres provided Garcia with false information, she rendered the twins more vulnerable

---

be said the state "played no part" in creating the danger the twins faced. *See DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. Rather, Garcia placed the twins in harm's way by leaving them alone with Langdon.

[15] The FAC does not directly define "CWS" as equating to Torres herself. Instead, it defines "CWS" as County of Tulare's Child Welfare Services. It describes "CWS workers" as including Torres and an unnamed employee of CWS. However, the FAC repeatedly uses "CWS" when it appears to refer to Torres as an individual. For example, the FAC states "CWS told [Garcia] it could take custody of the twins but only if the mother was taken into custody," and later clarifies that "Ms. Torres told Sgt. Garcia CWS would not take the babies unless [the police] arrested the mother or put her on a psychiatric hold." The FAC also later clarifies that Torres told TPD officers that Langdon was homeless and that Torres "concealed Langdon's history of child cruelty convictions."

to physical injury by Langdon by eliminating the most obvious solution to ensuring the twins' safety: returning them to Jose's custody. Absent Torres's affirmative misrepresentation, Garcia may have conducted an independent investigation into Langdon's criminal history and living situation prior to settling on the decision to take the family to the motel.

Martinez v. City of Clovis is illustrative of how revealing certain information can enhance the risks facing a plaintiff. 943 F.3d 1260 (9th Cir. 2019). In *Martinez*, we held that a police officer committed a constitutional violation by telling the plaintiff's abuser about the plaintiff's allegations of abuse against him and telling him that plaintiff was not "the right girl" for him, after which the abuser further physically abused the plaintiff. *Id.* at 1272. In finding that the officer affirmatively exposed the plaintiff to an actual, particularized danger, the court reasoned that "[a] reasonable jury could find that [the officer's] disclosure provoked [the abuser], and that her disparaging comments emboldened [the abuser] to believe that he could further abuse [the plaintiff], including by retaliating against her for her testimony, with impunity." *Id.* The court further found that the injury to plaintiff—further abuse—was objectively foreseeable as a matter of common sense. *Id.* at 1273–74.

The facts alleged here parallel those in *Martinez*, where the officer provided the abuser with information that may have changed his course of action. Torres potentially changed Garcia's course of action in responding to the situation at Lighthouse when she falsely represented that Langdon was homeless and did not have a criminal record of prior

child cruelty. It was foreseeable "as a matter of common sense" that Langdon—who Torres allegedly knew had a history of abusing her own children and who was exhibiting signs of rage and behaving erratically at Lighthouse—might harm the twins if left alone with them. *See id.* at 1274. It was similarly foreseeable that the misinformation Torres provided would impact Garcia's decision about whether to separate Langdon from the twins.

Moreover, Plaintiffs have alleged that Torres acted with deliberate indifference. The complaint alleges that Torres was aware of three criminal convictions and prior CWS cases against Langdon, including two convictions for child cruelty, a case against Langdon for abuse of her own son, and a case that remained open. When Torres affirmatively told Garcia that Langdon had no criminal background history, Torres implied that she personally knew Langdon's history or that she had conducted a background check on Langdon (a representation consistent with the allegation that Torres knew about Langdon's history of child cruelty). According to the FAC, a background check of Langdon would reveal "Langdon's history of mental illness, cruelty to children and CWS history." In addition, Torres knew that Garcia was considering arresting Langdon for disturbing the peace. We can further infer from the complaint's allegations that Torres knew that the situation at Lighthouse involved a mental health crisis given that Garcia discussed the possibility of involuntary commitment.

Given the allegations that Torres knew about Langdon's history of abuse—including abuse of her own son—we conclude that the complaint alleges Torres was aware of the obvious risk of harm Langdon

presented to the twins. *Kennedy v. City of Ridgefield* is demonstrative of how past violent acts can put an officer on notice of a risk to plaintiffs. 439 F.3d 1055 (9th Cir. 2006). In *Kennedy*, the plaintiff reported to the defendant police officer that the plaintiff's 13-year-old neighbor molested the plaintiff's daughter. *Id.* at 1057. The plaintiff warned the officer that the neighbor was violent and repeatedly asked the officer not to inform the neighbor of her allegations without first notifying the plaintiff so she could protect her family. *Id.* at 1055. The police officer knew the neighbor had a history of violent behavior. For example, the plaintiff told the officer that the neighbor had been involved in fights at school, had lit a cat on fire, had broken into his girlfriend's house and attacked her with a baseball bat, and had thrown rocks at a downtown building. *Id.* at 1057–58. The officer later learned that the neighbor had also been investigated for sending death threats to a classmate, though the investigation concluded he was not responsible. *Id.* at 1058. Despite this knowledge, the officer ignored the plaintiff's request to warn her prior to informing the neighbor of the allegations. *Id.* The officer drove to the neighbor's house and informed the neighbor's mother of the allegations without first warning the plaintiff. *Id.* The officer then drove to the plaintiff's house and informed her that he had told the neighbor's mother of the allegations. *Id.* Approximately 15 minutes passed between the officer's conversation with the neighbor's mother and his conversation with the plaintiff. *Id.* The plaintiff and her family decided to spend the night in their home and planned to leave town the next day. *Id.* But early the next morning, the neighbor broke into the

plaintiff's house and shot the plaintiff and her husband, killing the husband. *Id.*

This court affirmed denial of summary judgment for the officer. In finding that the officer acted with deliberate indifference, the court considered the fact that the officer knew about the neighbor's violent tendencies, including several specific incidents of "alarming, aggravated violence." *Id.* at 1064. The court also noted that the plaintiff had left several messages with the police department expressing fear for her family's safety and requesting notice before the department notified the neighbor of the allegations. *Id.* The court therefore concluded that the officer "knew that telling [the neighbor] about the allegations against him without forewarning the [plaintiff's family] would place them in a danger they otherwise would not have faced." *Id.*

Making all reasonable inferences in favor of Plaintiffs, the FAC alleges that Torres knew about Langdon's history of violence and mental illness, including multiple specific instances of physical violence against her own family members, including her son. A reasonable jury could find that Torres was aware of the risk that Langdon would physically harm the twins and nevertheless lied to Garcia about Langdon's background, and in doing so ignored the consequences of her actions. Our conclusion is bolstered by the young age and utter defenselessness of the ten-month-old twins.[16]

---

[16] The dissent argues that Torres cannot be held liable because she did not intend to cause harm to the twins or know that her actions would lead to violence against the twins, but our case law does not require *intent to cause harm* or knowledge of *certain* harm. The deliberate indifference standard is satisfied

VII. DEFENDANTS' AFFIRMATIVE ACTIONS

We next address Plaintiffs' arguments that Defendants' wrongful affirmative acts deprived Plaintiffs of their constitutional rights. Plaintiffs identify four wrongful acts by the Individual Defendants that Plaintiffs contend give rise to § 1983 liability as "affirmative acts" rather than omissions. Specifically, Plaintiffs allege: (1) Lewis and Cerda deprived Plaintiffs of their rights to familial association by temporarily separating Jose and the twins; (2) Lewis and Cerda deprived Jose of his Fourth Amendment right to be free from unreasonable seizure by preventing him from following the twins; (3) Garcia committed a wrongful affirmative act by misrepresenting the situation at Lighthouse to Torres; and (4) Torres committed a wrongful affirmative act by lying about Langdon's living situation and criminal background to Garcia.

---

when a state actor "recognizes the unreasonable risk and actually intends to expose the plaintiff to such risks *without regard* to the consequences to the plaintiff." *L.W. v. Grubbs*, 92 F.3d 894, 899 (9th Cir. 1996) (emphasis added) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 573 n.8 (10th Cir. 1995)). In other words, the state actor must take an intentional action with knowledge that his actions will expose the plaintiff to an unreasonable risk. But the state actor need not know with certainty that the risk will materialize or intend for the plaintiff to face the risk. For example, in *Kennedy v. City of Ridgefield*, there was no finding that the officer intended to expose the plaintiff to danger or knew with certainty that his actions would result in violence to the plaintiff's family. 439 F.3d 1055, 1064–65 (9th Cir. 2006). Nevertheless, the officer was deliberately indifferent because he intentionally told the plaintiff's neighbor about the allegations of abuse even though he knew that doing so would place the plaintiff's family "in a danger they otherwise would not have faced." *Id.* 1064.

a. Familial association

Plaintiffs' first allegation is that Lewis and Cerda violated Plaintiffs' constitutional rights to familial association when they separated Jose and the twins. The FAC includes the following relevant allegations: "Deputy Lewis with the approval of Sgt. Cerda affirmatively ordered Jose to step outside, away from the twins and denied him custody of the twins." "[W]hen Langdon said she did not want Jose in his own home, Lewis ordered Jose to stay out and away from the twins." When Jose asked the deputies to stop Langdon from taking the twins, "[the] deputies told Rosa and Jose that the deputies were going to let Langdon take the babies. One [County] deputy ordered Jose to "just let her go." The deputies then "stayed parked outside of [Jose's] house for 30 minutes, watching Jose and affirmatively showing their authority and restricting Jose's movement, causing Jose [to] fear that if he followed the twins, the [County] deputies would arrest him." The FAC does not allege that the Deputies expressly threatened to arrest Jose if he followed the twins. The FAC also does not include any allegations suggesting that separating Jose and the twins was necessary to prevent imminent danger to the twins, nor do Defendants make this argument in their answering brief.

The constitutional right to familial association derives from the First and Fourteenth Amendments. *Keates v. Koile*, 883 F.3d 1228, 1236 (2018). The standard for analyzing a § 1983 claim for interference with the right to familial association depends on the context in which the case arises. *See Brittain v. Hansen*, 451 F.3d 982, 989–90 (9th Cir. 2006) (distinguishing cases where the state terminated

parental rights due to allegations of child abuse from cases where a state actor intervened in a child custody dispute). When the case involves the seizure of children from their parents based on suspicions of danger to the child, "[o]fficials may not remove children from their parents without a court order unless they have 'information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury.'" *Keates*, 883 F.3d at 1236 (quoting *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007)). When the case involves the intervention of a state officer in an ongoing custody dispute, the parent "must show both a deprivation of [his] liberty and conscience shocking behavior by the government." *Brittain*, 451 F.3d at 991.

In *Brittain v. Hansen*, this court found that an officer's interference with a non-custodial parent's visitation rights did not amount to a constitutional violation. *Id.* at 996. The father had sole legal custody of the child, and the mother had visitation rights governed by a visitation schedule. *Id.* at 985. The father attempted to take the child on vacation at a time when the mother believed she was entitled to a week of visitation. *Id.* at 986. The father arrived at the mother's house with a police officer. *Id.* The officer believed the father was entitled under the visitation schedule to take the child that week and threatened to arrest the mother if she did not comply. *Id.* at 986–87. The mother allowed the child to leave with the father, but later brought a § 1983 action against the officer for violating her right to familial association.

As the case involved the state's intervention in a custody dispute *between two parents* rather than the

government's *seizure* of the children *from* the parents, the court reasoned that the mother needed to show that the officer deprived her of her liberty in a way that shocked the conscience. *Id.* at 991. Although the mother had a liberty interest in the companionship, care, custody, and management of her child, the court reasoned that "a relatively minor infringement on this liberty interest in visitation will not give rise to a Section 1983 substantive due process claim." *Id.* at 992. Thus, "a single *instance* of visitation, of a single week in duration, [was not] a 'fundamental' right." *Id.* at 994, 996.

There are obvious differences between *Brittain* and the present case: Jose had presumptive joint *custody* of the twins,[17] not mere *visitation* rights,[18] and there was no formal custody or visitation agreement in dispute. Further, Jose and Langdon lived together with the twins, and Langdon was experiencing a mental health crisis. But there are several key similarities between this case and *Brittain*. In both cases, a state officer transferred a child from the care of one (or both) parents to the other parent. Both the mother in *Brittain* and Jose believed they had an entitlement to their children at the relevant time. Both cases involved the same aspect of the right to familial association (namely, the right to *physically be with* the child at a particular time).[19] In both cases, the state officers restricted this

---

[17] Cal. Fam. Code § 3010.

[18] As we repeatedly recognized in *Brittain*, "visitation is a lesser interest than legal custody." *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006).

[19] Although Jose had custody rights of the twins rather than mere visitation rights, he does not allege that any

right by threatening arrest or intimidating the parent into thinking he would be arrested if he did not comply. Given the strong similarities between the present case and *Brittain*, we follow *Brittain* and conclude that the physical separation of Jose and the twins while Langdon took the twins to Church with Rosa was a "relatively minor infringement on [Jose's] liberty interest" and therefore not sufficient to form a basis for a § 1983 claim.

b. Seizure

Plaintiffs' second allegation arising from "affirmative act[s]" is that Lewis and Cerda seized Jose without cause when they sat outside Jose's home for 30 minutes, preventing Jose from following Langdon and the twins. "A person is seized . . . and thus entitled to challenge the government's action . . . when the officer, by means of physical force or show of authority, terminates or restrains [the person's] freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (internal citations and quotation marks omitted). "When the actions of the police do not show an unambiguous intent to restrain . . . a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* at 255, 127 S.Ct. 2400 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). The FAC states that the Deputies "restrained [Jose's] liberty by ordering Jose to get away from his children and

---

privileges specific to the custodial relationship were violated (e.g., the ability to participate in decisions about the children's care).

repeatedly ordering Jose to stay away and not follow his children when they left. The Deputies reinforced these words with a show of authority by staying 30 minutes [outside Jose's home] to intimidate him from following the children."

Plaintiffs have not adequately pleaded a § 1983 claim for the unreasonable seizure of Jose. Jose alleged that the Deputies' show of authority prevented him from *following the twins*. He did not allege that the Deputies prevented him from leaving his house for other purposes—he could have driven off in another direction. Jose's gripe is not that he was *seized*, but that he was separated from his children.

Plaintiffs' third allegation, that Garcia committed a wrongful act by misrepresenting the situation at Lighthouse to Torres, and fourth allegation, that Torres committed a wrongful act by lying to Garcia about Langdon's living situation and criminal background, simply recast as "affirmative act[s]" claims addressed under the state-created danger exception and do not require separate analysis.

