No.

In the Supreme Court of the United States

DENISE FISHER, AS NEXT FRIEND OF M.F., A MINOR,
PETITIONER,

v.

JODI M. MOORE, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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 held in *DeShaney v. Winnebago County Department of Social Services*, that state inaction—in that case passively allowing a private party to harm another person—does not violate the Due Process Clause. 489 U.S. 189, 197 (1989). But the Court distinguished state inaction from state action where a state actor knowingly places a person in a situation that poses an unjustifiably high risk that a private party will harm that person. *Id.* at 201.

That latter doctrine has come to be known as the "state-created danger" doctrine. By November 2019, when the events giving rise to this case took place, every regional circuit court of appeals but one had recognized the doctrine—uniformly holding that the Due Process Clause forbids state officials from knowingly placing a specific person at an unjustifiably high risk of serious harm. One holdout remains. In case after case for decades, and again in the decision below, the Fifth Circuit has declined to treat the doctrine as clearly-established and has declined to establish it.

The question presented is:

Whether the Court should hold that it was clearly established by November 2019 that the Due Process Clause prohibits state officials from knowingly placing a specific person at an unjustifiably high risk of serious harm, or should at least clearly establish that doing so violates due process going forward.

PARTIES TO THE PROCEEDING

Petitioner is Denise Fisher as next friend of M.F., a minor.

Respondents are Jodi M. Moore; Amna Bilal; Rebecca Kaminski; James Brian Shillingburg; and Michael Yelvington.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Fisher v. Fort Bend Independent School District, No. 4:21-cv-00937 (Oct. 8, 2021)

United States Court of Appeals (5th Cir.):

Fisher v. Moore, No. 21-20553 (July 14, 2023)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The operative opinion of the court of appeals (Pet. App. 1a-16a) is reported at 73 F.4th 367. The original panel opinion, withdrawn and superseded by the operative opinion on denial of rehearing on banc (Pet. App. 19a-32a) is reported at 62 F.4th 912. The order of the district court denying respondents' motion for partial dismissal (Pet. App. 17a-18a) is unreported.

JURISDICTION

The court of appeals issued an opinion reversing the district court's judgment on March 16, 2023. Pet. App. 19a. The court of appeals denied a timely petition for rehearing en banc on July 14, 2023 and, at the same time, the panel withdrew the panel opinion and issued a superseding opinion. Pet. App. 1a. Justice Alito granted a 32-day extension of time to file a petition for certiorari to November 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, U.S. Const. amend. XIV, § 1 and 42 U.S.C. § 1983, are reproduced in the petition appendix, Pet. App. 35a-36a.

STATEMENT OF THE CASE

This case presents an important recurring question over which the circuits are divided: Whether it is clearly established that the Due Process Clause bars state officials from knowingly placing a specific person at an unjustifiably high risk of serious harm.

Thirty-five years ago, in *DeShaney v. Winnebago County Department of Social Services*, this Court held that "a State's failure to protect an individual against

private violence . . . does not constitute a violation of the Due Process Clause." 489 U.S. 189, 197 (1989). But at Solicitor General Charles Fried's urging, *see* Brief for the United States, *DeShaney*, 489 U.S. 189 (No. 87-154), 1988 WL 1025922 ("*DeShaney* U.S. Br."), Chief Justice Rehnquist, writing for the Court, carefully and specifically distinguished state inaction in passively allowing a third party to deprive someone of liberty—*i.e.*, failing to protect a person—from state action where an official creates the danger to life, liberty, or property that a person faces or makes her more vulnerable to it. *See* 489 U.S. at 201. The Court thereby preserved a rule that, even by *DeShaney*'s time, was already firmly established in the Second, Seventh, Ninth, Eleventh, and D.C. Circuits, *see DeShaney* U.S. Br. 15-16 & n.5, and several others, *see* pp. 5-7, *infra*.

Notwithstanding *DeShaney*'s recognition that state action that knowingly places a person at an unjustifiably high risk of harm violates the Due Process Clause, an entrenched (and widely acknowledged) circuit split has emerged on the question. For decades, virtually every federal court of appeals has agreed that the Due Process Clause clearly prohibits state officials from engaging in such conduct—now amounting to eleven circuits. The doctrine has even acquired a name—the "state-created danger" doctrine. But the Fifth Circuit has resolutely "refused," for decades, to recognize that the Due Process Clause forbids such egregious misconduct by state officials. Pet. App. 15a-16a (Higginson and Douglas, JJ., dissenting from denial of rehearing en banc).

Further percolation would be futile. The Fifth Circuit is dug in—it denied rehearing *en banc* even in this case, a case that in the words of Judge Wiener presented the Fifth Circuit with "an excellent opportunity" to stake out a position on the question. Pet. App. 14a (Wiener, J., concurring). And the circuits that recognize the state-

created danger doctrine have coalesced around the core elements of a common standard, thus leaving little for those circuits to divide over further except the application of the doctrine to specific fact patterns.

