No. 23-270

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

42 U.S.C. § 1983 creates a cause of action against "[e]very person who, under color of" state law, "subjects, or causes to be subjected, any ... person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." For decades, eleven circuits have held that section 1983 encompasses claims against state actors who cause the deprivation of constitutional rights by affirmatively increasing the risk of harm to a person.

The question presented is:

Whether section 1983 permits liability against state actors whose affirmative acts cause a person to be deprived of his substantive-due-process rights to life and familial unity.

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INTRODUCTION

For four decades, the courts of appeals have widely recognized that 42 U.S.C. § 1983 permits liability against state actors whose affirmative acts cause the deprivation of federal rights. Those courts have appropriately confined that state-created-danger doctrine to truly egregious governmental misconduct. This case is one of a handful of unthinkably tragic examples where any claims survived a motion to dismiss. Petitioners separated eleven-month-old twin babies from their loving, competent father, removed them from the home, isolated them

in a motel room without diapers, clothes, or other baby-care necessities, and left them alone with their mentally disturbed mother who had already been repeatedly convicted of child abuse. Petitioners placed the twins in her care despite encountering the mother five times over a 36-hour period in response to five 911 calls about her ongoing mental-health crisis. Soon after petitioners left the motel, the mother drowned the babies in the motel room's bathtub. The decision below held that, as to some defendants but not others, the father's complaint could proceed past a motion to dismiss.

This Court should decline petitioners' invitation to upend that longstanding body of law. To start, while petitioners now attack the state-created-danger doctrine root and branch, petitioners forfeited, if not outright waived, any objection to the doctrine below. Petitioners instead embraced settled Ninth Circuit precedent, including the panel majority's framings of the doctrine, merely objecting to the doctrine's application to these facts.

Moreover, petitioners miscast the state-created-danger doctrine as a species of substantive due process rather than section 1983 liability. Petitioners trace the doctrine to one sentence in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which purportedly spiraled into an expansion of substantive-due-process rights. But petitioners overlook the textual and historical basis for the state-created-danger doctrine: section 1983. Section 1983 assigns liability to a state actor who "*causes* [a person] to be subjected" to harm. Far from creating a new substantive-due-process right, the state-created-danger doctrine reflects Congress' decision to extend constitutional tort liability to state wrongdoers further up the causal chain. Congress did so to counteract state-facilitated private violence from the Ku Klux Klan.

Petitioners' fundamental misframing risks non-responsive merits briefing that ignores the operative text of section 1983 while also muddying the waters with ancillary substantive-due-process questions not unique to the state-created-danger doctrine.

Moreover, the question presented implicates no circuit split. Eleven circuits accept the state-created-danger doctrine; the remaining circuit (the Fifth) has simply declined to decide the question. Other areas of disagreement noted in the petition are either immaterial semantics or reflect broader, unsettled substantive-due-process questions ill-suited for review in this context. Notwithstanding petitioners' wolf-crying, forty years of circuits applying the state-created-danger doctrine have not prevented police and social services in 47 States from supplying much-needed help. Very few plaintiffs even pass the motion-to-dismiss stage in state-created-danger cases, as the extreme facts of this case illustrate. This Court has denied dozens of previous petitions raising similar questions and should do so here.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

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.

STATEMENT

A. Factual Background

1. Born in January 2018 in Tulare County, California, fraternal twins Mason and Maddox Murguia entered a world of difficult circumstances. Pet.App.4a. The twins were the fourth and fifth boys born to their mother, Heather Langdon, and their father, respondent Jose Murguia. Pet.App.3a-4a. By the twins' births, their parents were no longer married due to Langdon's severe, recurrent physical abuse of Jose and the twins' brothers, culminating in multiple child abuse and battery convictions. First Am. Compl. (FAC) ¶¶ 25-33.

For instance, in 2011, Child Welfare Services opened a case against Langdon for abusing Jose, prompting concern for their sons. *Id.* ¶ 25. In 2014, Langdon admitted to social workers that she had hit their eldest son, then ten-year-old Jayden. Later in 2014, she hit Jose with a speaker, splitting his lip. In 2016, Langdon was convicted in Visalia Superior Court of two counts of willful cruelty to a child and one count of inflicting injury on a child. *Id.* ¶¶ 28-29. Langdon's alcohol abuse exacerbated the physical abuse; in one such incident, she struck her son Jayden with a glass beer bottle, bruising his chest.

The twins were the product of Langdon's reconciliation with Jose in spring 2017. But Langdon soon fell into old patterns. In May 2017, Child Welfare Services opened a case against Langdon for abusing Jayden, and in August

2017, the Visalia Superior Court convicted her of battery against Jose. *Id.* ¶¶ 25, 32.

Thus, when Mason and Maddox were born, their three older brothers—aged thirteen, twelve, and four—lived with Jose, who had sole custody. Pet.App.4a. Indeed, the Tulare Family Court had stripped Langdon of her custody and visitation rights over the older boys to protect them from further abuse. Pet.App.3a-4a. To support his family, Jose took two truck-driving jobs that required him to work seven days a week. Jose and the boys lived in a four-bedroom home with Jose's mother, who helped Jose take care of the boys as he juggled two jobs with family outings and the boys' soccer games.

The twins initially lived alone with Langdon in a small apartment. *See* Pet.App.4a. Langdon worked at Macy's; Jose helped pay the twins' expenses. Jose visited frequently, especially as Langdon's behavior triggered alarms. In February, Langdon was visibly drunk when Jose visited the one-month-old twins. Pet.App.4a. In March, Langdon was so inebriated in front of her two-month-old twins that friends called Child Welfare Services. Pet.App.4a.

In May 2018, Langdon called Jose, told him that four-month-old Mason and Maddox were too much work, and asked him to take custody. Pet.App.4a. By August, the twins were living with Jose and their three older brothers in Jose's home. Jose let Langdon live in his home as well. Pet.App.4a-5a. The twins thrived, beginning to show differences and distinct personalities. Mason's eyes were bright blue; Maddox's were dark brown. Sheyanne Romero, *Goshen Mother May Face Death Penalty in Drownings*, Visalia Times-Delta (Dec. 12, 2018), https://bit.ly/3M5TWUw. Mason struck relatives as "always curious," while Maddox was "full of a calm wisdom." *Id.*

2. But three months later—the eve of the twins' first birthday—Langdon again exhibited disturbing signs of mental instability. In late November 2018, she told fourteen-year-old Jayden that "these were 'End Times' because a fire had destroyed the town of Paradise." FAC ¶ 37 (emphasis omitted). Around December 3, Langdon called her church and falsely accused Jayden of "threaten[ing] to shoot up an elementary school," prompting Tulare County Sheriff's Department officers to investigate and deem the call a hoax. *Id.* ¶ 38.