VIII. *MONELL* LIABILITY

Having found that Plaintiffs failed to allege that any state actor deprived them of their constitutional rights, the district court dismissed Plaintiffs' *Monell* claims against the County of Tulare and the City of Tulare. Because we reverse the district court's dismissal of some of Plaintiffs' § 1983 claims against County of Tulare Social Worker Torres and City of Tulare Sergeant Garcia, we reverse the district court's dismissal of Plaintiffs' *Monell* claims and remand for further proceedings.

IX. SUPPLEMENTAL JURISDICTION

The district court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims after having dismissed all of Plaintiffs' federal claims. Because we reverse the district court's dismissal of some of Plaintiffs' federal law claims, we reverse the district court's dismissal of Plaintiffs' state law claims and remand for further proceedings.

X. CONCLUSION

For the reasons discussed above, we reverse the district court's dismissal of Plaintiffs' § 1983 claims against Garcia and Torres under the state-created danger doctrine. We vacate the district court's dismissal order as to Plaintiffs' § 1983 claims against Lewis and Cerda and remand with instructions to grant Plaintiffs leave to amend. On remand, the district court will have an opportunity to apply the correct standard. Lastly, we reverse and remand for further proceedings Plaintiffs' *Monell* claims against the County of Tulare and the City of Tulare, as well as all state law claims.

REVERSED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

IKUTA, Circuit Judge, dissenting in part:

Tragic consequences may flow from negligence, mistakes of judgment, and the failure to provide safety and security to those who need it, as the case before us sadly shows. But victims of such lapses must pursue redress through tort law, because these mistakes do not rise to the level of egregious abuse of government power that violates citizens' constitutional rights. Here, the majority loses sight of the fundamental principles of substantive due process and instead turns the Fourteenth

Amendment into a "font of tort law," *County of Sacramento v. Lewis*, 523 U.S. 833, 842–43, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), contrary to Supreme Court direction. Therefore, I respectfully dissent.

I

A

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

The Supreme Court has recognized a substantive component of the Due Process Clause. According to the Court, the clause places "a limitation on the State's power to act" that "was intended to prevent government from abusing its power, or employing it as an instrument of oppression." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (cleaned up) (citation and quotation marks omitted). The Court's conclusion is based on "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (citations and quotation marks omitted). The Supreme Court has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'" *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708 (citing *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)).

"[O]nly the most egregious official conduct" qualifies as "abusive executive action" that violates

the substantive component of the Due Process Clause. *Id.* at 846, 118 S.Ct. 1708. Official conduct meets this high standard only when the "executive abuse of power" is so outrageous that it "shocks the conscience," *id.*, such as when a state official engages in "conduct *intended* to injure in some way unjustifiable by any government interest," *id.* at 849, 118 S.Ct. 1708 (emphasis added). If there is no "affirmative abuse of power" by the state, then there is no violation of substantive due process. *Daniels*, 474 U.S. at 330, 106 S.Ct. 662.

The Supreme Court has been "reluctant to expand the concept of substantive due process" beyond these narrow bounds. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Given the limited scope of the doctrine, the Supreme Court has identified a state abuse of power only in situations, "when the State takes a person into its custody and holds him there against his will." *DeShaney*, 489 U.S. at 199–200, 109 S.Ct. 998. In such custodial situations, the state's egregious abuse of authority, such as forcibly pumping the stomach of a detainee, *Rochin v. California*, 342 U.S. 165, 166, 172–73, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or purposely using objectively unreasonable force against a detainee, *Kingsley v. Hendrickson*, 576 U.S. 389, 395–96, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015), violates a detainee's substantive due process rights. And when the state holds a person against his will, "the Constitution imposes upon [the state] a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199–200, 109 S.Ct. 998. Therefore, the state abuses its authority when it fails to discharge the

state's minimal responsibility for the safety and well being of detainees.

But when the state has not taken on custodial responsibilities, the state is generally "under no constitutional duty to provide substantive services." *Youngberg v. Romeo*, 457 U.S. 307, 317, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). The Due Process Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *DeShaney*, 489 U.S. at 196, 109 S.Ct. 998. Nor does the clause constitute "a guarantee of certain minimal levels of safety and security." *Id.* at 195, 109 S.Ct. 998. Because "[t]he Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196–97, 109 S.Ct. 998.

Whether a person is injured in a custodial situation or not, the Court has been clear that mere negligence or mistakes on the part of the state actor does not give rise to a constitutional claim. *See Daniels*, 474 U.S. at 333, 106 S.Ct. 662. "[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Lewis*, 523 U.S. at 848, 118 S.Ct. 1708. For example, in *Daniels*, the Court rejected an inmate's claim that his due process rights were violated when he slipped on a pillow negligently left on a stairway by a county official. 474 U.S. at 332, 106 S.Ct. 662. "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person." *Id.* For the same

reason, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 333, 106 S.Ct. 662 (citing *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). Indeed, even the state's negligent failure to protect a prisoner from attack by another inmate does not "abus[e] governmental power." *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). A fortiori, outside of custody, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197, 109 S.Ct. 998. Thus, even in a case where state social workers returned an abused child to the custody of his abusive father, and the child subsequently was the victim of further abuse resulting in severe brain damage, the state could not be held liable for a due process violation. *Id.* at 201–02, 109 S.Ct. 998.

B

Although the Supreme Court has recognized a substantive due process violation only when the state abuses its power in custodial situations, we have expanded this doctrine to apply when the state abuses its power by acting with deliberate indifference to expose a person to a foreseeable danger that the person would not have faced absent the state's intervention. *See Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012). We based this so-called "state-created danger doctrine" on statements in *DeShaney* that although "the State may have been aware of dangers [the child] faced in the free world, it played no part" in the creation of those dangers nor in rendering the child more vulnerable to them, notwithstanding the state's act of returning the abused child to his abusive father. 489 U.S. at 201,

109 S.Ct. 998. From these statements, we inferred that a state *would* have liability under the Due Process Clause had the state played a part in creating such a danger or rendering an individual more vulnerable. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

Although our substantive due process jurisprudence has elaborated and expanded Supreme Court doctrine to a significant degree, until today we were careful to remain within the Supreme Court's framework. Thus, our cases have generally reflected the Court's principles that the state-created danger doctrine applies only when an injury is caused by a state's abuse of its executive power undertaken with the intent to injure someone in a "way unjustifiable by any government interest," *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708, not when the injury is the result of mere negligence.

The majority of our cases applying the doctrine involved state officials who abused the power entrusted to them as officers of the state by intentionally putting a person in harm's way. In *Munger*, we held that police responding to a 911 call from a bartender regarding a disturbance created by Munger were liable for taking "Munger physically by the arm and walk[ing] him out" of the bar and instructing him not to drive his truck home or reenter the bar, even though "Munger was very obviously drunk" and wore only a t-shirt and jeans in 11 degree weather. *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084 (9th Cir. 2000). We explained that the officers, responding to a request for government assistance and acting as agents of the state, "affirmatively place[d] Munger in a position of danger," knowing "the danger that he was in." *Id.* at

1087. *See also Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (per curiam) (holding that officers responding to a 911 call were liable for a substantive due process violation because their affirmative acts, including cancelling a request for paramedics and moving a gravely ill man inside the house and locking the door, made "it impossible for anyone to provide emergency medical care to Penilla").

We have likewise applied our doctrine when the harm is caused by a third party, but only when state officials exercised their authority to force an individual into a dangerous situation where injury by the third party was foreseeable. For example, in *Wood v. Ostrander*, a police officer abused his official powers by arresting a driver and impounding the driver's car, which stranded the female passenger in a high-crime area at 2:30 a.m. 879 F.2d 583, 590 (9th Cir. 1989). Noting "the [F]ourteenth [A]mendment's purpose of redressing abuses of power by state officials," we explained that in leaving the woman "by the side of the road at night in a high-crime area," the officer "show[ed] an assertion of government power" and "disregard for [the woman's] safety." *Id.* at 588. Similarly, in *Hernandez v. City of San Jose*, police officers forced attendees of a political rally to exit by walking through a crowd of violent protestors, knowing that the "protesters posed an immediate threat to the Attendees." 897 F.3d 1125, 1133, 1136 (9th Cir. 2018). Without the officers' abuse of authority, the attendees would have taken a different route. *Id.* at 1129; *see also Bracken v. Okura*, 869 F.3d 771, 778–80 (9th Cir. 2017) (holding that police officers could be held liable for preventing the plaintiff from leaving a party and placing him under the

control of security guards who assaulted him). We have applied the same reasoning when state officials exercised their authority to intentionally assign a nurse to work alone in a medium security custodial facility's clinic with an inmate, whom they knew "was a violent sex offender who had failed all treatment and was likely to assault a woman if alone with her." *L.W.*, 974 F.2d at 123. Similarly, we have held that state officials abused their authority and violated children's due process rights by "removing [children] from their homes and placing them in the care of foster parents" with known histories of abuse and neglect. *See Henry A.*, 678 F.3d at 1002; *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 843–46 (9th Cir. 2010).

At the furthest reach of this doctrine, we have extended liability to state officials who abused their state authority by intentionally acting in a way they knew would provoke a third party to injure the plaintiff. For example, in *Kennedy v. City of Ridgefield*, a police officer deliberately informed a person known to be violent that his neighbor had reported him to the police for child molestation, without giving that neighbor any advance warning (despite his promise to do so). 439 F.3d 1055, 1057–58, 1063–64 (9th Cir. 2006). And in *Martinez v. City of Clovis*, police officers abused their authority by first informing a suspect (who was also a police officer) that his girlfriend had made a police report accusing him of domestic violence, and then (after making disparaging remarks about the girlfriend) telling the suspect that he would not be arrested for domestic violence, even though the police had probable cause to do so. 943 F.3d 1260, 1273 (9th Cir. 2019). We held that this interchange emboldened the suspect to

further abuse the girlfriend. *Id.* Although it is questionable whether the state officials' conduct in these cases rises to the level of an egregious abuse of power that the Supreme Court has held necessary for a substantive due process violation, at least these cases stop short of holding that officers could be liable for due process violations based on mere negligence or mistakes.

II

Today the majority jettisons even these meager limits on our state-created danger doctrine. Contrary to Supreme Court precedent (and our own), the majority finds a substantive due process violation despite the absence of any abuse of power entrusted to the state. Instead, the majority holds that plaintiffs can state a claim for a violation of their due process rights based solely on negligence and mistake, exactly what the Supreme Court has told us not to do. *See Daniels*, 474 U.S. at 333, 106 S.Ct. 662.

Starting with Deputy Lewis and Sergeant Cerda, the complaint alleges that in response to a 911 call from Murguia, Deputy Lewis and Sergeant Cerda arrived at the Murguia home and ordered Murguia to step outside the home while they spoke to Langdon. After Murguia asked his neighbor Rosa to help, Lewis and Cerda told Murguia to allow the neighbor, Rosa, to drive Langdon and the twins to a local church. The majority agrees that these allegations are not enough to state a claim for a due process violation against Lewis and Cerda, but asserts that plaintiffs could state a claim simply by alleging facts from which it could be inferred that "the twins were rendered more vulnerable by Lewis's and Cerda's actions." Maj. Op. at 1113.

But under the Supreme Court's framework, such allegations are largely irrelevant, because the officers' actions did not constitute an abuse of authority. Neither Lewis nor Cerda exercised their authority to order the twins into a position of danger. Separating the parties to a domestic disturbance is standard procedure. *See Martinez*, 943 F.3d at 1268. And the allegations show only that the officers failed to stop a parent, her children, and her friend from leaving while warning the other parent to let them go, all without incident. No case has suggested that this conduct is such an egregious abuse of authority as to "shock the conscience," amounting to a constitutional violation. *Collins*, 503 U.S. at 126, 112 S.Ct. 1061. While Lewis and Cerda may have been negligent in failing to recognize that Langdon was experiencing a mental health crisis and that the twins would be safer at home with Murguia, the Supreme Court has been clear that the negligent "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197, 109 S.Ct. 998. Even our state-created danger cases do not hold that mere negligence is enough to give rise to a due process violation. *See, e.g.*, *Wood*, 879 F.2d at 588 (stating that the officials acted with a degree of culpability higher than negligence); *L.W.*, 974 F.2d at 122 (same); *Hernandez*, 897 F.3d at 1135 (stating that substantive due process claims "require[ ] a culpable mental state . . . higher than gross negligence" (citation and quotation marks omitted)); *Kennedy*, 439 F.3d at 1064 (same); *Martinez*, 943 F.3d at 1274 (same).

At least Lewis and Cerda exercised some state authority—even if they did not exercise it in an

abusive way intending to cause harm. The other defendants in this case did not exercise such authority at all. Officer Garcia was called to the Lighthouse shelter after Langdon created a disturbance, and the shelter refused to allow Langdon and the twins to stay there. Based on the complaint, Garcia's conduct was limited to driving Langdon and the twins from the Lighthouse shelter to a motel and arranging for them to stay there overnight. Contrary to the majority's assertion that Garcia "exercised his authority to force the twins into an obviously dangerous situation," Maj. Op. 1115 n.14, the complaint does not allege that he ordered or compelled Langdon and the twins into the car or directed them to stay at the motel. Thus, although Garcia was cloaked with the state authority of a police officer, he acted solely as a chauffeur and a Good Samaritan—not as an instrument of the state—in giving Langdon and the twins a ride and asking the motel to let them stay overnight for free. The majority asserts that Garcia violated the plaintiffs' substantive due process rights because he should have known that Langdon was incapable of caring for the twins given that she was suffering a mental health crisis, and therefore his transportation of Langdon and the twins to the motel rendered the twins more vulnerable to injury by Langdon. Maj. Op. 1114–15. But negligently leaving an incapacitated mother and her children in a motel gives rise only to a tort claim; it is not an abuse of the state's power. The fact that Garcia was a police officer, as opposed to a taxi driver or a Good Samaritan giving Langdon a lift, does not transform his bad decision into a constitutional violation. *See Lewis*, 523 U.S. at 848, 118 S.Ct. 1708; *Daniels*, 474 U.S. at 332–33, 106 S.Ct. 662. Even our state-created danger cases involving third party

violence do not go that far; rather, they identify a substantive due process violation only when an officer's exercise of authority forced a victim into contact with the attacker in the first instance, *see Wood*, 879 F.2d at 588, 590; *Hernandez*, 897 F.3d at 1129; *Bracken*, 869 F.3d at 778–80; *L.W.*, 974 F.2d at 123; *Henry A.*, 678 F.3d at 1002; *Tamas*, 630 F.3d at 843–46, or provoked a dangerous person to attack the victim, *see Kennedy*, 439 F.3d at 1057–58, 1063–64; *Martinez*, 943 F.3d at 1273.