There is some minor variation among the circuits in the precise wording and application of the standard, but all of them would find that respondents' actions in this case violated petitioner's daughter M.F.'s clearly established liberty interest under the Due Process Clause. "The circuits that recognize the doctrine uniformly require that the defendant affirmatively acted to create or exacerbate a danger to a specific individual or class of people." *Irish v. Fowler*, 979 F.3d 65, 73-74 (1st Cir. 2020). "Each circuit requires that the defendant's acts be highly culpable and go beyond mere negligence": the defendant must knowingly place that person at an unjustifiably high risk of serious harm. *Id.* at 74 & n.4. And the circuits all require a "causal connection between the defendant's acts and the harm." *Id.* This case satisfies that standard.[1]

The Fifth Circuit is alone in staking out the extreme outlier position that the Due Process Clause has no role to play even in cases like M.F.'s, where the state itself "puts a man in a position of danger from private persons," essentially "throw[ing] him into a snake pit" and then standing by to let him be harmed. *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982). The Fifth Circuit's refusal to enforce the Due Process Clause in cases where the state's own acts caused the deprivation of a person's liberty is at

[1] The circuits vary immaterially in how they articulate how much a state official must know to be liable; most circuits hold that the official's conduct, in light of the official's knowledge, must "shock the conscience" in the constitutional sense. *Irish v. Fowler*, 979 F.3d 65, 73-74 & n.4 (1st Cir. 2020); *see also, e.g.*, *Kneipp v. Tedder*, 95 F.3d 1199, 1208 & n.21 (3d Cir. 1996) (discussing the interplay of the "deliberate indifference" and "shocks the conscience" standards).

odds with the Constitution's text, structure, and history; with the text and logic of *DeShaney* itself; and with this Court's other due process precedents. The principle that the state is responsible for the deprivations of liberty that arise from its own actions is as rooted in history as it is obvious. The Fifth Circuit's refusal to recognize the doctrine licenses state officials in the Fifth Circuit to knowingly place people in unjustifiably dangerous situations, thus curtailing the Constitution's protections in that Circuit.

This case offers the Court an opportunity to clearly establish the state-created danger doctrine and define its core application. The Court should grant this case and resolve the longstanding disagreement between the Fifth Circuit and eleven others, and define the parameters of the Due Process Clause in this important and recurrent category of constitutional cases. The petition for certiorari should be granted.

* * *

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. While often associated with the fairness of procedures, the Clause of course also bars state officials from depriving individuals of life, liberty, or property with no process whatsoever, by, for example, causing them physical harm without justification.

a. The Court has been called upon over time to determine the outer boundaries of the Clause: to decide how much involvement state officials must have in the deprivation of a person's life, liberty, or property for the state to be responsible for the deprivation. On one end of the spectrum, state officials violate the Due Process Clause when they personally deprive a person of liberty without justification. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961) (citing *Home Tel. & Tel. Co. v. City of*

Los Angeles, 227 U.S. 278, 287-96 (1913)). Similarly, this Court has held that the Due Process Clause imposes on state officials an affirmative duty to protect individuals in their custody. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). On the other end of the spectrum, in *DeShaney*, the Court held that "as a general matter" "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." 489 U.S. 189, 197 (1989).

b. But courts have long recognized—since before *DeShaney*—that there are scenarios between the two poles that involve state action. Before *DeShaney*, courts drew this intuition from the Supreme Court's ruling in *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, state officials had made the decision to release a parolee who subsequently killed the decedent. *Id.* at 279. The decedent's survivors argued that, in releasing the parolee, the defendant state officials "subjected [the] decedent to a deprivation of her life without due process of law." *Id.* at 283. This Court rejected the argument on the facts of the case, holding that the "decedent's death [wa]s too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.* at 285. But the Court prefaced its holding by clarifying that it "need[ed] not and d[id] not decide that a[n] officer could *never* be deemed to 'deprive' someone of life by action taken in connection with the release of a [parolee]"—that is, a private actor. *Id.* (emphasis added).

After *Martinez*, courts generally understood that "it [was] clear . . . that § 1983 [wa]s not limited to cases of direct harm inflicted by state officials." *Commonwealth Bank & Trust Co., N.A. v. Russell*, 825 F.2d 12, 16 (3d Cir. 1987). Rather, constitutional liability turned on proximate causation. *See, e.g.*, *id.* ("We read *Martinez* as holding that the key element . . . was a causal nexus."); *Nishiyama v. Dickson Cnty.*, 814 F.2d 277, 280 (6th Cir. 1987) (en

banc) (explaining the factors that *Martinez* considered in evaluating the "issue of proximate cause" for "liability of government officials . . . for a murder committed by" a private actor); *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983) (per curiam) (upholding dismissal of § 1983 claim on the facts because deprivation of life was "too remote from state action" under *Martinez*). Under the proximate-causation framework, state-created danger became one way of showing the nexus required to establish constitutional liability. *See e.g.*, *Est. of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986); *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988). "'[S]tate created danger' liability," the Second Circuit later explained, "arises from the relationship between the state and the private assailant": when state officials create the danger, they "d[o] not bring the victim to the snakes; they let loose the snakes upon the victim." *Pena v. DePrisco*, 432 F.3d 98, 109 (2d Cir. 2005).

c. In its brief in the *DeShaney* case the United States explained that numerous federal courts of appeals had, by the time of *DeShaney*, recognized that state action that creates an unjustified risk of serious harm to a specific individual violates the Due Process Clause. *See DeShaney* U.S. Br. 15-16 & n.5.