On December 4, Langdon—apparently believing that Jose was possessed by a demon—repeatedly shouted "I refute you Satan," and told Jose she had called the police and that he should "get ready to go to jail." *Id.* ¶ 39 (emphasis omitted). Jose called 911, detailed Langdon's erratic behavior to petitioner City of Tulare's Public Safety Dispatcher, and asked the operator for mental-health services. *Id.*

Instead, the operator dispatched petitioner Lewis and another deputy from the Tulare County Sheriff's Department. Pet.App.5a. California law and departmental policies call for a mental-health assessment when officers "respond[] to a call involving a person in crisis." FAC ¶¶ 53-59, 174 (emphasis omitted); *accord* Cal. Welf. & Inst. Code §§ 5150, 5150.05 (2016). Lewis could have called the Tulare County Psychiatric Emergency Team, which would have deployed a trained mental-health expert to evaluate Langdon. FAC ¶ 55.

Yet, despite Jose's pleas and recitation of Langdon's mental-health problems, the deputies refused to facilitate mental-health services or call the Psychiatric Emergency Team. Pet.App.5a-6a. They simply told Jose to call back if Langdon threatened the children or herself, at which point the deputies promised to put Langdon on an involuntary psychiatric hold. FAC ¶ 41.

3. December 5—the last day of the twins' lives—began when Langdon awoke at 4 AM and hoisted one of the twins in the air while shouting "haneeshewa." Pet.App.6a. Langdon told Jose that she had drank bleach and was drinking vinegar "to cleanse the demons in her soul." Pet.App.6a. Once again, Jose called 911 and urgently requested mental-health services. Pet.App.6a.

Instead, petitioners Lewis and Cerda, other Tulare County Sheriff's deputies, and EMTs arrived at Jose's home. Pet.App.6a. By now, Langdon was well known to the Tulare County Sheriff's Department. She had made a false report of a school shooting two days earlier. Pet.App.5a. Lewis had seen Langdon the night before and been poised to recommend an involuntary hold. Pet.App.5a-6a. Jose had detailed to Lewis and 911 operators Langdon's disturbing behavior. FAC ¶¶ 39-40, 44. Lewis and Cerda then witnessed Langdon insisting she was "crazy" and "really want[ed] to go see a doctor." Pet.App.7a.

Upon arrival, the deputies demanded Jose's license and ran it through the California Law Enforcement Telecommunications System. FAC ¶ 61. That check would have shown the domestic-violence protective order that Jose had received against Langdon, *id.* ¶ 26, putting the officers on yet further notice of Langdon's long history of abuse and mental illness. Officers also were supposed to run Langdon's license, which would have returned her two convictions for willful cruelty to a child, convictions for inflicting injury on a child and battery, and a pending child abuse report regarding further abuse of Jayden. *Id.* ¶¶ 25, 28-29, 32, 61.

Faced with calls for mental-health help, California law and department policies directed Lewis and Cerda to assess Langdon's mental health, request resources, and collaborate with mental-health professionals. *Id.* ¶¶ 53-

59, 174. Department policies also directed Lewis and Cerda to transport Langdon to the hospital after she requested mental healthcare. *Id.* ¶ 58. And California statutes instructed the deputies to determine if they had probable cause to involuntarily hold Langdon by considering "available relevant information about the historical course of [her] mental disorder." Cal. Welf. & Inst. Code § 5150.05(a).

Instead, Lewis and Cerda ordered Jose to exit his own home, leaving Mason and Maddox with Langdon. Pet.App.7a-8a. Stonewalled by the deputies, Jose asked his neighbor, Rosa, for help. Pet.App.8a.

A deputy let Rosa into Jose's home, but barred Jose from entering. FAC ¶ 70. With Lewis, Cerda, and others watching, Rosa told the deputies that Langdon needed mental-health services and could not care for the babies. Pet.App.8a. The deputies told Rosa to take Langdon to the hospital and keep the twins. FAC ¶ 72.

Rosa tried, but Langdon insisted on going to church with the twins because "Jose's house was hexed." Pet.App.9a. Langdon packed a bag; all she planned to bring was nail polish. Rosa had to ask for food and diapers for Mason and Maddox. Pet.App.9a.

Outside, Jose begged the deputies to prevent Langdon from taking the babies, because Mason and Maddox were not safe with her. Pet.App.9a. One deputy ordered Jose to "just let her go." Pet.App.9a. Deputies stayed outside Jose's home for 30 minutes, physically preventing him from regaining custody and leaving Jose to fear arrest if he followed his family. Pet.App.9a-10a. None of them followed Langdon.

4. At Langdon's church, Langdon left the boys unattended in their car seats while she asked her pastor for mental-health help. FAC ¶¶ 83, 85. He called 911; a City

of Tulare police officer responded. But, instead of taking Langdon to the hospital as department policy dictated, the officer took Langdon, Mason, and Maddox to a women's shelter and left. *Id.* ¶¶ 58, 94-95.

At the women's shelter, Langdon alarmed staff with abusive screaming and bizarre delusions, prompting two 911 calls and two more police visits to the shelter. Pet.App.11a-12a. All the while, Mason and Maddox were "functionally unattended." FAC ¶ 104. No one appeared to have fed them for hours. *Id.* ¶ 101.

Petitioner Garcia, a Tulare Police sergeant and crisis intervention officer, arrived in response to the second 911 call. *Id.* ¶¶ 101-02. His initial instinct was to arrest Langdon for disturbing the peace, so he called petitioner Roxanne Torres, an emergency-response social worker with Child Welfare Services, to discuss where Mason and Maddox should go. *Id.* ¶¶ 105, 114. Garcia asked if Child Welfare Services had any history on Langdon; Torres falsely represented that Langdon had no record of child abuse and was homeless. *Id.* ¶ 115. Based on Garcia's description of events, Torres believed Langdon "sounded delusional and might be a threat to the children." *Id.* ¶ 116 (emphasis omitted). Torres and her supervisor concluded that the twins were in immediate danger. *Id.*

Child Welfare Services' intake policies require "an immediate in-person investigation" and in-person visit to the child "when there is imminent danger to a child." *Id.* ¶¶ 112, 116, 175; Cal. Dep't of Soc. Servs., Child Welfare Services Manual § 31-115 (2016). Yet Torres merely flagged the twins' situation for further risk assessment. While she scheduled an immediate in-person investigation, she never assigned an investigator before the twins' deaths. FAC ¶ 116.