Nor did Torres, a social worker, abusively exercise state authority in a manner that shocks the conscience. Torres became involved when Garcia called her for information about Langdon. The complaint alleges that the County of Tulare's Child Welfare Services (CWS) "falsely stated that Langdon was homeless" and "falsely stated that Langdon had no history of child abuse." It also alleges that Torres failed to inform Garcia "that Jose was an available parent who could take custody of the twins." But there is no allegation that Torres (or CWS) made these false statements or failed to provide relevant information in order to cause harm to the children, nor is that a reasonable inference. Therefore, even if Torres's conduct could be the basis for a tort action based on intentional or negligent misrepresentation, Torres did not engage in the sort of abuse of executive power intended to cause harm that could give rise to a substantive due process claim. *See Lewis*, 523 U.S. at 849, 118 S.Ct. 1708 (stating that an official's conduct shocks the conscience when the official "intended to injure" the plaintiff). Even *Martinez* and *Kennedy* do not go that far. In both those cases, the police officer intentionally gave information obtained from a confidential police report to the accused

perpetrator, knowing that it would lead to violence against the victim.

The majority's explanation of how Torres could be held liable is not plausible. According to the majority, "[a]bsent Torres's affirmative misrepresentation, Garcia may have conducted an independent investigation into Langdon's criminal history and living situation prior to settling on the decision to take the family to the motel." Maj. Op. at 1115. But because of the misrepresentation, the majority asserts, "Torres potentially changed Garcia's course of action in responding to the situation at Lighthouse," Maj. Op. at 1116, "eliminating the most obvious solution to ensuring the twins' safety: returning them to [Murguia's] custody," Maj. Op. at 1115. It is doubtful that a plaintiff could prevail even on a claim of *negligence* based on this speculative chain of causation. *See State Dep't of State Hosps. v. Super. Ct.*, 61 Cal. 4th 339, 356, 188 Cal.Rptr.3d 309, 349 P.3d 1013 (2015) (holding that "[p]laintiff's showing of 'but for' causation is weak" where the plaintiff alleges a chain of intervening discretionary acts because the results of those acts is "speculative and conjectural"). Even if Torres's conduct was negligent and reprehensible, an allegation that she exercised her state authority to intentionally injure plaintiffs is implausible.

III

In short, the majority makes three mistakes that conflict with the Supreme Court's doctrine and, in doing so, finally tears our state-created danger doctrine clear of its moorings.

First, the majority opinion finds a substantive due process violation in the absence of any abusive

exercise of state authority. This is directly contrary to the Supreme Court's rulings that the substantive due process doctrine "was intended to prevent government from abusing its power, or employing it as an instrument of oppression," *DeShaney*, 489 U.S. at 195–96, 109 S.Ct. 998 (cleaned up) (citation and quotation marks omitted), and absent the "affirmative abuse of power" by the state, there is no substantive due process violation, *Daniels*, 474 U.S. at 330, 106 S.Ct. 662.

Second, the majority opinion indicates that officials may be liable for failing to take affirmative actions to protect children from a dangerous parent. But, as *DeShaney* held, that failure to protect is not an egregious abuse of state-assigned power. 489 U.S. at 201–03, 109 S.Ct. 998. Moreover, *DeShaney* made clear that the state has "no constitutional duty to protect [a child] against his [parent's] violence," and therefore the "failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause." *Id.* at 202, 109 S.Ct. 998.

Finally, the majority imposes liability for substantive due process violations when the plaintiffs' allegations amount to mere negligence. But "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708.

The majority's expansion of our state-created danger doctrine into the realm of tort law conflicts with Supreme Court precedent and is out of step even with our broad state-created danger doctrine. Because the majority erroneously erodes "[t]he guarantee of due process" into a "guarantee [of] due care," *Davidson*, 474 U.S. at 348, 106 S.Ct. 668, I respectfully dissent.

[2021 WL 4503055]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSE MURGUIA, for himself and for the Estates of Mason and Maddox Murguia, Plaintiff, v. HEATHER LANGDON, et al., Defendants.	No. 1:19-cv-00942-DAD-BAM ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (Doc. Nos. 38, 40, 41, 43)

Before the court are four motions to dismiss filed by defendants City of Visalia and Officer Hernandez (Doc. No. 38), defendant First Assembly of God of Visalia ("First Assembly") (Doc. No. 40), defendants Cerda, Lewis, Torres, and County of Tulare (collectively "county defendants") (Doc. No. 41), and defendants Davis, Garcia, Valencia, and City of Tulare (collectively "city defendants") (Doc. No. 43). Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic, the motions were taken under submission on the papers. (Doc. Nos. 39, 42, 44.) For the reasons explained below, the court will grant the motions to dismiss.

BACKGROUND

The factual background of this case has been discussed at length in the court's prior order granting defendants' previous motions to dismiss. (Doc. No. 35.) In its prior order, the court synthesized plaintiffs' original 131-page complaint with considerable difficulty. Indeed, in dismissing plaintiffs' original complaint with leave to amend the court cautioned plaintiffs to comply with Rule 8's requirements for a short and plain statement of their claims showing that they are entitled to relief, or risk having an amended complaint dismissed with prejudice. (Doc. No. 35 at 20.) Despite the court's instruction, plaintiffs' first amended complaint ("FAC") is 98-pages in length and asserts thirty-six causes of action. (Doc. No. 36.) In any event, the court will only briefly repeat plaintiffs' undeniably tragic factual allegations here.

Plaintiff Jose Murguia and defendant Heather Langdon married in 2004 and had three children. (FAC at ¶ 24.) Following reports of domestic violence committed by Langdon against Jose, the state court issued a TRO against Langdon on January 5, 2015 and then "awarded sole physical and legal custody of their three children to Jose." (*Id.* at ¶¶ 25–26.) The couple terminated their marriage in April of 2015. (*Id.* at ¶ 27.) However, in Spring of 2017 plaintiff Murguia and defendant Langdon started seeing each other again and Langdon become pregnant with twins. (*Id.* at ¶ 31.) On January 12, 2018, Langdon gave birth to twin boys, Mason and Maddox, but there was no formal custody order for the twins. (*Id.* at ¶ 33.)

On December 5, 2018, defendant Langdon was experiencing an ongoing and escalating mental health crisis. (*Id.* at ¶ 17.) Defendant Langdon, plaintiff Murguia, and their twin infants ("decedents") had been living together in plaintiff Murguia's home with the couple's three older children since August of 2018. (*Id.*) Plaintiff Murguia called 911 on December 5, 2018 and requested psychological help for Langdon. (*Id.*) The Tulare County Sheriff's officers were the first to respond. (*Id.* at ¶ 18.) The officers did not take defendant Langdon into custody. Instead, plaintiffs' neighbor took Langdon and the decedents to the First Assembly church. (*Id.*) Shortly after Langdon and the decedents arrived at First Assembly, the church called the Visalia Police Department ("VPD"). (*Id.* at ¶ 20.) Rather than taking Langdon into custody or placing her under a § 5150 hold, the VPD officers drove Langdon and the decedents to a shelter for women. (*Id.*) The shelter refused to admit Langdon because "Langdon was disruptive and in the shelter's opinion, acting 'crazy.'" (*Id.* at ¶ 21.) The shelter then called the Tulare Police Department ("TPD") twice in order to get help dealing with Langdon. (*Id.*) Allegedly, the TPD called Child Welfare Services ("CWS") and "*falsely* told them that Langdon had gone to a hospital for a psych evaluation and that the hospital concluded that Langdon did not meet the criteria for an involuntary commitment." (*Id.*) (emphasis in original.) CWS told the TPD officers that it could take custody of the decedents, but only if Langdon was taken into custody. (*Id.* at ¶ 22.) The TPD officers refused to take Langdon into custody. (*Id.*) Believing that Langdon was not capable of finding her own shelter, the TPD officers arranged for a motel to give a free night's lodging to her and

the decedents. (*Id.*) The TPD officers then drove defendant Langdon and the decedents to the motel, where defendant Langdon drowned the decedents sometime thereafter. (*Id.* at ¶ 23.)

On June 30, 2020, the court granted defendants' motions to dismiss plaintiffs' original complaint but also granted plaintiffs leave to amend. (Doc. No. 35.) Plaintiffs filed their FAC on July 30, 2020. (Doc. No. 36.) On August 20, 2020, both defendant City of Visalia and defendant First Assembly each filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Doc. Nos. 38, 40.) On September 3, 2020, the county defendants also filed a motion to dismiss under Rule 12(b)(6) (Doc. No. 41) and on September 18, 2020, city defendants did the same (Doc. No. 43). Plaintiffs filed their oppositions to City of Visalia, First Assembly, and county defendants' motions on September 22, 2020 (Doc. Nos. 45, 46, 47) and their opposition to city defendants' motion on October 5, 2020 (Doc. No. 54). County defendants, City of Visalia, and First Assembly each filed replies on September 29, 2020 (Doc. Nos. 49, 50, 51) and city defendants filed their reply on October 12, 2020 (Doc. No. 55).

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A claim for relief must contain "a short and plain statement of the claim

showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Though Rule 8(a) does not require detailed factual allegations, a plaintiff is required to allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). It is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

DISCUSSION

Defendants City of Visalia and Officer Hernandez, First Assembly, county defendants, and city defendants each move to dismiss plaintiffs' respective claims against them pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Below, the court will address the pending motions with respect to plaintiffs federal and state law claims separately.

A. Federal Claims

Plaintiffs bring twelve separate federal claims pursuant to 42 U.S.C. § 1983 for violation of their constitutional rights. (FAC at ¶¶ 119–339) (claims 1–12.) Plaintiffs' twenty-four additional claims are all brought under state law. (FAC at ¶¶ 340–502) (claims 13–36.) Plaintiffs' federal claims are brought against both the individual defendants as well as against City of Visalia, City of Tulare, and County of Tulare pursuant to *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978). As was the case when the court issued its previous order (Doc. No. 35), "the sole issue posed by the pending motions to dismiss this [case] is whether plaintiffs have adequately alleged that any of the individual defendants' conduct deprived them of a constitutional right." (*Id.* at 10.) The court concluded in its prior order that plaintiffs had not adequately alleged a constitutional violation in their original complaint. With respect to the FAC, the court finds that plaintiffs have again failed to adequately allege constitutional violations against the individual defendants. Moreover, because a *Monell* claim requires an underlying constitutional violation as an essential element of the claim, the court concludes plaintiffs' *Monell* claims against the municipal entity defendants must also be dismissed. The court will address the federal claims brought against each group of defendants in turn below.

1. Claims Against the Individual Defendants

Plaintiffs bring the same federal claims against each individual defendant. Defendants move to dismiss those claims, arguing that plaintiffs have failed to allege facts sufficient to state a claim upon which relief could be granted. Specifically, plaintiffs bring their claims under § 1983, alleging violations of

the due process clause of the Fourteenth Amendment, violations of their Fourth Amendment right to be free from unreasonable seizure, and violations of their First Amendment right to familial association. To succeed on a § 1983 claim, a plaintiff must allege and ultimately show that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011) (citing *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1094 (9th Cir. 2006)). Relevant to plaintiffs' claims here, the Ninth Circuit has explained as follows:

> "[T]he general rule is that [a] state is not liable for its omissions." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). In that vein, the Fourteenth Amendment's Due Process Clause generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*, 489 U.S. 189, 196 (1989). As a corollary, the Fourteenth Amendment typically "does not impose a duty on [the state] to protect individuals from third parties." *Morgan v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007).
>
> There are two exceptions to this rule: (1) when a "special relationship" exists between the plaintiff and the state (the special relationship exception), *DeShaney*, 489 U.S. at 198–202; and (2) when the state affirmatively places the plaintiff in danger by acting with "deliberate indifference" to a "known or obvious danger"

> (the state-created danger exception), *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). If either exception applies, a state's omission or failure to protect may give rise to a § 1983 claim.

Id.

The special-relationship exception "applies when a state 'takes a person into its custody and holds him there against his will.'" *Id.* at 972 (quoting *DeShaney*, 489 U.S. at 200); *see also Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012) ("[W]hen a custodial relationship exists between the plaintiff and the State such that the State assumes some responsibility for the plaintiff's safety and well-being."). "The types of custody triggering the exception are 'incarceration, institutionalization, or other similar restraint of personal liberty.'" *Id.* at 972. "The special-relationship exception does not apply when a state fails to protect a person who is not in custody." *Id.* The other exception, the state-created danger exception, has two requirements: (1) there must be "affirmative conduct on the part of the state in placing the plaintiff in danger," and (2) the state must act "with deliberate indifference to a known or obvious danger." *Id.* at 974 (internal quotations and citations omitted); *see also Henry A.*, 678 F.3d at 1002; *Kennedy v. Ridgefield*, 439 F.3d 1055, 1062–64 (9th Cir. 2006).

In their FAC, as in their original complaint, plaintiffs assert a constitutional right to life and to familial companionship. (*See, e.g.*, FAC at ¶ 207.) The Ninth Circuit recognizes that a parent has a Fourteenth Amendment liberty interest in the companionship and society of his or her child, *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010), "and that a child's interest in [their] relationship with

a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." *Curnow By & Through Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (internal citation and quotation marks omitted). Likewise, "the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life.'" *Lee*, 250 F.3d at 685. Plaintiffs also allege that the individual defendants named in this action were acting under color of state law. (*See, e.g.*, FAC at ¶ 120.) Thus, the lone issue posed by the pending motions to dismiss is whether plaintiffs have adequately alleged that any of the individual defendants deprived plaintiffs of their constitutional rights.

a. *County of Tulare Officers*

Plaintiffs bring their first and second claims under § 1983 against defendants Cerda and Lewis, both officers with the Tulare County Sherriff's Department, asserting violations of plaintiffs' substantive due process rights under of the Fourteenth Amendment[1], violations of their right to

---

[1] Plaintiffs also bring claims for violation of their procedural due process rights. (*See, e.g.*, Doc. No. 47 at 20–21.) Although somewhat unclear, the basis for their claims in this regard appears to be that defendants had a duty to call the decedents' father but did not give him notice or an opportunity to be heard about getting the decedents back. (*Id.* at 20.) For the reasons articulated throughout this order, no such duty existed as a matter of law. Plaintiffs also appear to contend that defendants were mandatory reporters under California law and thus "had to investigate and report when a reasonable person

be free from unreasonable seizures under the Fourth Amendment, and violations of their right to familial association under the First Amendment. (FAC at 29, 33.) The County defendants move to dismiss those claims, arguing that plaintiffs have failed to allege an exception to the rule that the failure to protect an individual against private acts of violence does not constitute a violation of the Due Process Clause of the Fourteenth Amendment. (Doc. No. 41-1 at 13.)