"The lesson that most of the courts of appeals have correctly drawn from the Constitution itself and from this Court's cases," the United States explained, "is that a tort, in order to rise to the level of a violation of the Due Process Clause, must at a minimum involve some action of the state that creates the victim's predicament, and not just inaction in the face of a predicament that is not of the state's making." *DeShaney* U.S. Br. 15. "Only if the state has placed the individual in a position of danger can it be said to have deprived him of life, liberty, or property." *Id.*

The United States contended that all of the relevant circuit cases were "at least arguably consistent with the

rule that the state violates the Due Process Clause only by acting so as to deprive a person of liberty, and not merely by passively allowing a third party to deprive someone of liberty." *Id.* (citing *Doe v. New York City Dep't of Social Services,* 649 F.2d 134 (2d Cir. 1981) and *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc)). "[N]umerous courts of appeals," the United States explained, "have endorsed the principle, stated repeatedly by the Seventh Circuit, that duties to protect a person arise under the Due Process Clause only when 'the state itself has put [that] person in danger.'" *Id.* at 16 & n.5 (quoting *Escamilla v. City of Santa Ana,* 796 F.2d 266, 269 (9th Cir. 1986); citing, *inter alia*, *Wideman v. Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1035, 1037 (11th Cir. 1987); *Washington v. District of Columbia,* 802 F.2d 1478, 1481-82 (D.C. Cir. 1986); *Est. of Gilmore v. Buckley,* 787 F.2d 714, 722 (1st Cir. 1986); *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982)).

In a footnote, the United States collected a half-dozen Seventh Circuit cases recognizing the state-created danger doctrine. *See id.* at 16 n.5. Seventh Circuit law was significant because *DeShaney* arose out of a decision by Judge Posner. *See* 812 F.2d 298 (7th Cir. 1987). In his opinion in *DeShaney*, Judge Posner distinguished *DeShaney* from a case involving state-created danger. *Id.* at 303. As Judge Posner wrote: "The botched rescue must be distinguished from the case where the state places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm." *Id.* "If the state, having arrested a child's parents, leaves the child alone in a situation where he is quite likely to come to grief because no one is watching over him, and he is injured, the state is a cause of the injury." *Id.*

d. Chief Justice Rehnquist, writing for the Court in *DeShaney* and affirming Judge Posner's decision, limited

the holding in *DeShaney* to cases involving state inaction. 489 U.S. at 197-202. The Due Process Clause was not implicated in *DeShaney*, the Court explained, because "[w]hile 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."[2] *Id.* at 201.

In the years since *DeShaney*, every circuit court of appeals but one has recognized the state-created danger doctrine, which was already well-developed by the time *DeShaney* was decided. But the Fifth Circuit has resolutely refused to join this consensus, reasoning that the Due Process Clause no more prohibits government officials from placing individuals at risk of serious harm than it obligates them to protect individuals from danger the government played no role in creating. This Court has not provided further guidance on this question since it decided *DeShaney* nearly 35 years ago.

2. M.F. is a teenage girl with mental and physical disabilities, who, as a result of those disabilities, has the cognitive functioning of a young child. Pet. App. 4a. At the time of the events in this case, in the fall of 2019, M.F. was around thirteen years old and a student at James Bowie Middle School in the Fort Bend Independent School District. Pet. App. 3a-4a.

M.F. had an Individualized Education Program (IEP) under the Individuals with Disabilities Education Act (IDEA) to help her meet her individual educational needs in light of her cognitive and physical disabilities. Pet. App. 4a. As this Court has explained, an IEP is a "comprehensive plan" created by the school and a child's

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[2] The question whether the state had in fact created the danger in *DeShaney* was perhaps the central question discussed at the oral argument in the case. *See* Transcript of Oral Argument at 13-14, 19, 20-21, 38-39, 41, 57, *DeShaney*, 489 U.S. 189 (No. 87-154).

parents to ensure "special education and related services are tailored to the unique needs of a particular child." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quotation marks omitted).

M.F.'s IEP specified that she sometimes "left her classroom without the teacher's permission and therefore need[ed] assistance transitioning throughout the school day." Pet. App. 4a (quotation marks omitted). "Accordingly, the IEP provided, among other things, that [f]or [M.F.'s] safety, escorting her during transitions within the school building will be required. In fact, M.F. was to be escorted at all times in middle school." Pet. App. 4a. (quotation marks omitted).

Another minor student, R.R., attended James Bowie Middle School alongside M.F. in the fall of 2019. R.R. had a well-documented history of severe behavioral problems, including violence against other students and teachers, a fact that was known to teachers and staff at the school. Pet. App. 4a. Among R.R.'s many infractions were "[h]itting students in the head with rocks"; "[p]oking a student in the eye"; "[h]itting other students with a belt"; "[t]hreatening to burn a teacher to death"; and "[b]iting," "[k]icking[,] and spitting on students." Pet. App. 4a.

As pleaded in the complaint, school administrators knew that R.R. posed an especially serious risk to female students, whom he frequently taunted with obscene remarks. Pet. App. 4a. R.R. once told school staff that he "was going to be a rapist when he grows up." Pet. App. 4a-5a. But R.R.'s sexual misconduct was not limited to verbal abuse. He repeatedly entered the girls' restroom at school and on one occasion, groped a female classmate. Pet. App. 5a. Another incident involved R.R. pulling his pants down to expose his genitals and then urinating on the wall. Pet. App. 5a.

As a result of the danger he posed to other students, R.R., like M.F., also had an IEP. Pet. App. 5a. R.R.'s IEP required him to be escorted and supervised at all times for the safety of the other students. Pet. App. 5a.

On September 4, 2019, notwithstanding the IEP requirements, M.F. and R.R. were "both allowed . . . out of their respective classes" without anyone supervising either of them. Pet. App. 5a. R.R. and M.F. "ended up in the boys' restroom" where R.R. sexually assaulted M.F. Pet. App. 5a. School employees learned the specifics of the incident when they found R.R. and M.F. coming out of the bathroom and questioned both students about what they were doing. Pet. App. 5a. M.F. conveyed to the staff members that she had been sexually assaulted. Pet. App. 5a. School officials, investigating her claim, confirmed from the security camera footage that both R.R. and M.F. were in the boys' restroom at the time of the assault. Pet. App. 5a. As a result, the school district knew that R.R. posed a substantial threat to the physical safety and well-being of M.F. specifically. Pet. App. 5a. She was a specific, identifiable target and victim of R.R. Pet. App. 5a.