Meanwhile, by the end of the call with Torres, Garcia had inexplicably decided against arresting Langdon or getting her psychiatric help. *Id.* ¶¶ 115-17. Torres offered to have Child Welfare Services come to the shelter and take the twins if Langdon was arrested or put on a psychiatric hold. *Id.* ¶ 115. Garcia declined. He falsely told Torres that Langdon received an in-hospital psychological evaluation that concluded that Langdon did not meet the criteria for a commitment. Garcia also falsely told Torres that Langdon had all the baby supplies the twins needed. *Id.* ¶¶ 21, 105.

Garcia instead arranged for Mason and Maddox to stay alone with Langdon in a motel overnight. *Id.* ¶ 117. He put the twins and Langdon in a police cruiser for transport to the motel, and arranged for a nonprofit organization to pay for their stay. *Id.* ¶¶ 23, 117; Reggie Ellis, *Lindsay Mother Charged with Killing Infant Twins*, Sun Gazette (Dec. 12, 2018), https://bit.ly/3Q751pu. Garcia knew Langdon had already left the twins "functionally unattended" and unfed at the shelter. FAC ¶¶ 101, 104. He saw Langdon had no diapers or bottles. *Id.* ¶ 105. He had been briefed by responding police officers on Langdon's disturbed behavior, including scooting on the ground while complaining that "something was 'sucking her out' of the door." *Id.* ¶ 102 (emphasis omitted). He had witnessed firsthand Langdon's delusional state and inability to communicate. *Id.* ¶ 107. Yet Garcia decided to leave defenseless eleven-month-old twins in a motel room with Langdon—a room they were in only because he had them transported there, organized payment, and abandoned them.

Early in the morning of December 6, motel guests woke to the sounds of Langdon screaming for 911, covered only by a motel blanket. *Id.* ¶ 117; Ellis, *supra.* Langdon had placed Mason and Maddox in the bath,

drowned them, and laid their naked bodies on the motel bed. FAC ¶ 117. Just shy of a year old, they died before taking their first steps.

Langdon was prosecuted for murder and found not guilty by reason of insanity. Pet.App.14a. To date, Tulare County and City have not investigated any officers or social workers for their conduct.

B. Procedural History

1. In July 2019, Jose filed a 42 U.S.C. § 1983 suit on behalf of himself and the twins' estates in the U.S. District Court for the Eastern District of California, against petitioners and other defendants no longer at issue. Jose argued that petitioners' conduct caused Mason and Maddox to be subjected to the deprivation of their due-process rights to life and familial association. Pet.App.14a-16a. Specifically, Jose argued, petitioners Lewis, Cerda, Torres, and Garcia caused the deprivation of the twins' due-process right to life by removing them from Jose's custody and isolating them with Langdon, despite her obvious mental-health crisis and litany of abuse convictions. Pet.App.28a-39a. Jose alternatively argued that petitioners caused the deprivation of Jose's and the twins' due-process right to family unity by separating the family and causing the twins' deaths. Pet.App.67a-68a. Jose alleged that petitioners the City and County of Tulare were vicariously liable for these officials' misconduct. Pet.App.15a.

The district court dismissed the complaint. Pet.App.94a. The court recognized that the Ninth Circuit has long applied the state-created-danger doctrine. Pet.App.67a. But in the court's view, none of the individual officials increased the risk of harm to Mason and Maddox because the twins remained in Langdon's custody before and after petitioners intervened. Pet.App.78a, 80a, 88a. Because the court dismissed all

claims against individual officers, the court dismissed the supervisory-liability claims against the City and County. Pet.App.90a.

2. A divided Ninth Circuit panel reversed in part. Pet.App.46a. Writing for the majority, Judge Bea held that some of Jose's claims could proceed under the Ninth Circuit's two-part state-created-danger test for section 1983 liability. *First*, the state official must have engaged in "affirmative conduct … placing the plaintiff in danger." Pet.App.26a (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011)). *Second*, the official must have acted with "'deliberate indifference' to a 'known or obvious danger'"—a "stringent standard" that "is higher than gross negligence." Pet.App.26a-27a (quoting *Patel*, 648 F.3d at 974).

Emphasizing that the state-created-danger doctrine applies only in "narrow circumstances," Pet.App.19a, the court rejected Jose's claims against petitioners Lewis and Cerda. The majority reasoned that those two did not affirmatively increase the risk of harm because they entrusted the twins' care to neighbor Rosa, not just Langdon. Pet.App.29a. But the court gave Jose leave to amend his complaint as to these defendants. Pet.App.30a-31a.

By contrast, the Ninth Circuit held, petitioner Garcia could be held liable. *First*, Garcia affirmatively acted to endanger the twins; he moved them from the shelter, arranged a motel room, had the twins and Langdon transported there, and abandoned the twins with Langdon while she was visibly disturbed, belligerent, and delusional. Pet.App.31a. *Second*, although the question was "close," the court deemed Garcia deliberately indifferent to the obvious risk that Langdon would not care for two infants, for whom "the failure to provide care can be fatal." Pet.App.32a, Pet.App.34a. The court disclaimed "expand[ing] the state-created danger exception to apply

in cases of mere negligence." Pet.App.34a n.14. Instead, Jose's claim against Garcia fit existing precedent because Garcia had "exercised his authority to force the twins into an obviously dangerous situation" and "placed the twins in harm's way." Pet.App.34a-35a n.14.

The court also allowed Jose's section 1983 claim against petitioner Torres, the social worker who knew Langdon had a history of child abuse but falsely represented the opposite to Sergeant Garcia. Pet.App.35a. Absent this lie, the court concluded, "Garcia may have conducted an independent investigation into Langdon's criminal history and living situation" and decided not to leave the twins alone in a motel with their abusive, mentally disturbed mother. Pet.App.36a.

Because Jose had adequately pleaded an underlying section 1983 violation, the court reversed the dismissal of supervisory-liability claims against the City and County and remanded for further consideration. Pet.App.45a.

Judge Ikuta dissented in part. Pet.App.46a. She recognized that the Ninth Circuit had been "careful" to keep its state-created-danger jurisprudence "within the Supreme Court's framework," so the circuit's case law "generally reflected the Court's principles." Pet.App.51a. But she disagreed with the majority's application of circuit precedent to these facts. In her view, the complaint alleged only that petitioners acted negligently, which would not state a claim under Ninth Circuit precedent. Pet.App.54a-58a; *see* Pet.App.34a-35a n.14 (majority op.).

3. Petitioners sought rehearing en banc only as to the panel's holding that the section 1983 claims against social worker Torres could proceed. Petitioners notably did not challenge petitioner Garcia's liability, let alone the viability of the state-created-danger doctrine. Rather,

petitioners agreed with the panel majority that the doctrine applies when affirmative conduct by state actors endangers plaintiffs and exhibits deliberate indifference. En Banc Pet. 6-8, No. 21-16709, 73 F.4th 1103 (9th Cir. 2023). Petitioners merely contended that Torres' conduct did not meet that test. *Id.* at 17.

