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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This petition easily satisfies the criteria for certiorari. The circuits are split on whether and how the state-created danger doctrine applies. The Ninth Circuit's extreme position expands substantive due process in ways that flout the Constitution's original meaning and *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). And the issue is important and frequently litigated, as a wide array of state, local, and law enforcement amici confirm.

Respondents seriously contest none of this. To the contrary, they affirmatively acknowledge multiple circuit splits, and they concede that state-created danger claims are both frequently filed and frequently meritless.

Instead, respondents urge the Court to reject review based on a novel defense of the doctrine that bears no resemblance to the justifications given by the Ninth Circuit or other federal courts. But while respondents will have every opportunity to advance their new merits theory on plenary review, that theory is no reason to deny certiorari. And respondents' vehicle objections are all baseless: If this Court grants review, it will have no difficulty squarely resolving the question presented.

This case presents an ideal opportunity to resolve the circuit splits and settle the validity of the state-created danger doctrine. The petition should be granted.

ARGUMENT

A. The Circuit Splits Are Real And Entrenched

1. Respondents concede that the circuits recognizing the state-created danger doctrine are intractably divided over its core requirements. Respondents do not deny the existence of (1) a 10-1 split over whether the State's conduct must "shock the conscience," and (2) a 3-2-3-1 split over whether and when deliberate indifference suffices to impose liability. Opp.23-25; *see* Pet.15-20. Nor do respondents dispute that these splits are important and result in divergent outcomes across the country, or that the Ninth Circuit has embraced the broadest view of liability on each split.

Respondents nevertheless oppose review because the splits are supposedly "not . . . unique to the state-created-danger doctrine," and instead "reflect broader disagreement over substantive-due-process claims." Opp.23. That rejoinder makes no sense. The splits implicate essential guardrails limiting the scope of the state-created danger doctrine. Regardless of whether and how those principles apply to other substantive due process theories, this Court should resolve the circuit splits in this important category of cases.

If anything, the case for review is *strengthened* if this case implicates broader—and even more significant—circuit splits over substantive due process. After all, as respondents themselves acknowledge, those broader splits exist because this Court "'has not fully explicated'" the relevant legal standards. *Id.* This problem will persist unless the Court grants certiorari to resolve them.

But respondents' unusual too-important-to-grant argument means that fundamental disagreements over substantive due process will *never* be resolved, because any given case will present the issue in only a single type of claim. That is a recipe for perpetual confusion about federal law—precisely what certiorari is designed to prevent.

2. The circuits are also split 4-2 over how much a State must increase the danger to a private party in order to trigger the state-created danger doctrine. Pet.20-21. Respondents do not deny that the circuits apply divergent standards, with some requiring "'greatly' . . . increase[d]" danger (or the creation of "significant[]'" or "'substantial'" risks) and others looking to whether state action enhanced the private danger to *any* degree. Opp.25. But they dismiss the split as a "semantic quibble," asserting that the latter circuits "achieve a similar end through the mens rea element" by requiring that defendants "'actually knew of a *substantial* risk of serious harm.'" *Id.*

Respondents are mistaken. Magnitude of harm and mens rea are apples and oranges. Whereas the circuit split focuses on the *marginal increase* in *actual* danger attributed to state action, the mens rea requirement addresses the State's *state of mind* as to the *overall* danger.

Nor is disagreement over the former just semantics. In *Johnson v. City of Biddeford*, for example, the district court found no constitutional violation because the officers had not "greatly" enhanced the danger to the victim. 454 F. Supp.3d 75, 89 (D. Me. 2020). The First Circuit reversed, instructing the district court to find a violation if state action had enhanced the danger *at all*. *Welch v. City of Biddeford Police Dep't*, 12 F.4th 70, 76 (1st Cir.

2021). Applying that new standard on remand, the district court shifted course, rejecting the officers' argument that their conduct was necessarily lawful. *Johnson v. City of Biddeford*, 2023 WL 2712861, at *15-16 (D. Me. Mar. 30, 2023). Lowering the standard made the key difference.

3. Respondents also argue that because the Fifth Circuit has not *categorically* rejected the state-created danger doctrine, there is no circuit split as to the doctrine's constitutional validity in the first place. Opp.21-22. But as a practical matter, the Fifth Circuit slammed the door on the doctrine long ago. *See* Pet.13-14.