Thus, as of September 4, 2019, at the absolute latest, respondents were aware that R.R. posed an immediate, real, and substantial risk to M.F.'s safety and welfare. Respondents knew how critical it was to ensure that both M.F. and R.R.'s IEPs were implemented, and that M.F. and R.R. were each escorted and supervised at all times.

Yet, on November 12, 2019, respondents Jodi Moore and Amna Bilal permitted M.F. to leave her classroom and navigate the school hallways without supervision, in violation of M.F.'s IEP. Pet. App. 5a. *At the very same time*, respondents Moore and Bilal *also* allowed R.R. to leave *his* classroom and wander the hallways by himself in violation of *his* IEP. Pet. App. 5a. Moore and Bilal did this knowing that R.R. posed an extraordinary risk to

M.F.'s physical safety, knowing that he had already sexually assaulted her once before, and despite the explicit and agreed upon directive that both students were required to be supervised at all times.

M.F. entered the girls' bathroom, and R.R. followed her inside. Pet. App. 5a. R.R. then climbed under the stall M.F. was using and sexually assaulted her again. Pet. App. 5a-6a. M.F. suffers lasting trauma as a result of the assaults. ROA13.

3. In March 2021, M.F.'s mother, petitioner Denise Fisher, filed suit on M.F.'s behalf against Fort Bend Independent School District and several individual school-official defendants, the respondents here. ROA3. In a two-count complaint, petitioner asserted a § 1983 claim against the District and the respondents for violations of M.F.'s rights under the Fourteenth Amendment, and a claim under Title IX against the District. ROA13-17. In petitioner's § 1983 claim against the school officials, petitioner alleged liability under the state-created danger doctrine. Pet. App. 2a, ROA14-16.

On May 20, 2021, the District and respondents moved to dismiss M.F.'s § 1983 claim under Federal Rule of Civil Procedure 12(b)(6). ROA4, 64. As relevant here, the school officials sought dismissal on qualified-immunity grounds, arguing that, given the Fifth Circuit's "express[] refus[al] to adopt" the state-created danger doctrine, they "cannot be found to have violated any 'clearly established law' based on M.F.'s allegations of student-on-student violence." ROA68, 76. On October 8, 2021, the district court denied the District's and respondents' motion in a one-page order. Pet. App. 17a-18a. Respondents appealed the qualified-immunity ruling, and the district court stayed the proceedings pending resolution of their interlocutory appeal. Pet. App. 2a, ROA5.

On March 16, 2023, after oral argument, the Fifth Circuit issued its opinion and entered judgment,

reversing the district court's judgment and remanding. Pet. App. 20a. M.F. then petitioned the Fifth Circuit for rehearing en banc. On July 14, 2023, the court denied M.F.'s petition. Pet. App. 1a. But the court withdrew its prior opinion and substituted a new one in its place, while maintaining its original disposition of the case—reversing the district court's judgment and remanding with instructions to dismiss M.F.'s § 1983 claim against respondents. Pet. App. 2a-3a.

The court explained that it "has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule." Pet. App. 2a. The court acknowledged that "as of November 2019," when the events out of which the case arose took place, "a majority of [its] sister circuits had adopted the state-created danger theory of liability in one form or another." Pet. App. 10a. But the court explained that Fifth Circuit precedent foreclosed reliance on out-of-circuit caselaw for qualified immunity in this context:

> As we have held, the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger in some circumstances . . . is insufficient to clearly establish the theory of liability in our circuit. . . . [D]espite widespread acceptance of the [state-created danger] doctrine [in other circuits], the circuits were not unanimous in [the doctrine's] contours or its application.

Pet. App. 10a (cleaned up). The court therefore held that the district court erred in denying qualified immunity to respondents. Pet. App. 9a.

The court then declined M.F.'s invitation to adopt the state-created danger doctrine of liability. Pet. App. 11a-12a. "For starters," the court explained, M.F. did not brief the issue. Pet. App. 11a. And the court was especially hesitant "to expand the reach of substantive due process . . . [w]ithout meticulous briefing on how state-created

danger liability meets [this Court]'s reinvigorated test" for whether a right is protected by substantive due process. Pet. App. 11a-12a.

The court emphasized that in "repeat[ing] [] that the state-created danger doctrine is not clearly established" in the Fifth Circuit, it was not categorically ruling out the doctrine. Pet. App. 9a. Rather, the court clarified, it was "merely declin[ing] to adopt this [] theory of constitutional liability," as it had done for a "decade-plus." Pet. App. 9a & n.15. A "decade-plus," the court added, marked by "indecision—never adopting state-created danger yet never rejecting it." Pet. App. 9a n.15.

Judge Wiener concurred in the opinion and judgment but wrote separately to express his disagreement with the court's denial of M.F.'s petition for rehearing en banc, on which he was not eligible to vote given his senior status. Pet. App. 14a-15a. In his view, "[i]t [was] well past time for [the Fifth Circuit] to be dragged screaming into the 21st century by joining all those other circuits that have now unanimously recognized the state-created danger cause of action," and "[t]he horrific facts of this case . . . presented an ideal vehicle for th[e] circuit's consideration of joining th[os]e ten other circuits."[3] Pet. App. 14a-15a. Judges Higginson and Douglas, joined by Judges Stewart, Elrod, Haynes, and Graves, dissented from the denial of rehearing en banc, criticizing the court's pattern of "indecision" on the state-created danger doctrine as "a disservice to injured plaintiffs who are forced to litigate in endless uncertainty about their federal rights." Pet. App. 15a-16a.