The Ninth Circuit denied rehearing en banc over Judge Bumatay's dissent. Pet.App.96a. Judge Bumatay *sua sponte* criticized the state-created-danger doctrine as constitutionally "atextual and ahistorical" and subject to inconsistent approaches among courts. Pet.App.107a, Pet.App.116a-118a. He would have limited the doctrine to cases where officials abused "*coercive* government power" and restrained the plaintiff's "freedom to act on his own behalf." Pet.App.120a (citation omitted). Judge Bumatay reasoned that Jose's claims would fail that standard, although he acknowledged a "close call" as to petitioners Lewis and Cerda. Pet.App.122a-126a.

REASONS FOR DENYING THE PETITION

This case is an exceptionally poor vehicle to address the state-created-danger doctrine. Below, petitioners forfeited, if not altogether waived, any challenge to the validity of the state-created-danger doctrine, along with the petition's various sub-questions about the contours of that doctrine. Moreover, this case presents an unusually complex fact pattern for resolving the petition's broader questions implicating other substantive-due-process claims. Plus, the petition rests on a fundamental misunderstanding of the state-created-danger doctrine—which derives from section 1983, not substantive due process alone—that skews everything from the question presented to the relevant legal framework.

The petition also does not implicate any circuit split. As petitioners (at 12) catalog, eleven circuits recognize

that state actors can be liable for egregious affirmative actions that cause harm by private parties. Only the Fifth Circuit has demurred, and that court recently confirmed that it has not definitively weighed in either way. Petitioners (at 15-21) raise other questions about the scope of the state-created-danger doctrine, including over the mens rea and increase in harm that should be required. But those differences are either semantic or reflect broader disagreements over substantive due process generally, not the state-created-danger doctrine. Regardless, every circuit that recognizes the state-created-danger doctrine would allow Jose's claims to proceed.

For over 40 years, eleven circuits have faithfully applied section 1983's plain text and permitted liability in narrow circumstances when egregious governmental misconduct causes a loss of rights. At least 26 times in the last 25 years, this Court has declined invitations to unsettle that precedent. *Infra* p. 27 n.3. This 27th attempt should fare no differently.

I. This Case Is an Unsuitable Vehicle for Considering the State-Created-Danger Doctrine

1. Petitioners have forfeited, if not altogether waived, the questions they now press. This Court ordinarily does not decide questions "'not raised or addressed' in the Court of Appeals," especially if the "petitioner … assert[s] new substantive grounds attacking … the judgment." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001). This Court is particularly averse to allowing parties to raise new arguments in this Court at odds with their positions below. *E.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 & n.2 (1989); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Here, petitioners object to the existence and elements of the state-created-danger doctrine. But until now, petitioners embraced the Ninth Circuit's endorsement of the doctrine and its scope. Most glaringly, petitioners' en banc petition adopted the panel's test: "[I]f affirmative conduct on the part of a state actor places a plaintiff in danger, and the [state actor] acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983." En Banc Pet. 6 (quoting Pet.App.26a). Petitioners did not even challenge the panel's holding that the state-created-danger claims against petitioner Garcia could proceed. Their en banc petition merely asserted that "[t]he allegations do not establish that Torres affirmatively created or exposed the twins to an actual, particularized foreseeable danger they would not otherwise have faced with a culpable mental state." *Id.* at 17. Similarly, petitioners' district-court and Ninth Circuit panel-stage briefs accepted the elements of the state-created-danger doctrine, merely disputing whether the facts here met the test.[1] This about-face is particularly problematic because petitioners now challenge the doctrine's historical origins without developing any factual or legal record. This Court should not accept petitioners' invitation to overhaul a doctrine that petitioners accepted below.

2. The petition is also unfit for review because petitioners obscure the foundations of the state-created-danger doctrine in ways that would impede resolution on the merits. Petitioners (at i) ask "[w]hether, and under what circumstances, a State's failure to protect an individual who is not in state custody from violence by a private

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[1] County MTD 13, No. 19-cv-942, 2021 WL 4503055 (E.D. Cal. Oct. 1, 2021); City MTD 8, No. 19-cv-942, 2021 WL 4503055 (E.D. Cal. Oct. 1, 2021); County Appellees Br. 8, No. 21-16709, 73 F.4th 1103 (9th Cir. 2023); City Appellees Br. 11, No. 21-16709, 73 F.4th 1103 (9th Cir. 2023).

person constitutes a violation of the Due Process Clause." Petitioners (at 12-13, 22-28) then fault circuits for inventing the state-created-danger doctrine by misreading this Court's substantive-due-process reasoning in *DeShaney*. And petitioners (at 23-24) variously attack the state-created-danger doctrine as an indefensible extension of substantive due process, or (at 28-29) urge the Court to rely on substantive-due-process cases in custodial settings to superimpose new limits on the doctrine.

But the state-created-danger doctrine does not rest on mere failures to protect, which this Court held non-actionable. *DeShaney*, 489 U.S. at 197. Thus, circuits that recognize the state-created-danger doctrine have uniformly *rejected* liability in non-custodial settings when state actors failed to protect individuals from private violence. *E.g.*, *First Midwest Bank v. City of Chicago*, 988 F.3d 978, 989-90 (7th Cir. 2021) (collecting cases).

Further, the state-created-danger doctrine derives from 42 U.S.C. § 1983, not the Due Process Clause alone. Undisputedly, state actors who themselves drown infants would be liable under § 1983 for violating the infants' substantive-due-process right to life. But section 1983 also creates a cause of action against state actors who "*cause*[]" persons "to be subjected … to the deprivation of [constitutional] rights," even if private actors are the ultimate perpetrators.

Section 1983's causation language dates to the Ku Klux Klan Act of 1871 and dealt with a "real and specific threat" of state-facilitated private violence—such as "a sheriff releas[ing] a prisoner to a vengeful lynch mob," or state officials facilitating the Klan's reign of racial terror. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 873 (5th Cir. 2012) (en banc) (Higginson, J., concurring in judgment); *see* David Pruessner, *The Forgotten Foundation of State-Created Danger*

Claims, 20 Rev. Litig. 357, 374-75 (2001). Thus, "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978).