Back in 2002, Judge Parker characterized the notion that "no Circuit split exists" because the Fifth Circuit has *technically* kept the question open as an "illusion" designed to "avoid[] Supreme Court scrutiny." *McClendon v. City of Columbia*, 305 F.3d 314, 338 n.10 (5th Cir. 2002) (dissenting). The Fifth Circuit and lower courts have since treated the unavailability of the doctrine as binding circuit precedent. *See e.g.*, *Robinson v. Webster County*, 825 F. App'x 192, 196 (5th Cir. 2020); *Brownlee v. Mississippi Dep't of Pub. Safety*, 2020 WL 5517677, at *9 (N.D. Miss. Sept. 14, 2020).

Respected academics have long agreed that the Fifth Circuit rejects the state-created danger theory. *See* Pet.15. So too have respondents' own Supreme Court counsel. In a recent certiorari petition for a different client, they told this Court that "the Fifth Circuit rejects the state-created danger theory, and has repeatedly reaffirmed its outlier position in the face of disagreement from almost every other federal appellate court in the country." Pet.10, *Robinson v. Webster County*, 141 S. Ct. 1450 (2021) (No. 20-634)

(*Robinson* Pet.); *see also id.* at 17-19 (citing eleven judicial decisions and four academic articles noting Fifth Circuit's outlier status).

Respondents highlight *Fisher v. Moore*'s recent statement that the Fifth Circuit has not formally rejected the state-created danger doctrine. 73 F.4th 367, 372 (5th Cir. 2023); Opp.21-22. But they ignore *Fisher*'s language unmistakably throwing shade on the doctrine's validity. *See* 73 F.4th at 373; Pet.14-15. Respondents also ignore later rulings describing *Fisher* as "fairly question[ing]" the doctrine's legitimacy and declaring that *Fisher* shows its future in the Fifth Circuit is "not promising."[1] Those assessments are right: The state-created danger theory is effectively dead in the Fifth Circuit, unlike everywhere else.

B. Respondents' Merits Arguments Fail

On the merits, respondents argue that state-created danger liability faithfully reflects Section 1983 causation principles. Opp.17-19. That argument is no reason to let the circuit splits fester. But it is wrong in any event, and certainly does not justify the Ninth Circuit's far broader outlier theory of the doctrine.

Respondents cannot persuasively defend the state-created danger doctrine under the Due Process Clause's original meaning or *DeShaney*. *See* Pet.23-28. Instead, they argue that it merely reflects Section 1983, which they say "assigns liability to a state actor

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[1] *Cappel v. Aston Twp. Fire Dep't*, 2023 WL 6133173, at *7 n.15 (E.D. Pa. Sept. 19, 2023); *Salinas v. City of Houston*, 2023 WL 8283636, at *3 (S.D. Tex. Nov. 30, 2023); *see also Jackson v. City of Houston*, 2023 WL 7093031, at *6 (S.D. Tex. Oct. 26, 2023) (same point).

who '*causes* [a person] to be subjected' to harm." Opp.2 (alteration in original) (quoting 42 U.S.C. § 1983).

That mischaracterization of Section 1983 fails. The statute does *not* impose liability for merely causing a victim's "harm." Rather, it imposes liability for causing a "deprivation of any rights . . . *secured by the Constitution*." 42 U.S.C. § 1983 (emphasis added). So, there can be no Section 1983 claim without an underlying violation of federal rights. For state-created danger claims, the only purported right at issue is the substantive due process right to be free from *state* deprivation of life or liberty. Without a substantive due process violation, all that's left is causation and an act of private violence. But *DeShaney* says these are not enough to establish Section 1983 liability. 489 U.S. at 194-201.

Even if respondents' theory were right, they concede that at most it justifies "hold[ing] state actors accountable under section 1983 . . . when they affirmatively facilitate harm *to such an extent that private harms become attributable to the state*." Opp.18 (emphasis added). That would cover extreme cases where state actors intentionally subject someone to private harm—for example, by throwing a person into a snake pit or delivering a Black person to a Ku Klux Klan mob. *See* Opp.18-19. But it would not encompass the far broader range of conduct deemed unconstitutional by the Ninth Circuit, which imposes liability even when state action does not shock the conscience and only unintentionally increases the risk of harm by any amount. *See* Pet.28-31.