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[3] The Eleventh Circuit also recognizes the state-created danger doctrine, so the number of other circuits that recognize the doctrine is in fact eleven. *See Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997). Every circuit with geographic jurisdiction except the Fifth Circuit has recognized the doctrine.

REASONS FOR GRANTING THE PETITION

I. THIS CASE INVOLVES A CLEAR AND IMPORTANT CONFLICT AMONG THE CIRCUITS

The decision below deepens a circuit conflict over whether it was clearly established in November 2019, at the time of the incident in this case, that a plaintiff could bring a due process claim under the state-created danger doctrine. It was. And definitive guidance over this recurring, nationally important question is overdue and critically important. The circuit conflict is undeniable, and it should be resolved by this Court in this case.

1.a. The decision below conflicts with settled law in the Ninth Circuit. The Ninth Circuit recognized the state-created danger doctrine in *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986), and reaffirmed it in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Since *Wood*, the Ninth Circuit has analyzed claims premised on the state-created danger doctrine under a two-element test: first, whether there is affirmative conduct on the part of the state in placing the plaintiff in danger; and second, whether the state acts with deliberate indifference to that known or obvious danger. *Murguia v. Langdon*, 61 F.4th 1096, 1111, 1113 (9th Cir. 2023). For more than three decades and across dozens of cases, courts in the Ninth Circuit have applied the state-created danger doctrine and have found viable claims in circumstances involving a state actor knowingly placing a victim, who was under the state actor's supervision or care, at an unjustifiably high risk of serious harm.[4]

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[4] *See, e.g.*, *Murguia*, 61 F.4th at 1113; *Henry A. v. Willden*, 678 F.3d 991, 1002-03 (9th Cir. 2012); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062-65 (9th Cir. 2006); *see also, e.g.*, *Sepulveda v. City of Whittier*, 2019 WL 13070119, at *12 (C.D. Cal. Aug. 7, 2019); *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1102 (E.D. Cal.

A Ninth Circuit case that clearly establishes the unlawfulness of the conduct in this case is *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). In *L.W.* the Ninth Circuit found viable a § 1983 claim brought by a registered nurse employed at a medium-security custodial institution for young male offenders against her supervisors, who required her to work alone with a sex offender who subsequently "raped and terrorized" her. *Id.* at 120, 123. The plaintiff alleged that her supervisors, the defendants, "led her to believe that she would not be required to work alone with violent sex offenders." *Id.* at 120. Yet the defendants selected an inmate who was a violent sex offender and "considered very likely to commit a violent crime if placed alone with a female" to work alone with the plaintiff. *Id.* Once alone with her, the inmate "assaulted, battered, kidnapped, and raped" the plaintiff. *Id.*

The Ninth Circuit concluded that the actions of the plaintiff's supervisors created the danger to which she fell victim because they knowingly assigned her to work alone with a violent sex offender with "an extraordinary history of unrepentant violence against women and girls" who "was likely to assault a female if left alone with her." *Id.* at 121. Because the defendants "thus used their authority as state correctional officers to create an opportunity for [the inmate] to assault L.W. that would not otherwise have existed" and "enhanced L.W.'s vulnerability to attack by misrepresenting to her the risks attending her work," the Ninth Circuit held, L.W.'s allegations supported § 1983 liability. *Id.* at 121-22. In other words, the plaintiff stated a claim under § 1983 because the defendants deprived her of her liberty by taking "affirmative steps to place her at significant risk" and "did so with a sufficiently culpable mental state." *Id.* at 122-23.

2012). A Westlaw search for the term "state-created danger" returns over 500 cases in the Ninth Circuit.

Under clearly established law in the Ninth Circuit, therefore, petitioner's due process claim in this case would not have been dismissed.

b. The decision below is also squarely at odds with settled law in the Seventh Circuit. The Seventh Circuit recognized the state-created danger doctrine in *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979). And in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the Seventh Circuit explicitly reaffirmed its longstanding recognition of the state-created danger doctrine after *DeShaney*, stating that "*DeShaney* . . . leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." 986 F.2d at 1125. Like the Ninth Circuit, the Seventh Circuit has applied the state-created danger doctrine in numerous cases spanning decades.[5]

A Seventh Circuit case that clearly establishes the unlawfulness of respondents' conduct here is *T.E. v. Grindle*, 599 F.3d 583 (7th Cir. 2010). In *T.E.* the defendant, a school principal, had received repeated reports from students complaining of a teacher's sexual abuse, but she "ignore[d]" or "downplay[ed]" the incidents in communications with the students' parents and school administrators. 599 F.3d at 587-88. The defendant principal merely advised the teacher to avoid physical contact with students, which did not stop continued incidents. *See id.* at 586. Multiple students

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[5] *See, e.g.*, *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-50 (7th Cir. 1990); *White*, 592 F.2d at 383; *see also, e.g.*, *Doe v. City of Naperville*, No. 17 CV 2956, 2019 WL 2371666, at *5 (N.D. Ill. June 5, 2019); *Regalado v. City of Chicago*, 40 F. Supp. 2d 1009, 1016 (N.D. Ill. 1999); *Stauffer v. Orangeville Sch. Dist.*, No. 89-C-20258, 1990 WL 303595, at *2 (N.D. Ill. July 31, 1990); *Black ex rel. J.D. v. Littlejohn*, No. 19-C-2585, 2020 WL 469303, at*4 (N.D. Ill. Jan. 28, 2020). A Westlaw search for the term "state-created danger" returns over 200 cases in the Seventh Circuit.