In this regard, plaintiffs advance three arguments in response to the pending motion to dismiss. First, plaintiffs argue that a person may be held liable under § 1983 if he omits to perform an act which he is legally required to perform that causes the deprivation of which complaint is made. (Doc. No. 46 at 7) (citing *Preschooler II v. Clark Cnty. Sch. Bd. Of*

---

would consider a child in danger." (*Id.*) However, as plaintiffs note, in determining what procedural due process is constitutionally due under the Fourteenth Amendment to the United States Constitution, courts look to whether there is a protected liberty interest and whether there is a denial of adequate procedural protections. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). As to the protected liberty interest, courts ask "whether there exists a liberty or property interest which has been interfered with by the state." *Ky. Dep't of Corr. V. Thompson*, 490 U.S. 454, 460 (1989). Notwithstanding the failure of plaintiffs to allege what liberty interest was interfered with *by the state*, they also fail to specify "the particular outcome that must be reached if the substantive predicates of [a mandatory reporter] have been met." *Slusher v. City of Napa*, No. 15-cv-2394-SBA, 2015 WL 8527411, at *6 (N.D. Cal. Dec. 11, 2015) (noting that there, the plaintiffs "do not allege that any of the cited authority mandates a particular outcome—or what that outcome would be.") In the absence of such allegations, the court cannot conclude that plaintiffs have alleged a plausible claim for violation of their procedural due process rights.

Trs., 479 F.3d 1175, 1183 (9th Cir. 2007)). Plaintiffs contend that under various internal policies and California statutes, defendants were legally obligated to assist the decedents, the omission of which led to the violation of plaintiffs' constitutional rights. Second, plaintiffs argue that defendants had *de facto* custody over the decedents and therefore the "special-relationship" exception to the omission doctrine applies. (*Id.* at 11.) Third, plaintiffs argue that through their actions defendants created a more dangerous situation for the decedents and therefore the "state-created danger" exception applies. (*Id.* at 11–12.)

i. Failing to Perform a Legally Required Act

Plaintiffs assert that the FAC "alleges multiple mandatory duties that, if performed by defendants, would have saved the twins." According to plaintiffs, under *Preschooler II*, 479 F.3d at 1183, these omissions are actionable. Specifically, plaintiffs argue that the County of Tulare Sherriff's Department policies required defendants to be alert to signs of mental health issues such as "known history of mental illness," "[t]hreats of or attempted suicide," and "[d]elusions, hallucinations, perceptions unrelated to reality or grandiose ideas." (Doc. No. 46 at 9.) Plaintiffs also point out that The Commission on Peace Officer Standards and Training ("POST"), which the County of Tulare Sherriff's Department requires its officers to participate in, required defendants to consider similar factors that might raise red flags as to Langdon's mental state. (*Id.*) Lastly, plaintiffs argue that California Welfare & Institutions Code §§ 305, 627, 5008 (h)(1)(a), and 5150 required defendants to act in this situation and they

failed to do so. (*Id.* at 17.) For all of these reasons, plaintiffs aver that defendants were required by law to act and that their failure to do so led to the alleged constitutional harms being suffered.

The Ninth Circuit has held that "a person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, 'if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which the complaint is made.'" *Preschooler II*, 479 F.3d at 1183 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)) (citation omitted). Here, plaintiffs have not pointed to any law, statute, or regulation that legally required defendants to act in this situation. Plaintiffs cite California Welfare and Institutions Code § 305, which provides: "Any officer may, without a warrant take into temporary custody a minor . . . when the officer has reasonable cause for believing . . . that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety." However, the plain language of this statute clearly states only that an officer "may" act under such circumstances, not that the officer "must" act. Thus, § 305 does not create any mandatory duty.

Plaintiffs also cite California Welfare and Institutions Code § 627 (*see* Doc. No. 46 at 17), which states: "When an officer takes a minor before a probation officer at a juvenile hall or to any other place of confinement pursuant to this article, he shall take immediate steps to notify the minor's parent, guardian, or a responsible relative that such minor is

in custody and the place where he is being held." Cal. Welf. & Inst. Code § 627(a). It is unclear in what way plaintiffs believe this statute would apply under the circumstances presented in this case. First, the decedents were never taken to a place of confinement akin to those examples listed in the statute. Second, there was no need or requirement to notify a parent because the decedents were at all times with their mother. Thus, the court concludes that § 627(a) does not apply to situations like the one at issue in this action.

Plaintiffs next cite California Welfare and Institutions Code §§ 5008(h)(1)(a) and 5150. (Doc. No. 46 at 8.) California Welfare and Institutions Code § 5008(h)(1)(a) defines the term "gravely disabled" as a condition "in which a person, as a result of a mental health disorder is unable to provide for his or her basic personal needs for food, clothing, or shelter." California Welfare and Institutions Code § 5150 in turn states that "[w]hen a person, as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer . . . may, upon probably cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention . . . ." As the court noted in its previous order, "there is no mandatory duty to conduct a § 5150 assessment." (Doc. No. 35 at 13 n. 6.) As with respect to § 305, an officer "may" take a person suspected of being a danger due to their mental health disorder into custody, but the officer is not required by that statute to do so. In short, none of the statutes cited by plaintiffs creates a mandatory duty that defendants failed to adhere to in this case.

The internal policies cited by plaintiffs likewise do not create a legally mandatory duty and plaintiffs have provided no legal support for their contention that they do. Indeed, California law suggests just the opposite. California Government Code § 815.6 states in pertinent part: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." An enactment creates a mandatory duty if it requires a public agency to take a particular action. *County of Los Angeles v. Superior Court*, 102 Cal. App. 4th 627, 639 (2002). "An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." *Id.* The policies that plaintiffs appear to refer to are not enactments imposing mandatory duties. Rather, they are more akin to legislative goals and policies within the department's discretion. *See, e.g.*, *Asberry v. Salinas Valley State Prison Facility-D Male Dentist "G.*," No. 19-cv-06311-YGR, 2021 WL 121124, at *2 (N.D. Cal. Jan. 13, 2021) ("[S]ome of these regulations appear to be general declarations of policy goals, and thus do not impose a mandatory duty within the meaning of section 815.6."); *Bearden v. Alameda County*, No. 19-cv-04264-SI, 2020 WL 1503656, at *5 (N.D. Cal. Mar. 30, 2020) ("The County of Alameda's internal workplace violence prevention policy is not an enactment and thus cannot qualify as the basis for a § 815.6 claim."); *Quiroz v. Cate*, No. 11-cv-0016-LHK, 2012 WL 3236490, at *3 (N.D. Cal.

Aug. 6, 2012) ("[T]hese policy regulations appear to be general declarations of policy goals, and thus do not impose a mandatory duty within the meaning of § 815.6."). Comparing the alleged policy involved here to those involved in the cases cited above, the court concludes that the Tulare County Sheriff's Department policy did not establish a mandatory legal duty falling within the definition expressed in *Preschool II*. Plaintiffs have simply pointed to no "mandatory duty 'phrased in explicit and forceful language.'" *Bearden*, 2020 WL 1503656, at *5 (quoting *Collins v. Thurmond*, 41 Cal. App. 5th 879, 914 (2019)).

For all of the reasons expressed above, the court finds plaintiffs have not alleged that defendants omitted to perform acts which they were legally required to perform. Accordingly, plaintiffs have failed to state a cognizable claim under this theory of liability.

ii. Special-Relationship Exception

In its previous order, the court stated that

> according to the complaint, there was no formal custody order regarding the decedent children, and at the time of these events they lived with both Murguia and Langdon. . . . In other words, the complaint lacks allegations of affirmative conduct on the part of TCSD deputies. Rather, the children were always in Langdon's custody and it cannot be alleged that the deputies placed them there.

(Doc. No. 35 at 11) (citing *Enyart ex rel. Chally v. Kerper*, No. 97-cv-1725, 1999 WL 803319, at *5 (D. Or. Oct. 8, 1999)).

In an apparent effort to circumvent the court's reasoning in this regard, plaintiffs now contend in their FAC that by separating the decedents from their father, defendants "assumed *de facto* custody and control over the twins, [creating] a special relationship and a duty to protect." (Doc. No. 46 at 6.) Plaintiffs also argue that juveniles are always in some form of custody because of their incapacity to provide self-care. (Doc. No. 46 at 17.) Furthermore, according to plaintiffs, defendants were "authorized to take temporary custody because 'the fact that the child is left unattended poses an immediate threat to the child's health or safety.'" (*Id.*) (citing Cal. Welf. & Inst. Code § 305). Lastly, defendants cite the decision in *Doe v. United States Youth Soccer Association., Inc.*, 8 Cal. App. 5th 1118, 1129–30 (2017) for the proposition that "[a] special relationship is created when 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.'" (*Id.* at 18.)[2]

---

[2] Plaintiffs' reliance on the decision in *United States Youth Soccer* is misplaced. Although that decision did state that a special relationship exists when a plaintiff is particularly vulnerable and dependent on a defendant who has some control over the plaintiff's welfare, it concerned a negligence claim brought under state law, not a § 1983 claim. *United States Youth Soccer Assn., Inc.*, 8 Cal. App. 5th at 1129. Although the test for negligence and that applicable to a § 1983 failure to act claim both use the term "special relationship," they are applicable to wholly different scenarios, with the § 1983 test dealing with situations akin to "incarceration" or "institutionalization." *See DeShaney*, 489 U.S. at 200. Moreover, even if *United States Youth Soccer Assn., Inc.* did apply here, the defendants in that case acted as "quasi-parents" by assuming responsibility for the

In contrast, the county defendants argue that "[t]here is simply no authority for the proposition that in temporarily separating the parents or not stopping Langdon from leaving with the twins, the TCSD 'took custody' of the twins." (Doc. No. 41-1 at 12.)

With respect to the Tulare County officers, the court finds plaintiffs' arguments to be unpersuasive. Nothing in the FAC suggests that the county defendants ever took custody of the decedents and the analysis the court conducted in its previous order holds just as true now. *See DeShaney*, 489 U.S. at 190 ("No [affirmative duty to protect] existed here, for the harms petitioner suffered occurred not while the State was holding him in its custody, but while he was in the custody of his natural father, who was in no sense a state actor."). Once again, there are no factual allegations supporting plaintiffs' argument that the decedent children "were ever in custody." (Doc. No. 35 at 11.) Even if juveniles are, in some sense, always in a sort of custody as plaintiffs now assert, the court noted in its previous order that the decedents were always in the custody of their mother and the facts alleged in the FAC do not suggest otherwise. The county defendants allegedly responded to plaintiff Murguia's 911 call and then allowed Langdon to leave with the decedents, while simultaneous preventing plaintiff from intervening, but neither the decedents nor Langdon were ever put into any form of custody by the county defendants. (FAC at ¶¶ 73–78.) Ultimately, merely alleging in conclusory fashion that the decedents were in *de facto* custody is not sufficient to negate plaintiffs' factual

---

safety of players whose parents were not present. *Id.* at 1130. Here, the decedents' mother was at all times present with them.

allegations showing that Langdon always maintained custody of the children.

iii. State-Created Danger Exception

Plaintiffs' complaint also fails to allege facts supporting application of the state-created danger exception.

In its previous order, the court concluded that because the children were always in Langdon's custody "it cannot be alleged that the deputies placed them there." (Doc. No. 35 at 11.) The court cited the decision in *Kerper*, in which the court found the state was not liable under the state-created danger exception because it did not place the plaintiff, who was sexually abused while in the custody of her convicted sex offender father, in her father's custody in violation of the conditions of his probation. (Doc. No. 35 at 11) (citing *Kerper*, 1999 WL 803319 at *5.)

Plaintiffs now argue that defendants increased the level of danger faced by the decedents in "separating them from a mentally competent father and knowingly entrusting them to their violent, deranged mother." (Doc. No. 46 at 20.) Plaintiffs attempt to assert that Langdon no longer had custody pursuant to California Family Code § 3010(b), which states that "[i]f one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child." (FAC at ¶ 102.) Defendants in contrast argue that "Courts have jurisdiction to award custody of children, not law enforcement officers." (Doc. No. 41-1 at 19.) Defendants further contend that they played no part in creating the danger that the decedents faced "nor did [county defendants] do anything to render them any more vulnerable to [the dangers]." (*Id.* at 13.)

Plaintiffs are correct that officials may remove a child from the custody of their parent without prior judicial authorization; however, officials may do so only if the information they possess at the time of the seizure "is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000). The allegations of the FAC reflect that defendants in this case never terminated Langdon's custody of her children, as explained in this court's previous order. Indeed, as the Supreme Court in *DeShaney* stated, "had they moved too soon to take custody of the [children] away from their [mother], they would likely have been met with charges of improperly intruding on the parent-child relationship." *DeShaney*, 489 U.S. at 202; *see also Wallis*, 202 F.3d at 1140 (concluding that a reasonable jury could find that the officers were liable because they "did not have reasonable cause to remove the children without a court order."). Thus, nothing in the allegations of the FAC changes the court's previous analysis, which concluded that the complaint lacked allegations of affirmative conduct on behalf of the officers. (Doc. No. 35 at 11.) The decedents were in their mother's custody before the officers arrived on the scene, and they remained in her custody after the officers intervened. Accordingly, for the same reasons stated in the court's previous order, plaintiffs have not sufficiently alleged that the "state-created danger" exception applies to their claims.