That principle is the foundation of the state-created-danger doctrine, which holds state actors accountable under section 1983 for *causing* substantive-due-process violations when they affirmatively facilitate harm to such an extent that private harms become attributable to the state. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006); *Doe v. Rosa*, 795 F.3d 429, 438 n.6 (4th Cir. 2015); *Magee*, 675 F.3d at 871, 873 (Higginson, J., concurring in judgment); Pruessner, *supra*, at 374-75. As Judge Posner memorably put it, drawing from section 1983's tort-law roots: "If the state puts a man in a position of danger from private persons and then fails to protect him," the state "is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). State actors cannot evade section 1983 liability by blaming the snakes as the real tortfeasors. *Id.*

Petitioners (at 5, 23-27) further obscure the doctrine's origins by blasting circuits for fastening on language in *DeShaney* that absolved state actors for failing to intervene against child abuse where the state "played no part" in the "creation" of the danger, "nor did it do anything to render [the child] any more vulnerable." 489 U.S. at 201. But the state-created-danger doctrine emerged well before *DeShaney*, in such section 1983 cases as *White v. Rochford*, 592 F.2d 381, 382 (7th Cir. 1979); *Bowers*, 686 F.2d at 618; *Escamilla v. City of Santa Ana*, 796 F.2d 266, 269 (9th Cir. 1986); and *Wells v. Walker*, 852 F.2d 368, 370-71 (8th Cir. 1988). Courts simply took *DeShaney*'s distinction between failing to protect against a danger and affirmatively creating or enhancing a danger as implicitly

endorsing those circuits' approaches. *E.g.*, *Kennedy*, 439 F.3d at 1061 n.1; *Doe*, 795 F.3d at 438 n.6; *Magee*, 675 F.3d at 871, 873 (Higginson, J., concurring in judgment).

Petitioners' misconceptions of the state-created-danger doctrine do not just refute their position on the merits. *Infra* pp. 29-32. By framing this case as an attack on expanding substantive due process, petitioners also ask the wrong questions while leaving the right ones unaddressed. For instance, petitioners (at 23-24) assert that no Founding-era history or tradition supports the notion that due process obligates state actors to avoid putting individuals at risk of due-process violations by private actors. But if section 1983 provides the relevant framework, the briefing should instead train on section 1983's causation language, as understood circa 1871 within the context of state-facilitated Ku Klux Klan lynchings and mob violence.

Petitioners (at 28-30) likewise express willingness to accept strains of this Court's substantive-due-process jurisprudence in custodial settings to fashion further constraints on the state-created-danger doctrine. But if section 1983 is the body of law doing the work, the more relevant question might be to examine tort-law concepts, since the statute "created a species of federal tort liability for individuals to sue state and local officers for deprivations of constitutional rights." *Thompson v. Clark*, 596 U.S. 36, 42 (2022). These big-picture questions risk transforming merits briefing into a sprawling, unfocused morass of two ships passing in the night.

3. Even spotting petitioners their substantive-due-process framing, this would be a bad case to tease out appropriate substantive-due-process standards.

This case boils down to a fact-specific dispute over the application of the Ninth Circuit's state-created-danger

doctrine. Judge Ikuta contended that previous Ninth Circuit cases "were careful to remain within the Supreme Court's framework" but disagreed whether this case fit that circuit precedent. Pet.App.51a. Meanwhile, the panel majority "strongly disagree[d]" with Judge Ikuta's characterization of the facts. Pet.App.34a n.14. Reinforcing the case-specific disagreement over circuit precedent, petitioners filed a fact-bound rehearing petition challenging the application of Ninth Circuit state-created-danger caselaw as to only one defendant. *Supra* pp. 13-14.

And this case—unlike most state-created-danger cases—involves multiple substantive-due-process rights. Jose asserted section 1983 claims not just based on the twins' right to life, but also his and the twins' right to familial association. Substantive-due-process claims are highly context-specific, with rules that do not automatically apply across contexts. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). As petitioners' cited cases (at 17-19 & n.6) reveal, few state-created-danger cases have the familial-association overlay.

Further, while petitioners (at 34) spin the "range of defendants"—Lewis, Cerda, Garcia, Torres, the City, and the County—as an upside, their multitude adds needless complexity. The Ninth Circuit rejected Jose's claims against petitioners Lewis and Cerda. As to them, this Court would apparently be deciding the fact-bound, discretionary question of whether Jose should have been granted leave to amend. The only petitioners presently proceeding past the motion-to-dismiss stage are Garcia and Torres. But those defendants also present atypical fact patterns. Typical state-created-danger claims involve single defendants or defendants who worked together to cause the injury. *E.g.*, *Sanford v. Stiles*, 456 F.3d 298, 303 (3d Cir. 2006); *Turner v. Thomas*, 930 F.3d 640, 644 (4th Cir. 2019). Here, Garcia and Torres worked

at cross-purposes, lying to each other in ways that amplified the danger the twins faced. Finally, as to petitioners the City and County, the Ninth Circuit remanded for evaluation of supervisory liability—another mid-case docket-management decision injecting messiness.

II. This Case Does Not Implicate Any Circuit Split

For decades, eleven courts of appeals have held that section 1983 permits liability against state actors who place individuals in harm's way—thereby "caus[ing] [plaintiffs] to be subjected" to the deprivation of federal rights. 42 U.S.C. § 1983; *see Bowers*, 686 F.2d at 618; *White*, 592 F.2d at 384-85; *Wells*, 852 F.2d at 370-71. No circuits disagree. The Fifth Circuit simply remains undecided, as that court recently emphasized. This Court's intervention is manifestly unwarranted when no courts have endorsed petitioners' broadsides against the existence of the state-created-danger doctrine. Nor do petitioners' perceived variances in how circuits formulate the doctrine implicate clean splits. In every circuit, liability attaches only to egregious, affirmative misconduct. And petitioners' recognition that cases vary widely *within* circuits underscores the lack of entrenched circuit splits.

1. No circuits have split over whether the state-created-danger doctrine exists. As petitioners (at 12) acknowledge, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits recognize the doctrine.

Petitioners (at 13-15) claim a split with the Fifth Circuit, which "has not adopted" this "theory" for holding "a state actor … liable under [section] 1983." *Magee*, 675 F.3d at 864-65 (citation omitted). But as petitioners (at 14) admit, the Fifth Circuit just clarified it has "not categorically *ruled out* the doctrine either." *Fisher v. Moore*, 73 F.4th 367, 372 (5th Cir. 2023). Fifth Circuit panels have

assumed that the state-created-danger doctrine *is* viable, but rejected claims on the merits. *E.g.*, *Beltran v. City of El Paso*, 367 F.3d 299, 307-08 (5th Cir. 2004); *Piotrowski v. City of Houston*, 237 F.3d 567, 584-85 (5th Cir. 2001). Leaving a question open does not create a circuit split.

Petitioners (at 15) say the Fifth Circuit's divergence "is widely acknowledged." But, save for Judge Bumatay's dissent, petitioners' sources (at 15 & n.5) pre-date the Fifth Circuit's recent confirmation in *Fisher* that the door remains open to state-created-danger claims. Other circuits share the Fifth Circuit's own view: The Fifth Circuit has not "rejected the state-created danger doctrine." *Irish v. Fowler*, 979 F.3d 65, 78 n.7 (1st Cir. 2020).