brought a § 1983 claim that the principal deprived them of the constitutional right to bodily integrity. *Id.*

On summary judgment, the court denied the defendant qualified immunity. It was clearly established that a "reasonable school principal would have concluded that she could be held liable for turning a blind eye to and affirmatively covering up evidence of child sexual abuse by one of her teachers." *Id.* at 590. The court supported its holding in part by noting that it had recognized the "principle that the defendant[] could be liable under a due process theory if … [she] created a risk of harm, or exacerbated an existing one." *Id.* (quoting *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996)); *accord Nabozny*, 92 F.3d at 459-60 (agreeing with precedent holding that state actors can be liable for conduct that "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." (quoting *Reed*, 986 F.2d at 1126)). This was not a case of "mere failure … to act," but a case involving the defendant's "own actions" of "deliberate indifference." *T.E.*, 599 F.3d at 590-91. Had this case arisen in the Seventh Circuit, petitioner's due process claim would not have been dismissed.

c. The decision below is also squarely at odds with clearly established law in the Tenth Circuit. The Tenth Circuit recognized the "danger creation" doctrine in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). And since its recognition of the doctrine, the Tenth Circuit and district courts in the circuit have found viable state-created danger claims in numerous circumstances.[6]

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[6] *See, e.g.*, *T.D. v. Patton*, 868 F.3d 1209, 1230 (10th Cir. 2017); *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1264 (10th Cir. 1998); *see also, e.g.*, *Est. of Goodwin v. Connell*, 376 F. Supp. 3d 1133, 1157 (D. Colo. 2019); *Sanders v. Bd. of Cnty. Comm'rs of Cnty. of Jefferson, Colo.*, 192 F. Supp. 2d 1094, 1117 (D.

A Tenth Circuit case that clearly establishes the unlawfulness of respondents' conduct here is *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999). *Sutton*, just like this case, involved the repeated assault of a student with severe disabilities. 173 F.3d at 1230-31. There, the victim, who suffered from severe cerebral palsy, intellectual disability, total blindness, and speech impairment, was sexually assaulted by another student while using the bathroom at school. *Id.* at 1230. The victim's mother informed the school superintendent, principal, and plaintiff's teacher. *Id.* The principal and teacher repeatedly assured the victim's mother that the children were not allowed to go to the bathroom alone and promised that her child would be supervised at all times while in the bathroom. *Id.* Several days later, the child was sexually assaulted again by the same student in the school's bathroom. A teacher's aide had escorted the boy to the bathroom but abandoned her post in order to answer a call. *Id.* Three minutes after leaving, the teacher's aide returned to discover the assault. *Id.* at 1230-31. The plaintiff brought a claim under § 1983, alleging that the principal, with deliberate indifference, failed to adequately train school employees or adopt or implement a policy to prevent sexual assaults like those against the plaintiff's child. *Id.* at 1239.

The Tenth Circuit held that the plaintiff's claim was viable. *Id.* at 1240-41. The plaintiff had alleged that the principal acted with reckless indifference and malice "when he specifically failed to take action to prevent [the plaintiff] from being repeatedly molested after being informed … of the boy's complaints that he was being molested in the restroom while at school." *Id.* at 1240. Thus, given the victim's severe impairments; the

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Colo. 2001). A Westlaw search for the term "state-created danger" returns over 150 cases in the Tenth Circuit.

principal's awareness of the potential danger to the victim; and the principal's conduct, the court was satisfied that plaintiff stated a claim. *Id.* at 1241. Had this case arisen in the Tenth Circuit, petitioner's due process claim would not have been dismissed.

d. The decision below is also squarely at odds with settled law in the Third Circuit. The Third Circuit adopted the state-created danger doctrine in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). And since *Kneipp* courts in the Third Circuit have found viable state-created danger claims in a variety of circumstances involving a state actor knowingly placing a victim, who was under the supervision or care of the state actor, at an unjustifiably high risk of serious harm.[7]

A Third Circuit case that clearly establishes the unlawfulness of respondents' conduct here is *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235 (3d Cir. 2016). In *L.R.* one of the defendants, a teacher, allowed the victim, a kindergartener, to leave with an adult who later sexually assaulted the child off school premises. *Id.* at 239-40. The teacher had asked the adult to produce identification and verification that the kindergartner had permission to leave school but allowed the child to leave with the adult even though she was unable to produce the identification and authorization for release. *Id.* at 240. In the early hours the next morning, a sanitation worker found the child in a playground after hearing her cries. *Id.* at 239. The child's

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[7] *See, e.g.*, *Kedra v. Schroeter*, 876 F.3d 424, 447-48 (3d Cir. 2017); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 243 (3d Cir. 2008); *Rivas v. City of Passaic*, 365 F.3d 181, 194-95 (3d Cir. 2004); *D.N. ex rel. Nelson v. Snyder*, 608 F. Supp. 2d 615, 624-27 (M.D. Pa. 2009); *Hillard v. Lampeter-Strasburg Sch. Dist.*, No. Civ.A. 03-2198, 2004 WL 1091050, at *7 (E.D. Pa. May 13, 2004); *Sciotto v. Marple Newton Sch. Dist.*, 81 F. Supp. 2d 559, 567 (E.D. Pa. 1999). A Westlaw search for the term "state-created danger" returns over 1,000 cases in the Third Circuit.

parents brought suit under § 1983 alleging that the defendants deprived their child of her Fourteenth Amendment rights because they created the danger that resulted in the child's physical and emotional harm by releasing her to an unidentified adult. *Id.* at 240.