Because the FAC does not allege facts supporting a cognizable failure to protect claim against Tulare County officers Lewis and Cerda, their motion to

dismiss all federal claims brought against them will be granted.

b. *Child Welfare Services Social Worker Torres*

In their first and second causes of action, plaintiffs also bring the same federal claims against defendant Torres, a social worker at Child Welfare Services ("CWS"). (FAC at ¶ 6.) Specifically, plaintiffs assert violations of their substantive due process rights under of the Fourteenth Amendment, violations of their right to be free from unreasonable seizures under the Fourth Amendment, and violations of their right to familial association under the First Amendment. (*Id.*) County defendants argue that plaintiffs have failed to allege facts supporting an exception to the rule against liability based upon an alleged failure to act with respect to defendant Torres. (Doc. No. 41-1 at 20.)

In opposing this aspect of the motion to dismiss, plaintiffs contend that defendant Torres "increased the [decedents'] danger when she falsely told Garcia that Langdon had no history of child abuse" and "deliberately ignored the statutory and policy duties to immediately investigate in person." (Doc. No. 46 at 20.) Plaintiffs argue that defendant Torres had a "statutory duty to investigate all allegations that a child may be in danger of *suspected* abuse, neglect, or exploitation." (Doc. No. 46) (emphasis in original.) Plaintiffs assert that California Welfare and Institutions Code § 16504 requires CWS to carry out an immediate "in-person response" in situations like the one at issue here. (*Id.* at 30.)

As an initial matter, the argument that defendant Torres increased the level of danger posed to the decedents when she allegedly told Garcia that

Langdon had no history of abuse is the same argument plaintiffs made in opposition to defendants' previous motions to dismiss. (*See* Doc. No. 35 at 12.) Once again the court concludes that

> [t]he children were in their mother's custody before and after Torres failed to act and the complaint does not allege that the children were ever in CWS's custody. It therefore cannot be asserted that defendant Torres affirmatively placed the decedents in danger under the facts alleged.

(*Id.*) (citing *Kerper*, 1999 WL 803319 at *5 and *DeShaney*, 489 U.S. at 190).

With respect to defendant's alleged failure to investigate, California Welfare and Institutions Code § 16504 states that "[a]n immediate in-person response shall be made by a county child welfare services department social worker in emergency situations in accordance with regulations of the departments." However, § 16504 also states that "an in-person response is not required when the county child welfare services department, based upon an evaluation of risk, determines that an in-person response is not appropriate." Notably, in their FAC, plaintiffs assert that Torres "concluded that Langdon was not a danger to the twins, and set CWS's investigative response time for 10 days from the call." (FAC at ¶ 105.) But the FAC then alleges that Torres and her supervisor did a further assessment and "[t]he matter was then reclassified for immediate in-person investigation because 'the caregivers' behavior is bizarre and dangerous to the emotional health of the children.'" (*Id.* at ¶ 116.) The FAC does not specify who the referred to supervisor was, nor

does the FAC provide any specific factual allegations to support the allegation that the situation was reclassified as an emergency requiring an immediate in-person investigation. In other words, the allegations of the FAC do not support its conclusory assertion that defendant Torres abused her discretion in determining that an in-person response was not appropriate. Nevertheless, defendant Torres' alleged failure to abide by § 16504 could only give rise to a state negligence claim and does not provide a basis for a cognizable § 1983 claim. *DeShaney* is once again instructive here.

In *DeShaney* the Supreme Court held that a social worker in Wisconsin could not be found liable under § 1983 for her alleged failure to investigate and interfere with suspected child abuse. *DeShaney*, 489 U.S. at 191. Relevant to plaintiffs' case here, Wisconsin had established a child-welfare system that placed upon the local departments of social services "a duty to investigate reported instances of child abuse." *Id.* at 208 (J. Brennan, dissenting). "Even when it [was] the sheriff's office or police department that receive[d] a report of suspected child abuse, that report [was] referred to local social services departments for action." *Id.* Had Justice Brennan's dissent won the day, the court would have held that "[i]n this way, Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse." *Id.* According to the dissent in *DeShaney*, through its child protection program, Wisconsin "actively intervened in [the abused child's] life . . . and by virtue of this intervention, acquired ever more certain knowledge that [the abused child] was in grave

danger." *Id.* at 210. In *DeShaney*, the social worker had compiled substantial evidence of the child's abuse and admitted that "[she] just knew the phone would ring some day and [the abused child] would be dead." *Id.* at 209. Nonetheless, the majority held that despite the state statutory obligations and despite the knowledge of suspected abuse, the failure to intervene did not support a cognizable § 1983 cause of action. *Id.* at 202–03; *see also Seagrave v. City of Lake*, No. 89-cv-1834-EFL, 1995 WL 86552, at *5 (N.D. Cal. Feb. 21, 1995) ("Just as there is no federal constitutional right to be free from private violence under the principles set out in *DeShaney*, there is no such right to an investigation of reports of child abuse."); *Jimma v. Wash. St. Dep't of Hum. & Soc. Servs.*, No. 19-cv-1840-JCC, 2020 WL 832330, at *2 (W.D. Wash. Feb. 20, 2020) (concluding that failure to protect a child from abuse does not violate the Due Process Clause "even 'if the State knew that [the child] faced a special danger of abuse . . . and specifically proclaimed, by word and by deed, its intention to protect [the child] against that danger.'"); *Engler v. Arnold*, 209 F. Supp. 3d 988, 992–93 (N.D. Ohio 2016), *aff'd*, 862 F.3d 571 (6th Cir. 2017) (finding that even if the defendant acted "'in derogation of his responsibilities under Ohio law . . . the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation.'") (citation omitted).

The Supreme Court in *DeShaney* instructed that states, through their courts and legislatures, may "impose such affirmative duties of care and protection upon [their] agents as [they wish]. But not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth

Amendment.'" *Id.* at 202 (quoting *Daniels v. Williams*, 474 U.S. 327, 335 (1986)). In this vein, as in *DeShaney*, any remedy plaintiffs seek here must be through state channels, not federal claims brought pursuant to 42 U.S.C. § 1983. *See, e.g.*, Rudolph Alexander, Jr., *The Legal Liability of Social Workers after* DeShaney, 38 Social Work 64 (1993) ("Social workers employed in child protective services who heard of the ruling in *DeShaney* do not really have a safeguard against lawsuits. Given the current state of the law, they still may be sued and damages may be awarded, but this legal battle must occur at the state court level.").

Accordingly, as with their claims brought against the Tulare County Sherriff's officers, plaintiffs have failed to allege that they were deprived of a constitutional right by defendant Torres' alleged failure to act. The court will therefore grant the motion to dismiss filed on behalf of defendant Torres with respect to the federal claims asserted against her in this action.

c. *City of Visalia Officers*

Plaintiffs assert their fifth and sixth claims against defendant Hernandez, a police officer for the City of Visalia. (FAC at 45–51.) As with the county defendants, plaintiffs bring their claims under § 1983, alleging violations of their Fourteenth Amendment due process rights, violations of their Fourth Amendment right to be free from unreasonable seizure, and violations of their First Amendment right to familial association. (*Id.*)

Defendant Hernandez is alleged to have breached his duties by ignoring plaintiff Murguia, failing to call CWS, and by taking the twins and their mother

to Lighthouse Shelter ("Lighthouse"), an act that allegedly "increased the danger to the twins and reduced the probability that Langdon would get the mental help she needed and wanted." (Doc. No. 47 at 7.)

Plaintiffs contend that defendant Hernandez had a "mandatory duty to obtain an 'evaluation' or professional analysis of Langdon's 'medical, psychological, education, . . . conditions as may appear to constitute a problem.'" (*Id.* at 9) (citing Cal. Welf. Inst. Code § 5008(a)). Plaintiffs also contend that the City of Visalia's own policy required defendant Hernandez to be alert to a variety of signs of mental health issues. (*Id.*) Lastly, plaintiffs argue, once again, that California Welfare and Institutions Codes §§ 305 and 627 created mandatory duties that defendant Hernandez failed to perform. (*Id.* at 11.) For the reasons articulated above, however, neither the internal policy of the Visalia Police Department nor California Welfare and Institutions Codes §§ 305, 627, and 5008 created any constitutionally mandated duty on the part of defendant Hernandez. Accordingly, plaintiffs' arguments in this regard remain unpersuasive.

Plaintiffs also argue that the FAC cures their previous failure to allege in their original complaint that defendant Hernandez took custody of the decedents because they now allege that he had *de facto* custody of the twins. (Doc. No. 47 at 15.) However, merely alleging *de facto* custody in a conclusory fashion does not make it so. For the same reasons articulated above with respect to the other officer defendants, the court concludes that plaintiffs have not sufficiently alleged that defendants took plaintiffs into custody or created a special

relationship with them. "[P]laintiffs have simply failed to allege that any party involved in this tragic incident was taken into custody and held by authorities against their will." (Doc. No. 35 at 13) (citing *Patel*, 648 F.3d at 972). "Although VPD officers allegedly took Langdon to Lighthouse Shelter and left her and the children there . . . this factual allegation is insufficient, even if proven, to establish that they were taken into 'custody' for purposes of establishing a special relationship between the decedents and the police." (*Id.*) These allegations of the FAC at most allege that defendant Hernandez drove Langdon and her two children to a shelter where they would be able to stay for a night. In the case of a minor child, "custody does not exist until the state has so restrained the child's liberty that the parents cannot care for the child's basic needs." *Patel*, 648 F.3d at 974; *see also DeShaney*, 489 U.S. at 201 ("[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter."). Because the decedents here were never separated from the custody of their mother, the "special relationship" exception does not apply.

Finally, plaintiffs reassert their claims and arguments with respect to the state created danger exception. (Doc. No. 47 at 12.) Hernandez was the officer who allegedly drove Langdon and the decedents from the church to Lighthouse. Plaintiffs argue that defendant Hernandez "could have delivered the twins to José and connected Langdon to psychiatric help. Instead, he sent the twins away from their father, where they would be safe, and on to Lighthouse Shelter, where they would be with a deranged Langdon[.]" (*Id.*) For the same reasons that

the court will grant the pending motion to dismiss with respect to the "special relationship" exception, the court will also grant the pending motion as to plaintiffs' claim based upon the "state created danger" exception. The FAC fails to allege facts sufficient to find the state-created danger exception applicable in this case. As noted above, under the facts alleged in the FAC, the decedent children were always in their mother's custody and the mother was never in the custody of the Visalia Police Department. Officer Hernandez therefore played no affirmative role in placing the decedent children in greater danger than they otherwise faced when originally with their mother. *See DeShaney*, 489 U.S. at 190; *Kerper*, 1999 WL 803319 at *5.

For these reasons, the court concludes that plaintiffs have not alleged sufficient facts to state a cognizable claim that the City of Visalia defendants deprived them of any constitutional right. The court will therefore grant the motion to dismiss filed on behalf of the City of Visalia defendants with respect to all federal claims.

d. *City of Tulare Officers*

Plaintiffs assert their ninth and tenth claims against defendants Sargent Garcia, Officer Davis, and Officer Valencia of the *Cit*y of Tulare Police Department ("city defendants"). (FAC at 56–62.) As with the county defendants and City of Visalia defendants, plaintiffs appear to bring their claims against the city defendants under § 1983, alleging violations of their Fourteenth Amendment due process rights, their Fourth Amendment right to be free from unreasonable seizure, and their First Amendment right to familial association. (*Id.*)

Plaintiffs assert that the city officers knew that the decedents were in danger because they had no competent adult caring for them and that the officers had to protect the decedents under the same statutes and internal policies cited above. (Doc. No. 54 at 7–8.) Plaintiffs also aver that the officers took *de facto* custody of the decedents when they drove them from Lighthouse to the motel and that the officers enhanced the danger to the decedents by "taking them and their deranged mother to a motel, an affirmative act that eliminated any chance that Langdon would get the mental help she needed and led to the [decedents'] drowning." (*Id.* at 8.)

First, plaintiffs' arguments that city defendants had a mandatory duty to act pursuant to internal policies and California statutes are all unpersuasive for the reasons addressed at length above with respect to the other named individual defendants.

Second, plaintiffs' arguments that city defendants had *de facto* custody over plaintiffs, which would create a "special-relationship," are likewise unpersuasive for the same reasons addressed above with respect to the other individual defendants. The city defendants simply never restrained the liberty of plaintiffs, and decedents were at all times in the custody of their mother.

As to plaintiffs' state-created danger arguments, plaintiffs argue that city defendants increased the danger "by not assessing Langdon's mental state, not having her evaluated by a psych professional, either in the field or at a facility, not contacting Jose to take the twins, and actively discouraging CWS from investigating the deferral or detaining the children immediately." (Doc. No. 54 at 13.) Additionally, plaintiffs assert that the officers increased the

decedents' danger by "driving them away from Jose's house, where the twins would be safe, and driving Langdon and the twins to the Virginia Motor Lodge." (*Id.* at 14.) The court looks at the situation the decedents would have been in absent any interference by the city defendants. Based on the allegations of the FAC, the decedents would have either been at the Lighthouse Shelter with their mother or would have been removed from the shelter and forced to find some unknown new location. Instead, the city defendants took the decedents and their mother to a motel to get them a room and to avoid any additional altercations with third parties. Here, the risk to the decedents was that they lived with an adult mother who was prone to psychiatric incidents and delusions. Although defendants were "allegedly derelict in their failure to extricate" the decedents from that situation, "no facts are alleged that suggest that [defendants] placed [the decedents] in danger or affirmatively increased the risk of harm to [them] through their inaction." *Slusher*, 2015 WL 8527411 at *5.