2. Petitioners next identify disagreements over the scope of the state-created-danger doctrine among the eleven circuits that recognize it. Petitioners claim disagreement over whether (1) the defendant's conduct must "shock the conscience"; (2) "deliberate indifference suffices to impose liability"; and (3) "how much the State must increase the danger." Pet. 15-21 (emphasis omitted). Petitioners (at 22 n.9) identify two other splits on which they do not seek review, illustrating that even resolving petitioners' many questions presented would not yield doctrinal clarity.

Petitioners' splits miss the forest for the trees. All eleven circuits agree on key guardrails. They "uniformly require" that (1) "the defendant affirmatively acted to create or exacerbate a danger"; (2) the defendant was "highly culpable"; and (3) "a causal connection" exists between the defendant's action and the injury. *Irish*, 979 F.3d at 73-74 (cataloging cases). All eleven circuits view those criteria as stringent standards that only truly egregious cases of state-caused constitutional violations will satisfy. *E.g.*, *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir. 2008) (requiring "egregious" conduct to "screen[] out

all but the most significant constitutional violations"); *Turner*, 930 F.3d at 645 ("narrowly drawn"); *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019) ("quite narrow and reserved for 'egregious' conduct"); Pet.App.19a ("narrow circumstances"); *Moore v. Guthrie*, 438 F.3d 1036, 1042 (10th Cir. 2006) ("narrow exception").

Petitioners' first two asserted splits—whether conduct must shock the conscience and whether deliberate indifference ever suffices—are not even unique to the state-created-danger doctrine. Those questions reflect broader disagreement over substantive-due-process claims, because this Court "has not fully explicated the standard of culpability in substantive due process cases generally." *Sanford*, 456 F.3d at 305.

Start with whether conduct must shock the conscience. *Lewis* held that, "in the[] circumstances" of police injuring someone in a high-speed chase, the defendants' conduct must "shock the conscience" to violate substantive due process. 523 U.S. at 853-54. The Court left open the standard in other contexts. Since then, lower courts have struggled with what mens rea applies to substantive-due-process claims generally, even when state actors commit the harm from start to finish. The result has been a "growing circuit split on when and how to apply the requisite level of culpability under [*Lewis*]." *Braun v. Burke*, 983 F.3d 999, 1005 (8th Cir. 2020) (Grasz, J., concurring). But this Court has denied review in at least 19 cases presenting that question.[2] Deciding this cross-cutting question about a core element of every substantive-

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[2] *Place v. Anderson*, 143 S. Ct. 373 (2022); *Braun v. Burke*, 142 S. Ct. 215 (2021); *County of San Diego v. Mann*, 140 S. Ct. 143 (2019); *Schroeter v. Kedra*, 138 S. Ct. 1990 (2018); *Milwaukee Police Ass'n v. City of Milwaukee*, 580 U.S. 999 (2016); *Burgin v. Leach*, 571 U.S. 1130 (2014); *Al-Jurf v. Scott-Conner*, 565 U.S. 1113 (2012); *Wilcox v.*

due-process claim would shed no light on the specifics of the state-created-danger doctrine. Just as a case contesting the elements of section 1983 malicious-prosecution claims provides a poor context for settling whether certain speech enjoys constitutional protection, this dispute over state-created-danger claims provides an inapt setting for resolving substantive-due-process questions.

Similarly, courts in substantive-due-process cases writ large have struggled with what level of intent—deliberate indifference or something more—suffices. Even when state actors commit all the harm themselves, some courts require intent to harm, while others sometimes accept deliberate indifference. *Compare Bingue v. Prunchak*, 512 F.3d 1169, 1177 (9th Cir. 2008) (intent), *with Green v. Post*, 574 F.3d 1294, 1302-03 (10th Cir. 2009) (deliberate indifference). As then-Judge Gorsuch observed, the culpability standard in substantive-due-process cases "remains very much unchartered." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 (10th Cir. 2015).

But again, this Court has declined at least 19 invitations to settle these questions. *Supra* pp. 23-24 n.2. Answering these culpability questions would be far simpler in a case raising only those questions. The unique fact patterns of state-created-danger cases, involving indirect harms, make this setting a poor one to resolve

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Fenn, 562 U.S. 1134 (2011); *Sitzes v. City of West Memphis*, 562 U.S. 1109 (2010); *McDonough v. Crowe*, 562 U.S. 1135 (2011); *Matican v. City of New York*, 555 U.S. 1047 (2008); *Waybright v. Frederick Cnty. Dep't of Fire & Rescue Servs.*, 555 U.S. 1069 (2008); *Daniels v. City of Dallas*, 555 U.S. 1049 (2008); *Eichenlaub v. Twp. of Indiana*, 552 U.S. 826 (2007); *Perez v. Unified Gov't of Wyandotte Cnty.*, 548 U.S. 905 (2006); *Levin v. Upper Makefield Twp.*, 543 U.S. 1035 (2004); *Slusarchuk v. Hoff*, 541 U.S. 988 (2004); *Norton v. Hall*, 541 U.S. 1009 (2004); *Helseth v. Burch*, 534 U.S. 1115 (2002).

systemic substantive-due-process issues. If this Court wants to resolve the mens rea for substantive-due-process claims generally, the far better vehicle would be a case involving a direct violation by state actors.

Only petitioners' third asserted split—how much the state action must increase the danger—is specific to the state-created-danger doctrine. And here, petitioners mistake a semantic quibble for something more. Petitioners (at 20-21) note that some circuits require defendants to "greatly" or "significant[ly]" increase the danger. The First and Ninth Circuits omit the adverb and ask whether defendants placed plaintiffs in danger, but then require that defendants "actually knew of a *substantial* risk of serious harm," *Irish*, 979 F.3d at 75 (emphasis added), or "recognize[d] [an] *unreasonable* risk," *Patel*, 648 F.3d at 974 (citation omitted; emphasis added). In other words, the First and Ninth Circuit achieve a similar end through the mens rea element.

Petitioners identify no case where that framing difference mattered. Certainly, not this one. Multiple state actors working together to take 11-month-old babies from their loving, competent father and lock them alone with a convicted child abuser clears any degree-of-danger test. Besides, petitioners (at 21) mischaracterize the decision below. The Ninth Circuit did not fault the district court for asking whether petitioners left Mason and Maddox *significantly* more vulnerable, not just "more vulnerable." Rather, the Ninth Circuit held that the district court applied "the wrong standard" by asking whether Mason and Maddox were *in custody* because the circuit's state-created-danger test does not require custody. Pet.App.31a.