Respondents do not defend these extreme features of the Ninth Circuit's outlier rule. Nor do they

address—let alone justify—the absurd results that rule has produced. *See* Pet.31 (describing cases). They certainly cannot justify the result here, where petitioners' conduct—even if negligent—did not make Heather Langdon's violence against her children "attributable to the state" in any moral or legal sense. Opp.18. Respondents' merits arguments only underscore the case for review.

C. The Question Presented Is Important

Just like *DeShaney*, this case has wide-ranging and "importan[t]" implications for "the administration of state and local governments." 489 U.S. at 194; *see* Pet.32-34. A broad array of amici—representing interests of government and law enforcement entities—have emphasized the significance of the state-created danger doctrine and urged this Court to grant review. *See* Int'l Municipal Lawyers Ass'n Amici Curiae Br.5-14; National Sheriffs Ass'n Amici Curiae Br.12-20; Joint Powers Authorities Amicus Curiae Br.4-5.

1. Respondents do not deny that the state-created danger doctrine is frequently litigated and involves an important issue of constitutional law. On the contrary, as their counsel have written, the question presented here "recurs with regularity and is of critical importance." *Robinson*, Pet.19.

Respondent's assorted string cites (at 27-29 nn.3-5) only confirm this. And although respondents question (at 28) whether federal complaints invoking the "state-created danger" doctrine "actually raise state-created-danger claims," the answer is yes: In 2023, such claims have been filed in more than three dozen cases *within the Ninth Circuit alone*. *See* Pet.32 & n.10 (describing Lex Machina search methodology).

Respondents downplay this flood of state-created danger litigation, noting that the claims are often "meritless," "seldom succeed," and are "routinely resolved at the motion-to-dismiss stage." Opp.28-29. But respondents' own study shows that 25% of such claims *survive* motions to dismiss. 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, 49 n.12 (2006).

Regardless, the fact that so many state-created danger claims are frivolous or low merit confirms the need for this Court to decide whether they are ever legally viable at all. After all, "the burden of defending" even "marginal" or "frivolous" § 1983 suits "is substantial." *Town of Newton v. Rumery*, 480 U.S. 386, 387-88 (1987). As amici emphasize, broad liability for state-created danger has forced governments "to expend substantial public resources in defending these types of claims," Joint Powers Br.5, and to "settle even meritless Section 1983 actions," Municipal Lawyers Br.9. Such costs might be justifiable where actual constitutional rights are implicated. But not here, where the state-created danger theory lacks legitimate constitutional grounding.

2. Respondents have no answer to the perverse incentives the state-created danger doctrine creates for law-enforcement officers and other government actors. *See* Pet.32-33; Sheriffs Br.12-20; Municipal Lawyers Br.10-14; Joint Powers Br.4-5. All they muster is a general assertion that "state actors every day do their jobs, protect the public, and intervene to protect the vulnerable." Opp.29. But no one is saying that a broad state-created danger doctrine would

eliminate police protection and the provision of social services. Respondents' straw man cannot overcome amici's valid concerns, which reflect the real-world experiences of their members and constituents.

3. Respondents do not address petitioners' federalism points, nor do they explain why state law is ill-equipped to deal with state-created danger claims. *See* Pet.33-34. Here, for example, California has a detailed scheme for tort claims against state actors, and respondents have availed themselves of that scheme. *See id.* Respondents do not say why it is necessary to contort the Due Process Clause to provide an additional vehicle for recovery.

4. Ultimately, respondents fall back on this Court's prior denials of petitions allegedly implicating the state-created danger doctrine. Opp.27 & n.3. But those denials are a bad proxy for certworthiness here.