The court concludes that plaintiffs have not alleged sufficient facts to state a cognizable constitutional claim against city defendants. The court will therefore grant the motion to dismiss filed on behalf of the individual city defendants with respect to all federal claims.[3]

---

[3] Plaintiffs also claim that their Fourth Amendment rights to be free from unreasonable seizures were violated. (*See, e.g.*, Doc. No. 54 at 22.) Plaintiffs assert that because defendants took *de facto* custody and control of the twins without calling Jose, defendants committed a wrongful seizure. (*Id.*) Because the court concludes that defendants never took custody of the twins, this argument is without merit. Similarly, plaintiffs allege a violation of their First Amendment rights to a familial

2. *Monell* Claims Against the City of Visalia, County of Tulare, and City of Tulare

Municipalities "may not be held vicariously liable for the unconstitutional acts of [their] employees under the theory of *respondeat superior*." *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). Rather, for a municipality to be liable under § 1983, a plaintiff must allege and ultimately prove that an official municipal policy caused his or her constitutional deprivation. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691 (1978). "Official municipal policy includes the 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 v. Thompson*, 563 U.S. 51, 60 (2011). As the Ninth Circuit has stated:

> To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a [§] 1983 plaintiff must establish:
>
> (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and (4) that the

---

relationship. (Doc. No. 46 at 21.) However, plaintiffs' First Amendment rights to familial associated "are measured by the same standard as Fourteenth Amendment rights to familial association based on the Ninth Circuit's analysis" in *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001). *Kaur v. City of Lodi*, 263 F. Supp. 3d 947, 973 (E.D. Cal. 2017). Because the court concludes that plaintiffs have not alleged a claim under the due process clause of the Fourteenth Amendment, so too have they not alleged a cognizable First Amendment claim.

> policy is the 'moving force behind the constitutional violation.'

Oviatt By and Through Waugh v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389–91 (1989)).

However, "[a] government entity may not be held liable under 42 U.S.C. § 1983, unless a policy, practice, or custom of the entity can be shown to be a moving force behind a violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). "[S]ome evidence of constitutional violations is required to maintain the *Monell* claim" in this case. *Johnson v. City of Vallejo*, 99 F. Supp. 3d 1212, 1222 (E.D. Cal. 2015). Plaintiffs here have failed to adequately allege that any state actor deprived them of their constitutional rights. Because no underlying constitutional violation has been alleged here, plaintiffs' *Monell* claim must also be dismissed. The court will therefore grant defendants' motions to dismiss with respect to all of plaintiffs' *Monell* claims.

B. State Claims

This case was originally filed in this court based on federal question jurisdiction. The court has concluded that defendants' motions to dismiss must be granted as to all of plaintiffs' federal claims, leaving only state law causes of action remaining against them.[4] Once all federal claims have been

---

[4] The claims brought against First Assembly (FAC at 91–93) are all based in state law. Those claims are therefore not addressed in this order, but the court will nonetheless grant First Assembly's motion to dismiss (Doc. No.40) because the court will not retain supplemental jurisdiction over the remaining state law claims.

dismissed from a case, whether to retain jurisdiction over any remaining state law claims is left to the discretion of the district court. *See* 28 U.S.C. § 1367 (c)(3); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 537 (9th Cir. 1989). Generally, if federal claims are dismissed prior to trial, state law claims should be remanded to state court "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the remaining state-law claims."); *Acri*, 114 F.3d at 1000. If the court declines to exercise jurisdiction over the state-law claims in a case initially filed in federal court, the court must dismiss those claims without prejudice. *See Carnegie-Mellon Univ.*, 484 U.S. at 350–51 ("When the balance of these factors indicates that a case properly belongs in state court, . . . the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. . . . [Where] the plaintiff [has] filed his suit in federal court, remand [is] not an option."); *Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994). The factors to be weighed in making this determination are "the values of judicial economy, convenience, fairness, and comity." *Id.* at 350.

Because the court is not persuaded that plaintiffs have alleged any cognizable federal claims, the court will not consider the merits of their state law claims. The court finds that the exercise of supplemental

jurisdiction is not warranted in this case. The court elects not to retain the state matters because the parties have raised arguments related solely to California law. (*See* FAC at ¶¶ 340–502.) These issues are best resolved by a state court. For the federal court to address state law claims would be an attempt to divine how the California Supreme Court would rule on a particular issue. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391 (9th Cir. 1994). Declining to exercise supplemental jurisdiction respects the dual sovereignty of the federal government and the state of California, whose courts are better suited to these claims. Further, given the extreme caseload under which this court currently labors, considerations of judicial economy militate against the exercise of supplemental jurisdiction over the plaintiff's state law claims. All parties to this case are in California and represented by California lawyers, so any concerns regarding fairness or convenience are negligible.

Accordingly, the court finds that the interest of justice is best served if the court does not exercise supplemental jurisdiction over plaintiffs' remaining state law claims. Plaintiffs' state law claims will therefore be dismissed without prejudice.[5]

---

[5] The court also notes that any applicable statute of limitations under state law has been tolled during the pendency of this action. *See* 28 U.S.C. § 1367(d) (tolling the limitation period for any claim asserted in a federal action by way of supplemental jurisdiction both while the claim is pending "and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period"); *Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018) ("We hold that § 1367(d)'s instruction to 'toll' a state limitations period means to hold it in abeyance, i.e., to stop the clock.").

C. Leave to Amend

Generally, "[c]ourts are free to grant a party leave to amend whenever 'justice so requires,' and requests for leave should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). There are several factors a district court considers in whether to grant leave to amend, including undue delay, the movant's bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The court has now twice considered the adequacy of the federal claims asserted in this action and it is evident that the granting of further leave to amend would be futile. The undersigned recognizes the horrific and tragic facts of this case. Perhaps this heartbreaking incident could possibly have been prevented had different courses of action been pursued. But, as in *DeShaney*, the harm was inflicted not by the State of California, but by Maddox and Mason's mother. *DeShaney*, 489 U.S. at 202. "The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* The court will therefore deny further leave to amend.

CONCLUSION

For the reasons set forth above, the court grants defendants' motions to dismiss (Doc. Nos. 38, 40, 41, 43) with the plaintiffs' state law claims being dismissed without prejudice to their presentation in state court. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: **September 30, 2021**

/s/ Dale A. Drozd
UNITED STATES DISTRICT JUDGE

[73 F.4th 1103]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MURGUIA, for himself and for the Estates of Mason and Maddox Murguia, *Plaintiff-Appellant*, v. HEATHER LANGDON; COUNTY OF TULARE; LEWIS, Deputy at Tulare County Sheriff Department; ROXANNA TORRES, Social Worker at the Child Welfare Service; CITY OF TULARE; GARCIA, Sergeant at Tulare Police Department; FIRST ASSEMBLY OF GOD OF VISALIA; CERDA, *Defendants-Appellees*.	No. 21-16709 D.C. No. 1:19-cv-00942-DAD-BAM ORDER

Filed July 18, 2023

Before: Carlos T. Bea, Sandra S. Ikuta, and Morgan Christen, Circuit Judges.

Order;
Dissent by Judge Bumatay

ORDER

Judges Bea and Christen voted to deny the petition for panel rehearing. Judge Ikuta voted to grant the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35(a).

The petition for panel rehearing and rehearing en banc is **DENIED**. A dissent from the denial of rehearing en banc, prepared by Judge Bumatay, is filed concurrently with this order.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA and R. NELSON, Circuit Judges, dissenting from the denial of rehearing en banc:

As a general matter, the Constitution constrains the actions of only government actors. It ordinarily provides no relief to those injured by private parties. Faced with tragic facts, however, we may be tempted to expand the scope of constitutional rights to grant relief to injured parties in federal court. But our job is to look to the text and history of the Constitution for the scope of constitutional remedies—not simply to "make good the wrong done." *Boule v. Egbert*, 998 F.3d 370, 374 (9th Cir. 2021) (Bumatay, J., dissenting) (quoting *Bivens v. Six Unknown Named*

Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)), *rev'd*, 142 S. Ct. 1793 (2022).

Ignoring this principle, most circuit courts, including ours, have recognized the "state-created danger" doctrine as a substantive component of the Fourteenth Amendment's Due Process Clause. Extrapolating from just two sentences in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), federal courts have carved out an exception to the rule that the Due Process Clause does not obligate the State to protect its citizens from harm caused by private actors. Our court allows plaintiffs to seek damages against State actors who, by their "affirmative acts," place plaintiffs in danger of injury from others. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018).

But the state-created danger exception finds no support in the text of the Constitution, the historical understanding of the "due process of law," or even Supreme Court precedent. And as the Court recently emphasized, we should be reluctant to recognize rights not mentioned in the Constitution to "guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022). As such, at least one circuit has questioned the legitimacy of this recent-vintage right. *See Fisher v. Moore*, 62 F.4th 912, 913 (5th Cir. 2023) (declining to adopt state-created danger doctrine because of the Supreme Court's "forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition"). And given its opaque origins, the doctrine

has also caused a split among the other circuits about how to apply it.

Even if the state-created danger doctrine is properly considered a substantive due process right (which may be doubtful), we should reject its undue expansion and align it with the text of the Due Process Clause and Supreme Court precedent to the extent possible. But since the inception of the doctrine, courts have increasingly broadened its reach. *See* Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process First Principles*, 74 Rutgers U. L. Rev. 161, 175 (2021). Now, almost any conceivable action by a State actor can lead to a constitutional violation. And every expansion of the right moves the doctrine farther away from the Constitution and the Court's precedent.

Murguia v. Langdon, 61 F.4th 1096 (9th Cir. 2023), continues this trajectory. In this case, our court once again aggrandizes the "state-created danger" doctrine and expands its scope. Now, commonplace actions—like providing a ride, booking a motel room, or telling a lie—when done by a State actor, could become due process violations if the actions eventually lead to injuries caused by third parties. While Jose Murguia has suffered profound tragedy and deserves redress, the Constitution doesn't provide the remedy.

Instead, we should have recognized that the Due Process Clause requires a "deprivation of liberty" because it was intended to prevent abuses of coercive state authority—not torts that happen to be committed by State actors. *DeShaney*, 489 U.S. at 200. So we should have confined the "state-created danger" doctrine to only encompass affirmative acts

by a State actor that constitute the use of the government's coercive power to restrain the liberty of another. If those acts place a plaintiff in harm's way, then we may rightfully have a constitutional violation. But without a restraint of liberty, we remain in the realm of ordinary torts. And here, we let due process claims continue against several State actors without any allegation that they exercised the coercive power of the State. We should have affirmed the dismissal of Murguia's due process claims.

It's long past due that we revisit the state-created danger doctrine. This case presented us with a prime opportunity to reconcile our state-created danger jurisprudence with Supreme Court precedent and our Constitution. Regrettably, our court has passed it up.

I respectfully dissent from the denial of rehearing en banc.

I.

The facts here, as in many state-created danger cases, are deeply troubling.

A.

Factual Background

Jose Murguia and Heather Langdon had a turbulent relationship. They met in 2004, got married, divorced in 2015, and were living together again in 2018. They had five children together, including twin boys, Mason and Maddox, born in early 2018. Langdon suffered from severe mental illness and, over the years, had been accused of abusing Murguia and their children. Because of her mental illness, she was arrested several times and lost custody of her children at various points.

Leading up to December 2018, Langdon's mental health began to deteriorate. In late November 2018,

for example, Langdon told her oldest son that it was the end of times because "a fire had destroyed the town of Paradise, and that she was thinking at a higher power." In early December, she also falsely told others that her oldest son threatened to shoot up an elementary school. Langdon's mental illness became so severe that, on December 4, Murguia called the police for help with Langdon's erratic behavior. Deputies from the Tulare County Sheriff's Department arrived, but they told Murguia to call back if Langdon threatened herself or others.

i.

Deputy Lewis and Sergeant Cerda's Actions

The next day, December 5, Langdon told Murguia that she drank "bleach and vinegar to cleanse the demons in her soul." Murguia then called 911. Tulare County Sheriff's Department officials, including Deputy Lewis and Sergeant Cerda, responded. When Deputy Lewis arrived, he ordered Murguia to step outside, away from the twins and Langdon. Langdon told Deputy Lewis and Sergeant Cerda that she could see dead people and that Murguia was a devil worshiper. After being ordered outside, Murguia went to the house of their neighbor and friend, Rosa. Rosa accompanied Murguia back to his house, and a deputy allowed Rosa to go inside to see Langdon. A deputy told Rosa that she should take Langdon to the hospital.

Rosa tried convincing Langdon to go to the hospital, but Langdon refused and insisted that they take the twin babies to church because Murguia's "house was hexed." Rosa agreed to bring Langdon and the twins to Langdon's church. Murguia begged Deputy Lewis and Sergeant Cerda not to let Langdon

leave with the twins because they were not safe with her. But they allowed the twins to remain with Langdon and Rosa. Deputy Lewis and Sergeant Cerda then stayed outside Murguia's home for 30 minutes to make sure he didn't follow Langdon and the twins. Murguia feared that Deputy Lewis and Sergeant Cerda would arrest him if he tried.

ii.

Sergeant Garcia's and Social Worker Torres's Actions

When Rosa, Langdon, and the twins arrived at the church, Rosa warned church receptionists that the twins were in danger and needed to be taken away from Langdon. One receptionist responded that the twins would be in good hands with the pastor. Langdon told the pastor that she was homeless, needed shelter, and wanted mental health help. The pastor asked Langdon if she would go to a mental health center for an evaluation and she said yes. The pastor called 911. Instead of a hospital, however, police officers brought Langdon and the twins to the Lighthouse Shelter, a women's shelter in Tulare, California. At Lighthouse, the staff observed Langdon continuing to act erratically, and they eventually called the police.

Officers from the Tulare Police Department arrived at Lighthouse and witnessed Langdon yelling and acting belligerent. Officers offered to take her to the hospital, but Langdon refused, and they left her and the twins at Lighthouse. Based on Langdon's continued belligerent behavior, Tulare Police officers were called back to Lighthouse 40 minutes later. This time, an officer brought in Sergeant Garcia,

a Tulare Police Crisis Intervention Technician Officer, for assistance.

To learn more about Langdon, Sergeant Garcia called Roxanne Torres, an emergency response social worker with the County of Tulare Child Welfare Services. Torres falsely told Sergeant Garcia that Langdon did not have a history of child abuse. In fact, Child Welfare Services knew that Langdon had three criminal convictions for child cruelty and prior child welfare investigations, including an active case against Langdon. Torres also failed to inform Sergeant Garcia that Murguia was available to take custody of the twins.