The Third Circuit concluded that the parents had sufficiently alleged a state-created danger claim. The court found the risk of harm in releasing a five-year-old child to a complete stranger to be obvious. *Id.* at 245. The teacher's actions were the "catalyst for the attack." *Id.* at 246. The court found that the teacher's act of allowing the child to leave with the adult rose to "conscience-shocking behavior," especially in light of the school policy. *Id.* And even if such a policy did not exist, the court stated, the fact the teacher asked the adult for identification illustrated that the teacher was indeed aware of the risk of harm in releasing the child to a stranger. *Id.* And the court found that the child was a foreseeable victim. *Id.* at 247. Had this case arisen in the Third Circuit, petitioner's due process claim would not have been dismissed.

e. The decision below is also squarely at odds with settled law in the Sixth Circuit. The Sixth Circuit recognized the state-created danger doctrine in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), holding that "[l]iability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." 136 F.3d at 1066; *see Cartwright v. City of Marine City,* 336 F.3d 487, 493 (6th Cir. 2003). Since *Kallstrom*, courts in the Sixth Circuit have recognized viable state-created danger claims in numerous circumstances involving a state actor knowingly placing a victim, who was under the

supervision or care of the state actor, at an unjustifiably high risk of serious harm.[8]

A Sixth Circuit case that clearly establishes the unlawfulness of respondents' conduct here is *Lipman v. Budish*, 974 F.3d 726 (6th Cir. 2020). In *Lipman* the Sixth Circuit held that the plaintiffs stated a viable state-created danger claim by alleging that a county and its caseworkers deprived the victim of due process by repeatedly interviewing the victim about her abuse in the presence of her abusers, which the caseworkers knew placed the victim at an increased risk of further abuse. 974 F.3d at 743, 747. In *Lipman*, the victim suffered from a pattern of abuse at the hands of her guardians. *Id.* at 731. On one occasion, the victim was taken to the hospital with third-degree burns on her hands, arms, and fingers. *Id.* at 732. Despite the Cuyahoga County Division of Children and Family Services ("DCFS") having a policy of interviewing child victims alone, the DCFS social worker interviewed the victim in the presence of her alleged abusers. *Id.* Although the victim's statements contradicted some of the statements from one of her alleged abusers, the social worker discharged the victim to her alleged abusers. *Id.* Thereafter, on five different occasions, DCFS social workers went to the victim's home and interviewed her in front of the alleged abusers. *Id.* at 733. The plaintiffs alleged that, by interviewing the victim in those circumstances, DCFS knowingly took affirmative acts that increased the risk of harm. *Id.* at 733, 743. Had

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[8] *See, e.g.*, *Meyers v. Cincinnati Bd. of Educ.*, 343 F. Supp. 3d 714, 725 (S.D. Ohio 2018), *aff'd*, 983 F.3d 873 (6th Cir. 2020); *Est. of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.*, 341 F. Supp. 3d 793, 803 (S.D. Ohio 2018); *Lopez v. Metro. Gov't of Nashville & Davidson Cnty.*, 646 F. Supp. 2d 891, 911 (M.D. Tenn. 2009); *Wilson v. Columbus Bd. of Educ.*, 589 F. Supp. 2d 952, 963 (S.D. Ohio 2008). A Westlaw search for the term "state-created danger" returns over 400 cases in the Sixth Circuit.

this case arisen in the Sixth Circuit, petitioner's due process claim would not have been dismissed.

2. The decision below also conflicts with settled law in the First, Second, Fourth, Eighth, Eleventh, and D.C. Circuits. Each of those courts have also permitted individuals to bring due process claims under the state-created danger doctrine in circumstances like those presented here.

a. In 1990, in *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), the Eighth Circuit found *DeShaney* to establish the possibility that a constitutional duty to protect an individual against private violence may exist if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action. 911 F.2d at 55. The court stated that "[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty." *Id.* Had this case arisen in the Eighth Circuit, petitioner's due process claim would not have been dismissed.[9]

b. In 1993, in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), the Second Circuit reaffirmed the state-created danger doctrine, although it had long recognized that state actors may be liable if their culpable acts in connection with a known danger "was a proximate cause of plaintiff's deprivation of [constitutional] rights." *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981). In *Dwares*, the Second Circuit "read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon

[9] A Westlaw search for the term "state-created danger" returns over 100 cases in the Eighth Circuit.

reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights." 985 F.2d at 99. Had this case arisen in the Second Circuit, petitioner's due process claim would not have been dismissed.[10]

c. In 1997, in *Wyke v. Polk County School Board*, 129 F.3d 560 (11th Cir. 1997), the Eleventh Circuit reaffirmed the state-created danger doctrine, although the doctrine traces back pre-*DeShaney* to *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987). In *Wyke*, the Eleventh Circuit stated that "[t]he language of *DeShaney* does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it." 129 F.3d at 567 (quoting *DeShaney*, 489 U.S. at 210). Though the Eleventh Circuit has since refined its analysis, *see Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305-06 (11th Cir. 2003), had this case arisen in the Eleventh Circuit, petitioner's due process claim would not have been dismissed.[11]

d. In 2001, in *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001), the D.C. Circuit decided to "join the other circuits" by holding that "under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create

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[10] For additional Second Circuit state-created danger cases, see also, *e.g.*, *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 429-30 (2d Cir. 2009); *Pena v. DePrisco*, 432 F.3d 98, 111 (2d Cir. 2005); *Hemphill v. Schott*, 141 F.3d 412, 419-20 (2d Cir. 1998). A Westlaw search for the term "state-created danger" returns over 220 cases in the Second Circuit.