Most importantly, the vast majority of the prior petitions—all but two cited by respondents—were filed by *plaintiffs* seeking to *expand* the state-created doctrine. None of those petitions sought to overturn or narrow the doctrine, as petitioners do here. It's no wonder this Court rejected these efforts to further entrench substantive-due-process liability unmoored from the Constitution and *DeShaney*.[2]

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[2] The vast majority of the cited plaintiff-filed petitions had other significant problems, including (1) excessively weak factual claims (*e.g.*, Nos. 20-634, 15-532, 14-1396, 06-529, 05-1650); (2) failure to allege a clean circuit split implicated by the case (*e.g.*, Nos. 19-8017, 14-1396, 12-24, 00-664); (3) the presence of qualified-immunity defenses impeding clean review of the underlying constitutional issues (*e.g.*, Nos. 19-529, 19-656, 16-643), or (4) exceedingly narrow questions presented (*e.g.*, No. 16-1379). Moreover, one of those petitions (No. 21-414) was all

The two petitions filed by state actors are likewise uninstructive. *See Settles v. Penilla*, No. 97-664; *Lioi v. Robinson*, No. 13-667. Both arose from lower court decisions denying qualified immunity, and neither was a suitable vehicle for considering the constitutional validity and scope of the state-created danger doctrine more generally. Moreover, the *Lioi* petition primarily argued that the Fourth Circuit had improperly applied circuit law. The *Settles* petition failed to identify any real circuit split—the only conflict it identified rested on a misreading of an Eighth Circuit decision *approving* state-created danger liability. Neither was backed by amici supporting review. None of respondents' cited cases provides any reason to deny certiorari here.

D. This Case Is An Excellent Vehicle

1. Petitioners vigorously challenged their state-created danger liability at every stage. Contrary to respondents' suggestion (at 16), they neither "embraced" nor "adopted" the state-created danger doctrine below. Petitioners litigated within the confines of binding (and longstanding) Ninth Circuit precedent. They were not required to make "futile" arguments foreclosed by circuit precedent to preserve them for appellate review. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

Moreover, the core issues were fully aired before the full Ninth Circuit. Judge Bumatay's comprehensive dissent from denial of rehearing—joined by multiple colleagues—painstakingly showed how that circuit's state-created danger precedent conflicts with both the text of the Constitution and the

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about *Monell* liability and did not implicate the substance of the state-created danger doctrine at all.

most straightforward reading of *DeShaney*, as well as with the less extreme versions of the doctrine embraced by other courts. Pet.App.96a-126a. The Ninth Circuit was unmoved. But the key issues were indisputably considered below. If this Court grants review, petitioners will have every right to advance the full range of arguments presented in their petition. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

2. Respondents' other purported vehicle problems are equally baseless. Their revisionist Section 1983 framing will not "impede resolution on the merits." Opp.16-17. Both sides are represented by experienced counsel. If review is granted, both will have the opportunity to make their best case, and each will surely respond to the other. There is no danger of "two ships passing in the night." Opp.19.

Moreover, petitioners' differing roles in the events at issue will not add "needless complexity." Opp.20-21. The core questions—whether the state-created danger doctrine is valid, and if so how it applies—are legal and do not depend on each defendant's particular circumstances. Nonetheless, the range of defendants will illustrate the implications of the doctrine, not just for on-the-scene law-enforcement officers (like Cerda, Lewis, and Garcia), but also for social workers providing input and guidance by phone (like Torres). *See* Pet.34. And if the Court rules for petitioners, it will have the choice of applying its new standard to the parties' dispute or remanding for the lower courts to do so in the first instance.

3. Finally, respondents are wrong to say their claims would survive even under petitioners' preferred test. Petitioners' primary submission is that the state-created danger doctrine is an invalid

theory of substantive due process liability. Pet.23-28. If that argument prevails, this case ends—full stop.

Petitioners would also win under their backup argument for narrowing state-created danger liability. Pet.28-31. To be sure, petitioners' response to the domestic dispute did not prevent the tragedy. But nor did their conduct meaningfully increase the risk Langdon posed to the twins, who were already in her (lawful) custody when petitioners first arrived on the scene. Moreover, petitioners did not constrain respondents' liberty, and their actions certainly did not intentionally inflict harm or shock the conscience under the demanding test for substantive-due-process liability.

The sad reality is that petitioners did their best to manage an ambiguous and volatile situation, including by leaving Langdon and the twins under the supervision of a trusted friend with psychiatric-care experience, consulting a social worker, and arranging a warm motel room when the women's shelter cast them out late at night. Pet.6-7. Of course, everyone in retrospect wishes petitioners had been able to save the twins' lives. But their conduct did not violate the Constitution under any plausible theory.

This case perfectly tees up the major questions about the state-created danger doctrine that have intractably divided the circuits. The Court should seize the opportunity to resolve these questions, once and for all.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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