For his part, Sergeant Garcia told Torres that he did not want to separate the twins from Langdon and falsely reported that Langdon had been evaluated at a hospital and did not meet the criteria for involuntary commitment. Based on her call with Sergeant Garcia, Torres concluded Langdon was not an imminent threat to the children and decided not to initiate an immediate, in-person investigation of Langdon. After the call with Torres, Sergeant Garcia and two other police officers arranged for a motel to provide Langdon with free lodging and drove her and the twins to the motel.

The following morning, tragedy struck. At the motel, Langdon was observed screaming for help. A bystander called the police. When paramedics arrived, they found the twins had been drowned and were lying dead on the motel bed. Langdon was later prosecuted for murder but found not guilty by reason of insanity.

B.
Procedural History

Murguia brought suit under 42 U.S.C. § 1983 against Deputy Lewis, Sergeant Cerda, Sergeant Garcia, Torres, and others, for violating his constitutional rights under the state-created danger doctrine. The district court dismissed, and Murguia appealed.

A split panel of this court reversed in part. The panel majority affirmed the dismissal of Deputy Lewis and Sergeant Cerda from the suit. Because they "merely replaced one competent adult—[Murguia]—with another competent adult—Rosa," the panel majority held that the deputies did not leave the twins "in a situation that was more dangerous than the one in which they found them." *Murguia*, 61 F.4th at 1113 (simplified). The panel majority allowed the claim against Sergeant Garcia to proceed because "[w]hen Garcia left Langdon and the twins at the motel, he removed them from the supervision of the Lighthouse staff and rendered the twins more vulnerable to physical injury by Langdon as a result of their isolation with her." *Id.* Finally, the majority concluded that the claim against Torres should continue because she provided Sergeant Garcia with false information, thus "render[ing] the twins more vulnerable to physical injury by Langdon by eliminating the most obvious solution to ensuring the twins' safety: returning them to [Murguia's] custody." *Id.* at 1115.

Judge Ikuta dissented, pointing out that our court has expanded the state-created danger doctrine to "a significant degree" and that the panel majority's decision takes our court far afield of Supreme Court

precedent. *Id.* at 1122 (Ikuta, J., dissenting). Judge Ikuta explained that "the state-created danger doctrine applies only when an injury is caused by a state's abuse of its executive power undertaken with the intent to injure someone in a way unjustifiable by any government interest, not when the injury is the result of mere negligence." *Id.* (simplified). Under this framework, Judge Ikuta would have dismissed the remaining claims on appeal. *Id.* at 1124–26.

Judge Ikuta's concerns are well justified, and we should have corrected the panel majority's error on en banc review.

II.

A.

The Original Understanding of the Due Process Clause

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As a textual matter, "nothing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney*, 489 U.S. at 195. And as a historical matter, the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)); *see also* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911).

Thus, as a matter of text and history, the focus of the Due Process Clause was a protection against the

arbitrary use of the "exclusive sovereign prerogative to coerce or restrain action." Pritchard, 74 Rutgers U. L. Rev. at 192. The Clause served "as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. The due process right then "cannot fairly be extended to impose an affirmative obligation on the State to ensure" that life, liberty, and property "do not come to harm through" private action. *Id.* In other words, the Clause was meant "to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Ordinarily "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

To be sure, as the Court has recognized, "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198. Under the so-called "special relationship" doctrine, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety or general well-being." *Id.* at 199–200 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Youngberg v. Romeo*, 457 U.S. 307 (1982)). "[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* at 200.

So for over a century after the ratification of the Fourteenth Amendment, no court had recognized a substantive due process right against injury from private actors under a "state-created danger" exception. Instead, courts placed strict limits on substantive due process to reflect the well-established principle that the Constitution is not "a font of tort law." *Paul v. Davis*, 424 U.S. 693 (1976). This is "because [the Fourteenth] Amendment did not alter the basic relations between the States and the national government." *Id.* at 700 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945)). In accord with this understanding of federalism, the Supreme Court has stressed that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202; *see also Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution . . . does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."); *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) ("[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."). Rather, the Constitution generally leaves the regulation of torts committed by public officials to the States. Indeed, many States—including the one in this case—provide relief to plaintiffs for injuries caused by State officials' tortious conduct. *See, e.g.*, Cal. Gov't Code § 820.

B.
The Creation of the State-Created Danger Doctrine

Given this background, an obvious question arises: where did the state-created danger doctrine come from? It's not from the text of the Due Process Clause. Nor did it originate from a historical understanding of the "due process of law." It didn't even come from a Supreme Court pronouncement of the right. The simple answer—the right was plucked from just two sentences in *DeShaney*. Like Athena from Zeus's forehead, from two lines in the U.S. Reports sprung an atextual and ahistorical expansion of substantive due process rights. But unlike with Athena, the doctrine's wisdom is not apparent.

Recall the facts of *DeShaney*: Joshua DeShaney was a young boy whose father inflicted horrible abuse on him. 489 U.S. at 191. After multiple visits to Joshua's home, county caseworkers observed signs of abuse and temporarily removed him from his father's custody. *Id.* at 192. But Joshua was returned home a short while later. *Id.* After his return, his father beat him so badly that he fell into a coma and suffered severe brain damage. *Id.* at 193. Joshua blamed his county's social services department for failing to prevent the violence. *Id.* at 193. Joshua and his mother filed a § 1983 action, alleging that the State violated his substantive due process rights by failing to protect him from his father's abuse. *Id.* at 193, 195.

Based on its text and history, the Court rejected Joshua's argument that the Due Process Clause created an "affirmative obligation on the State to provide the general public with adequate protective services." *Id.* at 197. But the Court also looked at

whether the "special relationship" exception fit the situation and concluded it "ha[d] no applicability" to Joshua's circumstances. *Id.* at 201. There, the Court explained:

> While 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. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Id.

From these two lines explaining why the "special relationship" exception could not save Joshua's constitutional claim, circuit courts throughout the country have fashioned a brand new substantive due process right—the so-called "state-created danger" exception.

Take our circuit: from *DeShaney*'s language that the State "played no part in [the dangers'] creation, nor did it do anything to render [Joshua] any more vulnerable to them," we held that "*DeShaney* thus *suggests* that had the state created the danger, Joshua might have recovered." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (emphasis added). From that suggestion, we read two distinct exceptions to the "general rule" that "members of the public have no constitutional right to sue state employees who fail to

protect them against harm inflicted by third parties." *Id.* First, we have the established "special relationship" exception discussed in *DeShaney*, which requires custody of the plaintiff. *Id.* Second, we hatched a new "danger creation exception" that dispenses with any custodial requirement. *Id.* This latter exception creates liability for any conduct by a State actor that leads to harm by a third party if the State (1) "affirmatively place[d] the plaintiff in danger" (2) "with deliberate indifference to a known or obvious danger." *Murguia*, 61 F.4th at 1106 (simplified). Some of our cases add a third element: (3) "that the injury [the plaintiff] suffered was foreseeable." *Sinclair v. City of Seattle*, 61 F.4th 674, 680 (9th Cir. 2023).

Other circuits have followed suit in recognizing the "state-created danger" exception from *DeShaney*'s two sentences. *See Freeman v. Ferguson*, 911 F.2d 52, 54–55 (8th Cir. 1990); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993); *Uhlrig v. Harder*, 64 F.3d 567, 572 & n.7 (10th Cir. 1995); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996); *Davis v. Brady*, 143 F.3d 1021, 1025 (6th Cir. 1998); *Butera v. District of Columbia*, 235 F.3d 637, 647–49, 651 (D.C. Cir. 2001); *Doe v. Rosa*, 795 F.3d 429, 438 (4th Cir. 2015); *Irish v. Fowler*, 979 F.3d 65, 73, 75 (1st Cir. 2020).

C.

The Concerns with the State-Created Danger Doctrine

Whatever the wisdom of the state-created danger doctrine, three related concerns arise from its origin and application. First, we should be wary of recognizing a new constitutional right from such an

uncertain source. Second, given the lack of a textual and historical mooring, we should be careful before extending it. From its beginnings in *DeShaney* to *Murguia* today, the doctrine has evolved along a course of repeated expansion—so much so that the Constitution now is the "font of tort law" the Court has told us to avoid. *Paul*, 424 U.S. at 701. Third, the circuit courts have varied wildly on how to apply the doctrine. With just a couple of lines from *DeShaney* to go on, circuit courts have—predictably—come up with diverging tests for determining when the exception applies.

I look at each concern in turn.

i.

The Court Does Not Hide Elephants in Mouseholes

Start with the obvious: Two sentences from *DeShaney* are not enough to disrupt the constitutional landscape. Just as Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), it's doubtful that the Supreme Court meant to fashion a novel theory of substantive due process liability through such incidental language.

Indeed, we turn *DeShaney* on its head by reading it to *create* a new affirmative duty on States when the thrust of the opinion reaffirms the strict *limits* of the Due Process Clause's substantive component. *DeShaney* rejected a broad view of substantive due process, observing that "nothing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. at 195. To be sure, the Court acknowledged that its prior

"special relationship" cases recognize that the Constitution imposes "some responsibility" for the "safety and general well-being" of those that the State takes into its custody "against [their] will." *Id.* at 199–200 (citing the "*Estelle-Youngberg*" line of cases). Even if this doctrine extends beyond the custodial setting, the Court expressly held that it had no applicability in DeShaney's case because the State "played no part in th[e] creation [of the dangers to Joshua], nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

Read as a whole, this discussion in *DeShaney* makes clear that the Court was not proposing a new exception. Rather, the Court was merely providing further explanation for why the special relationship exception did not apply—even if the doctrine extended outside the custodial context. It's no mistake that the language the Court uses—which courts now use to justify the state-created danger exception—also fits neatly within the special relationship exception. After all, if the State takes a person into custody and, as a result, that person faces dangers he would not have faced in the free world, the State is to blame for creating those dangers and for "render[ing] [that person] . . . more vulnerable to them." *Id.* At most, *DeShaney* suggests the "special relationship" exception could apply beyond just the custodial setting. But it reads too much into the decision to cut a new doctrine out of whole cloth.

ii.

The Expansion of the Doctrine

Our court's expansion of the state-created danger doctrine poses another reason for concern. We first invoked the doctrine in *Wood v. Ostrander*, 879 F.2d

583 (9th Cir. 1989). There, our court assessed whether a police officer's decision to arrest a driver, impound that driver's car, and thereby strand the passenger in a high-crime area where she was later raped violated that passenger's right to due process. *Id.* at 589–90. Coming on the heels of *DeShaney*, we held that the passenger had raised a triable issue of fact as to whether the officer's actions violated due process by "affirmatively plac[ing] the plaintiff in a position of danger." *Id.* (simplified). While this case represents our first recognition of the state-created danger doctrine, its reach was modest because the officer was no doubt exercising an "exclusive sovereign prerogative," using the State's police authority to force the passenger into a dangerous situation. Pritchard, 74 Rutgers U. L. Rev. at 192.

But just three years later, our court expanded the state-created danger exception to cover any "affirmative conduct" of a government employee that places a plaintiff in danger. *Grubbs*, 974 F.2d at 121. In that case, an inmate at an Oregon state juvenile detention facility raped a nurse. *Id.* at 120. The nurse sued her State employers, arguing that they violated her due process rights by placing her with a known violent sex offender. *Id.* We concluded that the employers could face liability because they, "like the officer in *Wood*, . . . used their authority as state correctional officers to create an opportunity for [the inmate] to assault L.W. that would not otherwise have existed." *Id.* at 121. But the *Grubbs* court missed a critical distinction. Unlike the officer in *Wood*¸ who used *coercive State authority* to place the plaintiff in harm's way, the *Grubbs* employers were acting as, well, employers. Scheduling an employee for a shift, as any other private employer might, is

nothing like an officer using police powers to place a person in danger.

Relying on *Grubbs*, we widened the state-created danger exception even more in *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997) (per curiam). The plaintiff in that case was experiencing a medical emergency, prompting a 911 call from neighbors. *Id.* at 708. Two officers arrived and observed that the plaintiff needed medical care. *Id.* Even so, they canceled the request for paramedics, moved the plaintiff inside his house, locked the door, and left him there. *Id.* The plaintiff then died of respiratory failure. *Id.* We concluded that the officers violated the plaintiff's substantive due process rights because, even though they did not create any danger, they "increased the risk" the plaintiff faced. *Id.* at 710. In so doing, we rejected the distinction "between danger creation and enhancement" in favor of a distinction "between state action and inaction." *Id.* We thus eliminated yet another limiting principle—expanding the state-created danger exception to cover acts that merely *enhance* danger rather than *create* it.

Martinez v. City of Clovis, 943 F.3d 1260 (9th Cir. 2019), expanded the state-created danger doctrine even more by allowing any "affirmative actions"—even officers' remarks—to lead to state created-danger. In *Martinez*, a police officer responded to a domestic violence call, and while there, made "positive remarks" about the male abuser. *Id.* at 1273. Another officer who was there told the abuser that the victim "was not 'the right girl' for him." *Id.* at 1272. After the officers left, the abuser assaulted the victim later that night. *Id.* at 1269. We held that a jury could reasonably find that those officers' statements placed the victim in danger by

"provok[ing]" or "embolden[ing]" the abuser. *Id.* at 1272. But, once again, the officers' statements didn't reflect coercive State authority. At most, the words were a suggestion that the officers would *not* act. But *DeShaney* makes clear that the Due Process Clause doesn't impose an affirmative duty to "guarantee . . . certain minimal levels of safety and security." 489 U.S. at 195, 109 S.Ct. 998. It thus makes little sense to find liability in instances where the State suggests it will not act, but not where the State provides no warning that it will do nothing at all. And if "emboldening" a private actor is enough to violate due process, it's hard to explain *DeShaney*. There, the social workers repeatedly visited Joshua's home without removing him despite clear signs of abuse, eventually took temporary custody of Joshua, and then returned Joshua to his father's custody, all of which would have *emboldened* Joshua's father. *Id.* at 192–93, 109 S.Ct. 998. *Martinez* thus highlights the problems with our court's current reliance on mere "affirmative acts" to point to substantive due process violations.