Similarly, the First Circuit did not reverse the district court solely for requiring state action to "'greatly' increase the danger." Pet. 21 (citing *Welch v. City of*

Biddeford Police Dep't, 12 F.4th 70, 76 (1st Cir. 2021)). Rather, that court remanded for the district court to apply new First Circuit precedent comprehensively articulating the elements of state-created-danger claims. *Welch*, 12 F.4th at 76-77. While the court observed that the district court asked whether the defendants "'greatly' enhanced, "rather than simply 'enhanc[ing]' the danger," the court never suggested that adverb would change the judgment line. *Id.* at 76. Indeed, on remand, the district court granted the defendants' motion for summary judgment. *Johnson v. City of Biddeford*, 2023 WL 2712861, at *32 (D. Me. Mar. 30, 2023), *appeal docketed*, No. 23-1399 (1st Cir. May 1, 2023).

3. As petitioners' emphasis on "intra-circuit[] disharmony" underscores, variations within circuits' precedents thwart the development of any hard-and-fast differences *between* circuits that would warrant review. *See* Pet. 22 (citation omitted).

To start, petitioners (at 17, 21, 28-31) repeatedly portray the Ninth Circuit as the most extreme, pro-plaintiff forum. But Ninth Circuit panels describe circuit state-created-danger precedent as "somewhat scattershot." *Patel*, 648 F.3d at 974. For instance, while one panel rejected a shocks-the-conscience standard, *Kennedy*, 439 F.3d at 1064-65, another recently required state action to "shock[] the conscience," *Sinclair v. City of Seattle*, 61 F.4th 674, 680 (9th Cir. 2023).

Intra-circuit confusion abounds elsewhere too. In the Third Circuit, the standard for culpability was long "difficult to discern." *Sanford*, 456 F.3d at 305. In the Sixth Circuit, some cases invoke a more "demanding" culpability standard than others. *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 494 (6th Cir. 2019) (Murphy, J., concurring). And one panel of the Tenth Circuit criticized another for making "nary a mention" of that circuit's

limitations on the doctrine. *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 920 (10th Cir. 2012). But individual circuits—not this Court—should resolve any intra-circuit inconsistencies.

III. The Question Presented Is Oft-Denied and Does Not Demand Intervention

Over the last 25 years, this Court has denied at least 26 petitions asking this Court to address the state-created-danger doctrine.[3] Denial remains appropriate here, given the Fifth Circuit's recent confirmation of the lack of any split and petitioners' forfeiture and waiver below.

Moreover, the state-created-danger theory has reached middle age without wreaking discernible havoc, and petitioners identify no pressing reason to disrupt this long-standing body of law. For 40-plus years, circuits now covering 47 States and the District of Columbia have applied the state-created-danger doctrine to egregious cases

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[3] *Reilly v. Ottawa County*, 142 S. Ct. 900 (2022); *First Midwest Bank v. City of Chicago*, 142 S. Ct. 389 (2021); *Robinson v. Webster County*, 141 S. Ct. 1450 (2021); *Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 141 S. Ct. 895 (2020); *Anderson v. City of Minneapolis*, 141 S. Ct. 110 (2020); *Cook v. Hopkins*, 140 S. Ct. 2643 (2020); *Est. of Her v. Hoeppner*, 140 S. Ct. 1121 (2020); *Cancino v. Cameron County*, 140 S. Ct. 2752 (2020); *Robinson v. Lioi*, 140 S. Ct. 1118 (2020); *Turner v. Thomas*, 140 S. Ct. 905 (2020); *Long v. County of Armstrong*, 582 U.S. 932 (2017); *Est. of Reat v. Rodriguez*, 581 U.S. 904 (2017); *Doe 2 v. Rosa*, 577 U.S. 1065 (2016); *Crockett v. Se. Pa. Transp. Auth.*, 577 U.S. 820 (2015); *Lioi v. Robinson*, 572 U.S. 1002 (2014); *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 568 U.S. 883 (2012); *Repking v. Lokey*, 562 U.S. 1221 (2011); *Cravens v. City of La Marque*, 552 U.S. 822 (2007); *Jones v. Kish*, 549 U.S. 1166 (2007); *Rios v. City of Del Rio*, 549 U.S. 825 (2006); *Vaughn v. City of Athens*, 549 U.S. 955 (2006); *Piotrowski v. City of Houston*, 534 U.S. 820 (2001); *Est. of Henderson v. City of Philadelphia*, 531 U.S. 1015 (2000); *Kirk v. Del. Cnty. Sheriff's Dep't*, 522 U.S. 1116 (1998); *Settles v. Penilla*, 524 U.S. 904 (1998); *White-Page v. Harris County*, 522 U.S. 913 (1997).

of governmental misconduct without creating a plaintiff bonanza or compromising law-enforcement functions.

Petitioners (at 32) claim that state-created-danger cases are common because plaintiffs frequently use the phrase "state-created danger" in federal complaints. That statistic says nothing about whether those complaints actually raise state-created-danger claims or just mention the phrase in passing, or are frivolous. In practice, state-created-danger claims seldom succeed and are routinely resolved at the motion-to-dismiss stage. One study found that state-created-danger cases "rarely survive dismissal, much less summary judgment" on appeal. Laura Oren, *Some Thoughts on the State-Created Danger Doctrine:* DeShaney *Is Still Wrong and* Castle Rock *Is More of the Same*, 16 Temp. Pol. & Civ. Rts. L. Rev. 47, 48 (2006). As petitioners (at 12-13 n.3) note, no published Fourth Circuit opinion has *ever* upheld a state-created-danger claim.

Collectively, only eleven state-created-danger claims (including this one) survived appeal in the last five years.[4] By contrast, dismissals over the last five years are legion; in the last six months alone, nine circuit cases affirmed the

[4] *See* Pet.App.46a; *Polanco v. Diaz*, 76 F.4th 918 (9th Cir. 2023); *Garcia v. Mirabal*, 2023 WL 4758457 (9th Cir. July 26, 2023); *R.S. ex rel. V.H. v. Lucas Cnty. Child. Servs.*, 2022 WL 17730531 (6th Cir. Dec. 16, 2022); *Mears v. Connolly*, 24 F.4th 880 (3d Cir. 2022); *Welch*, 12 F.4th 70; *Ogbechie v. Covarrubias*, 2021 WL 3523460 (9th Cir. Aug. 11, 2021); *Irish*, 979 F.3d 65; *Lipman v. Budish*, 974 F.3d 726 (6th Cir. 2020); *Davis v. Wash. State Dep't of Soc. & Health Servs.*, 773 F. App'x 367 (9th Cir. 2019); *Corgan v. Keema*, 765 F. App'x 228 (9th Cir. 2019).

dismissal of a state-created-danger claim.[5] The ready dismissal of meritless complaints belies petitioners' concerns (at 32) over the costs of state-created-danger litigation.

Petitioners and amici argue that the state-created-danger doctrine intrudes on state tort law and creates "perverse incentives for state actors" by discouraging police from intervening. Pet. 32-33; CAJPA Br. 4-5; NSA Br. 12-20; IMLA Br. 10-14. But 40-plus years of experience belie those policy concerns; state actors every day do their jobs, protect the public, and intervene to protect the vulnerable.

Codes of conduct, state laws, and departmental policies across the country mandate intervention in certain contexts—including several interactions that officers had with Langdon here. For instance, California's Child Welfare Services manual requires social workers to respond to all referrals for child abuse with an in-person investigation. Child Welfare Services Manual, *supra*, § 31-101. Those laws and policies confirm that the norm is to require officials to act—not to deter them from intervening.

IV. The Decision Below Is Correct

1. Petitioners argue that they cannot be held liable for the deprivation of the twins' rights because Langdon, not petitioners, drowned Mason and Maddox. But petitioners overlook the missing link: section 1983. Enacted

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[5] *See Ablordeppey v. Walsh*, 85 F.4th 27 (4th Cir. 2023); *Gomez v. Se. Pa. Transp. Auth.*, 2023 WL 5950549 (3d Cir. Sept. 13, 2023); *Hall v. City of Portland*, 2023 WL 5527854 (9th Cir. Aug. 28, 2023); *Nguyen v. Boylan*, 2023 WL 5444524 (6th Cir. Aug. 21, 2023); *Martin v. Busby*, 2023 WL 4983234 (5th Cir. Aug. 3, 2023); *Linden v. City of Southfield*, 75 F.4th 597 (6th Cir. 2023); *Fisher*, 73 F.4th 367; *Haggard v. Mitowksi*, 2023 WL 4077337 (3d Cir. June 20, 2023); *Aga v. Meade County*, 2023 WL 3300960 (8th Cir. May 8, 2023).

to punish state officials who facilitated Klan violence, section 1983 permits liability against state actors who "cause[]" individuals "to be subjected" to the deprivation of rights. *Supra* pp. 17-18. The state-created-danger doctrine flows directly from that text. Pruessner, *supra*, at 374-75. Here, petitioners caused Mason and Maddox's loss of life and family unity by separating them from anyone who could help and deliberately isolating them with a mentally ill convicted child abuser.

Accordingly, the state-created-danger doctrine does not conflict with *DeShaney*'s holding that failing to protect does not violate due process outside of the custodial context. 489 U.S. at 197; *contra* Pet. 25. Petitioners object that *DeShaney* did not "fashion a novel theory of substantive due process liability." Pet. 27 (quoting Pet.App.110a (Bumatay, J., dissenting)). True, but that is because, as the Ninth Circuit has explained, *DeShaney* simply recognized a textually rooted theory of section 1983 liability that courts of appeals had been applying for over a decade. *Kennedy*, 439 F.3d at 1061 n.1. *DeShaney* did not need to create a theory of section 1983 liability that was already there.

2. Petitioners (at 28-30) argue that, even accepting the state-created-danger doctrine, the Ninth Circuit takes the doctrine too far. Petitioners do not challenge this Court's substantive-due-process precedent writ large, including substantive-due-process rights to parental custody and life. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality op.) (parental custody); *id.* at 77 (Souter, J., concurring); *Lewis*, 523 U.S. at 840 (life). And, at various points, petitioners (at 26, 30) seemingly embrace this Court's substantive-due-process precedents applicable to custodial contexts. *E.g.*, *DeShaney*, 489 U.S. at 199-201 (citing *Youngberg v. Romero*, 457 U.S. 307, 317 (1982)). But petitioners (at 28-30) ask this Court to limit

the state-created-danger doctrine to acts that (1) involve coercing or restraining action, (2) shock the conscience, and (3) greatly increase the danger to the plaintiff. Petitioners thus effectively ask this Court to double down on substantive-due-process precedents from the custodial context and engraft them onto the state-created-danger doctrine.

Despite embracing history and tradition elsewhere (at 23-25), petitioners do not explain how those guideposts support their proposed line-drawing, let alone how this Court could repudiate the supposed expansion of substantive-due-process here without throwing longstanding substantive-due-process precedents into question. Petitioners (at 30) simply deem their approach "more sensible"—a mode of analysis this Court has repudiated when it comes to expanding or contracting constitutional rights. And, again, all of this speculative line-drawing ignores the lines that section 1983 already drew to impose liability on state actors who "cause[]" citizens "to be subjected" to deprivations of constitutional rights.

Petitioners' test would also create anomalies in the meaning of state action. The Fifth Circuit has held that encouragement constitutes state action in the First Amendment context. *See Missouri v. Biden*, 83 F.4th 350, 387-91 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, 601 U.S. ---, 2023 WL 6935337 (2023). Petitioners never explain why state-created-danger claims should have a different definition of state action than other constitutional claims—particularly given section 1983's causation language.

Regardless, Jose's claims would survive dismissal even under petitioners' preferred coercion-based test. Petitioners (at 31) characterize their actions as "shortcomings in dealing with Langdon's mental disturbance." But that grossly understates petitioners' conduct.

At each turn, petitioners used coercive power to take the twins away from Jose, bringing them well under the umbrella of state-created-danger precedent. Petitioners Lewis and Cerda separated Jose from his children, sent Langdon to a church over a hospital, and then used the power of their office to prevent Jose from following. Garcia, similarly, used coercive power to remove the twins from the shelter, place them in a police cruiser, arrange for their stay at a motel, and isolate them with Langdon in a motel room.

Other circuits have similarly held state actors liable for isolating victims in dangerous situations, like leaving a drunk woman or children alone in the cold to suffer exposure. *E.g.*, *Kneipp v. Tedder*, 95 F.3d 1199, 1208-09 (3d Cir. 1996); *White*, 592 F.2d at 384-85. And Judge Bumatay accepted as a "modest" application of the state-created-danger doctrine a Ninth Circuit case where police left a woman alone in a high-crime area where she was raped. Pet.App.112a (citing *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989)).

Torres likewise used her authority as a social worker to shape Garcia's actions by lying to him about Langdon's housing and history of violence. An "affirmative act by a state actor to interfere with the protective services which would have otherwise been available" can constitute a viable section 1983 claim. *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990).

All of that conduct "meaningfully increased the risk of harm" to Mason and Maddox and is conscience-shocking in its egregiousness. *Contra* Pet. 35. Petitioners' fact-bound disagreement over the Ninth Circuit's application of settled precedent to the tragic facts of this case does not warrant this Court's review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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