And *Murguia* marks an even greater expansion of the doctrine. As Judge Ikuta points out, *Murguia* dispenses with *any* requirement that the state-created danger doctrine involve the "abuse of power entrusted to the state." *Murguia*, 61 F.4th at 1124 (Ikuta, J., dissenting). Instead, *Murguia* now creates a due process violation "based solely on negligence and mistake." *Id.* Neither Sergeant Garcia nor Torres exercised coercive government authority here. First, there's no allegation that Sergeant Garcia forced Langdon to stay at the motel that night. Second, Torres did not use exclusive government authority in providing Sergeant Garcia false

information. And even if she did, she didn't *abuse* State power because there's no allegation that she intentionally sought to injure Langdon or the twins by providing false information.

And so the doctrine continues to be "expanded . . . with increasing momentum, to apply in a number of distinct contexts involving state agents acting in their capacity as employers or service providers of some kind." Pritchard, 74 Rutgers U. L. Rev. at 175. Now, "*any* government activity can give rise to a state-created danger claim." *Id.* (emphasis added). But we should recognize that each expansion is a step farther away from our Constitution's text and the Supreme Court's instructions. And with each extension we intrude further on States' rights to regulate the torts of their own officials. *See Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 919 (10th Cir. 2012) (noting the state-created danger doctrine's "osmotic, ill-considered tendency to invade the province of both common law negligence and state tort law"). So rather than display "the false modesty of adhering to a precedent that seized power we do not possess," we should instead exercise "the truer modesty of ceding an ill-gotten gain." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1943 (2021) (Gorsuch, J., concurring).

iii.

The Lack of Uniformity

Since *DeShaney*, nearly every circuit has adopted some form of the state-created danger exception. So one might think that in the interest of uniformity, we ought to go along with the trend. But don't be fooled. Practically every circuit that's endorsed the state-created danger exception has come up with a different test for when it should apply. One look at the

variations is enough to make anybody question whether we've really "exercise[d] the utmost care . . . break[ing] new ground in this field." *Dobbs*, 142 S. Ct. at 2247 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Just see for yourself:

1st Cir.	(1) State affirmatively acts to create or enhance danger; (2) danger is specific to plaintiff; (3) State's act causes harm; and (4) State's conduct shocks the conscience. Level of culpability changes based on time the State has to act. *Irish*, 979 F.3d at 75.
2d Cir.	(1) State's affirmative conduct creates or enhances danger to plaintiff; and (2) shocks the conscience. Sustained inaction by the State may constitute affirmative conduct. *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 428, 431 (2d Cir. 2009).
3d Cir.	(1) There is a relationship between State and person injured; (2) State affirmatively uses government authority to create danger; (3) the ultimate injury is foreseeable and fairly direct; and (4) State's conduct shocks the conscience. *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018).

4th Cir.	(1) State affirmatively acts to create or increase the risk of harm to victim; and (2) State's conduct shocks the conscience. *Callahan v. N.C. Dep't of Pub. Safety*, 18 F.4th 142, 146, 149 n.5 (4th Cir. 2021).
5th Cir.	State-created danger exception not recognized. *Fisher*, 62 F.4th at 916.
6th Cir.	(1) Danger is specific to plaintiff; (2) State's affirmative act creates or increases danger; and (3) State knew or should have known of the danger. *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491–92 (6th Cir. 2019).
7th Cir.	(1) State's affirmative act creates or increases a danger; (2) State's failure to protect the individual causes injury; and (3) State's conduct shocks the conscience. *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019).
8th Cir.	(1) Plaintiff is member of limited and definable group; (2) State's conduct puts plaintiff at significant risk of serious harm; (3) risk is obvious or known; (4) State acts recklessly in conscious disregard of the risk; and (5) State's conduct shocks the conscience. *Villanueva v. City of*

	Scottsbluff, 779 F.3d 507, 512 (8th Cir. 2015).
9th Cir.	(1) State's affirmative actions create or expose plaintiff to danger; (2) the injury was foreseeable; and (3) State is deliberately indifferent. *Sinclair*, 61 F.4th at 680. No "shocks the conscience" requirement. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064–65 (9th Cir. 2006).
10th Cir.	(1) Plaintiff is member of limited and definable group; (2) State creates or increases danger to plaintiff; (3) State puts plaintiff at substantial risk of serious proximate harm; (4) risk is obvious; (5) State acts with conscious disregard; and (6) State's conduct shocks the conscience. *Est. of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014).
11th Cir.	Substantive due process violation if State's conduct is "arbitrary, or conscience shocking." *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999).
D.C. Cir.	State's affirmative conduct leads to harm and shocks the conscience. *Butera*, 235 F.3d at 651.

Of course, these varying tests for the same exception are no surprise when you consider the legal

foundation on which they rest. A two-sentence aside in a single opinion is not a lot to go on. But like Dr. Frankenstein, courts have cobbled together bits and pieces of standards from other contexts to try to breathe new life into substantive due process after *DeShaney*. *See, e.g., Wood*, 879 F.2d at 588 (pulling the "deliberate indifference" standard from Eighth Amendment context); *Uhlrig*, 64 F.3d at 573 (borrowing the "shocks the conscience" element from a case about a municipal § 1983 claim). And like his monster, the state-created danger exception roams menacingly among our circuit courts and is often difficult to comprehend. We should have done our part to contain this creation.

D.

The State-Created Danger Doctrine Revisited

By now, one point should be clear: the state-created danger doctrine needs a serious course correction. Courts, the States, and the people would be better off with clearer and more uniform guideposts to assess state-created danger claims. And we should stop the one-way ratchet of ever-expanding the doctrine. To fix things, we should return to the text of the Due Process Clause and *DeShaney*. If we are to continue to accept some form of the state-created danger exception, we must stick to the strict limits placed on it by both the Court and the Constitution.

As stated above, the best reading of *DeShaney*'s language concerning state-created danger is that the Court was *supplementing* its discussion of the special relationship exception—not carving out a new exception. What we now call the "state-created danger" exception is really a subset of the special

relationship exception. And with that understanding, we should recognize that state-created danger must follow the limits of the special relationship exception. While *DeShaney* may expand this exception outside the purely custodial context, it does not untether non-custodial claims from all constitutional constraints. Rather, at the heart of *DeShaney* was the understanding that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." 489 U.S. at 200.

Thus, what triggers the due process protection is not *any* affirmative act by a State actor—as our precedent currently holds—but only an "affirmative act of restraining [an] individual's freedoms to act on his own behalf." *Id.* So, at a minimum, state-created danger claims must arise from some "restraint of personal liberty," like incarceration or institutionalization. *Id.* In other words, the State actor's conduct must amount to the abuse of *coercive* government power to trigger substantive due process liability under a state-created-danger theory.

As stated recently:

> [A]ffirmative action by a state agent is a necessary, but not a sufficient, condition to find a deprivation of liberty in the constitutional sense. Every act of government is accomplished through a human agent. As with all humans, government agents sometimes affirmatively act in ways that cause harm to others. But not every such harm-causing act is a deprivation of

> liberty by the state. That constitutional deprivation can occur only when the harm results from the state acting qua state—i.e., the government using its exclusive sovereign prerogative to coerce or restrain action through the threat or application of physical force.

Pritchard, 74 Rutgers U. L. Rev. at 192.

This understanding comes directly from our Constitution's text, which prohibits the "deprivation of liberty," and *DeShaney*, which explains that the Due Process Clause "was intended to prevent government 'from abusing its power, or employing it as an instrument of oppression.'" 489 U.S. at 196 (simplified). This emphasis on coercive State power explains the Court's decision in *DeShaney*. There, the social workers engaged in "affirmative acts" by visiting Joshua's home several times without removing him and then returning him home after a temporary custody. But those "affirmative acts" didn't constitute coercive State power and the social workers "placed him in no worse position than" had the State not acted at all. *Id.* at 201.

To summarize: plaintiffs can't just point to *any* affirmative act to state a due process claim; they must point to "the State's affirmative act of restraining the individual's freedom to act on his own behalf" to "trigger[ ] the protections of the Due Process Clause." *Id.* at 200. Only then can we say that there was some "arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331 (simplified). After all, the Clause's purpose is "to protect the people from the State"—not to protect people from the negligence of State actors. *DeShaney*, 489 U.S. at 196; *see also Weiland v. Loomis*, 938 F.3d 917, 921 (7th Cir. 2019)

(quoting *DeShaney* and suggesting that constitutional liability arises from the State's limitation on a person's "freedom to act on his own behalf"). Following this limitation would keep federal courts from turning constitutional law into tort law—something the Supreme Court has made clear that we should not do. *See Paul*, 424 U.S. at 701.

III.

With the proper understanding of the state-created danger exception in mind, we may now turn back to Murguia's claims. While Murguia experienced unspeakable tragedy, under the proper due process analysis, his state-created danger claims against Sergeant Garcia, Torres, Deputy Lewis, and Sergeant Cerda should have been dismissed.

A.

Claim Against Sergeant Garcia

Sergeant Garcia had the unfortunate role of arranging for a motel room for Langdon and the twins and then transporting them there. Our court decided that these were sufficiently affirmative acts to state a due process claim. *Murguia*, 61 F.4th at 1113. We presumed that Sergeant Garcia's actions increased the risk of harm to the twins by "remov[ing] them from the supervision of the Lighthouse staff and render[ing] the twins more vulnerable to physical injury by Langdon as a result of their isolation with her." *Id.* Our court also concluded that Sergeant Garcia acted with deliberate indifference because he "was aware that Langdon was undergoing a mental health crisis" and that "Langdon posed an obvious risk of physical harm to the twins based on her worrisome behavior." *Id.* at 1114.

But this analysis overlooks that Sergeant Garcia's affirmative acts lacked state authority. By arranging transportation and housing, Sergeant Garcia acted "as a chauffeur and a Good Samaritan—not as an instrument of the state." *Id.* at 1125 (Ikuta, J., dissenting). Murguia doesn't allege that Sergeant Garcia forced Langdon to be driven to the motel or to spend the night there. So nothing Sergeant Garcia did approached "restrain[ing] [Langdon's] personal liberty," like incarcerating or committing her. *DeShaney*, 489 U.S. at 200. And while Sergeant Garcia may have been negligent in trying to help the twins, his commonplace actions did not give rise to a constitutional violation merely because he was an employee of the State.

Because Sergeant Garcia did not exercise coercive state authority by driving Langdon and the twins to the motel and leaving them there, Murguia's § 1983 claim against Sergeant Garcia should have been dismissed.

B.

Claim Against Torres

Murguia accuses social worker Roxanne Torres of lying to Sergeant Garcia about Langdon's circumstances and history of abuse. In particular, Torres told Sergeant Garcia that Langdon had no history of child abuse and neglected to tell him about Murguia's availability to take custody of the twins. Our court concludes that providing Sergeant Garcia with false information violated due process because it "eliminat[ed] the most obvious solution to ensuring the twins' safety: returning them to [Murguia's] custody." *Murguia*, 61 F.4th at 1115. We speculated that, "[a]bsent Torres's affirmative

misrepresentation, Garcia may have conducted an independent investigation into Langdon's criminal history and living situation prior to settling on the decision to take the family to the motel." *Id.*

But our court conceded that Torres's affirmative acts merely consisted of "revealing certain information," *id.*—information that turned out to be wrong. So again, we have an affirmative act that has nothing to do with the "restraint of personal liberty." *DeShaney*, 489 U.S. at 200. In some respects, Torres acted only as a conduit of false information—like any website or social media app could. Even if Torres falsely disseminated proprietary government information, her lies still didn't lead to the deprivation of Langdon's liberty. Instead, our court holds her accountable based on the counterfactual assumption that Sergeant Garcia would have prevented the twins' deaths if only he received accurate information from Torres.

Again, Torres's actions may constitute negligence or fraudulent misrepresentation. *See* Restatement (Second) of Torts §§ 304 ("A misrepresentation of fact or law may be negligent conduct."), 310 (stating that an actor who makes a misrepresentation is liable for physical harm of another person if that actor should know that his misrepresentation will likely induce action and knows that the statement is false). But that Torres receives her paycheck from the State is not a valid basis for transforming a traditional tort into a constitutional deprivation.

C.

Claim Against Deputy Lewis and Sergeant Cerda

Although our court dismissed the claim against Deputy Lewis and Sergeant Cerda, that claim is actually the strongest of Murguia's claims. Of the State actors involved, Deputy Lewis and Sergeant Cerda were the only ones who used coercive government power. *See Murguia*, 61 F.4th at 1124 (Ikuta, J., dissenting). The deputies ordered Murguia to separate from Langdon and the twins once they arrived on scene. They then let Langdon and the twins leave with Rosa while forcing Murguia to remain at home. They even stayed outside Murguia's house for 30 minutes so that he could not follow Langdon and the twins. Murguia alleged that he feared arrest if he disobeyed the deputies' commands. In other words, Deputy Lewis and Sergeant Cerda "restrain[ed] [Murguia's] freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200. Thus, of all Murguia's claims, the claim against these deputies is the only one that passes the threshold requirement of a deprivation of liberty.

Our court, however, dismissed the claim because the deputies "merely replaced one competent adult . . . with another competent adult" and so "the officers [did not leave] the twins in a situation that was more dangerous than the one in which they found them." *Murguia*, 61 F.4th at 1113 (simplified). Though it's a close call, I agree that Deputy Lewis and Sergeant Cerda did not violate Murguia's due process rights because of the lack of foreseeability. *See Sinclair*, 61 F.4th at 680 (requiring a foreseeable injury to allege state-created danger). So much more took place in the hours between the deputies' actions in restraining

Murguia and the deaths of the twins. As our court pointed out, the deputies left Langdon and the twins in the hands of Rosa, a "competent adult." *Murguia*, 61 F.4th at 1113. And the deputies could not have predicted the series of tragic bad judgments and mistakes made by the State and non-State actors who encountered Langdon and the twins over the next 24 hours. Thus, without causation or foreseeability, Murguia's state-created danger claim against Deputy Lewis and Sergeant Cerda should ultimately fail.

IV.

We should have seized this opportunity to correct our longstanding errors in applying the state-created danger doctrine. We could have put ourselves back on track with Supreme Court precedent and our Constitution's text. And the solution is a narrow and straightforward one—holding that only affirmative acts that cause the "deprivation of liberty" may suffice for a state-created danger claim. It is regrettable that our court has declined to take this textual approach.

I respectfully dissent from the denial of rehearing en banc.

U.S. Const. amend. XIV

Section 1. 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.

* * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

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.