[11] A Westlaw search for the term "state-created danger" returns over 60 cases in the Eleventh Circuit.

the danger that ultimately results in the individual's harm." 235 F.3d at 651.

e. In 2015, in *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015), the Fourth Circuit recognized the state-created danger doctrine under the "narrow limits set by *DeShaney* and *Pinder*." 795 F.3d at 439. In *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), the Fourth Circuit first confronted and declined to accept a state-created danger claim. 54 F.3d at 1175. But in *Rosa*, the court held that a plaintiff could make out a state-created danger claim if the plaintiff can "show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission." 795 F.3d at 439. Courts in the Fourth Circuit have since found viable state-created danger claims in circumstances involving a state actor knowingly placing a victim, who was under the supervision or care of the state actor, at an unjustifiably high risk of serious harm. [12] Had this case arisen in the Fourth Circuit, petitioner's due process claim would not have been dismissed.

f. In 2020, in *Irish v. Fowler*, 979 F.3d 65 (1st Cir. 2020), the First Circuit held that the state-created doctrine was clearly established, such that a state defendant could not reasonably have thought it was not the law nationwide. 979 F.3d at 78. Courts in the First Circuit have found viable state-created danger claims in circumstances involving a state actor knowingly placing a victim, who was under the supervision or care of the state

[12] *See, e.g.*, *Doe #1 v. Montgomery Cnty. Bd. of Educ.*, Civ. No. 21-0356 PJM, 2021 WL 6072813, at *11 (D. Md. Dec. 23, 2021); *DJ ex rel. Hughes v. Sch. Bd. of Henrico Cnty.*, 488 F. Supp. 3d 307, 327 (E.D. Va. 2020); *Swader v. Virginia*, 743 F. Supp. 434, 442-44 (E.D. Va. 1990). A Westlaw search for the term "state-created danger" returns over 100 cases in the Fourth Circuit.

actor, at an unjustifiably high risk of serious harm.[13] Because petitioner's case arose after *Irish* was decided, had it arisen in the First Circuit, petitioner's due process claim would not have been dismissed.

3. In stark contrast with every other court of appeals, the Fifth Circuit has "repeatedly declined to recognize" the state-created danger doctrine over a period of many decades. *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020). Dozens of cases have been brought in the Fifth Circuit by plaintiffs seeking the vindication of their due process rights, but all have failed. *See, e.g.*, *Fisher v. Moore*, 73 F.4th 367, 375 (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); *Est. 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, 324-25 (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). The Fifth Circuit has "consistently refused" to recognize the doctrine "even where the question of the theory's viability has been squarely presented." *Beltran*, 367 F.3d at 307.[14]

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[13] *See, e.g.*, *Joseph Doe v. Ayla Gavins*, No. 22-CV-10702-ADB, 2023 WL 6296398, at *7 (D. Mass. Sept. 27, 2023); *see also Doe v. Reg'l Sch. Unit No. 21*, No. 2:19-00341-NT, 2020 WL 2820197, at *3 (D. Me. May 29, 2020); *Doe v. Town of Wayland*, 179 F. Supp. 3d 155, 165-69 (D. Mass. 2016). A Westlaw search for the term "state-created danger" returns 90 cases in the First Circuit.

[14] A Westlaw search for the term "state-created danger" returns over 350 cases in the Fifth Circuit.

The Fifth Circuit's conflict with every the other circuit is widely acknowledged. In a recent case in the Ninth Circuit, *Murguia v. Langdon*, 73 F.4th 1103 (9th Cir. 2023), Judge Bumatay identified the Fifth Circuit as the only circuit in which the "[s]tate-created danger exception" is "not recognized." 73 F.4th at 1113) (Bumatay, J., dissenting from denial of rehearing en banc). The First Circuit has concluded that the Fifth Circuit has "flatly rejected the 'state-created danger' theory of liability." *Vélez-Díaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005). And scholars have explained 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); *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).

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The decision below breaks with clearly established law in eleven circuits. The conflict over the viability of a state-created danger claim is clear. Until this Court intervenes, parties will continue to face varying outcomes depending on the circuit. Review is urgently warranted.

II. THE QUESTION PRESENTED IS SIGNIFICANT AND MERITS REVIEW IN THIS CASE

1. This case presents an important and enduring question of constitutional law. It affects the rights of every individual in this country who may be harmed by the state "throw[ing] [them] into a snake pit"—or, quite literally, handing a gun to the person who fires it at them, *see McClendon v. City of Columbia*, 305 F.3d 314, 319 (5th

Cir. 2002). Every circuit has explicitly recognized the doctrine, except for the Fifth Circuit, which has declined to adopt the state-created danger doctrine with "admonition" against it. Pet. App. 13a.

The doctrine continues to be raised in hundreds of cases a year. All twelve geographical circuits have reviewed cases under the doctrine in the past five years. And such cases involve profound harms. Alongside decades of caselaw predating *DeShaney*, the sheer number of recent decisions involving the doctrine demonstrates that countless individuals are harmed through dangers created by state actors charged with safeguarding their safety or otherwise providing for their wellbeing: school administrators, law enforcement officers, and others.

a. Since Chief Justice Rehnquist penned the opinion in *DeShaney* in 1989, this Court has not spoken on its contours. The Fifth Circuit's decision "block[s]" the cohesion of law on the state-created doctrine. Pet. App. 16a (Higginson and Douglas, JJ., dissenting from denial of rehearing en banc). The "perpetual state of confusion" is costly to the judicial system, and it is unjust to individuals who are harmed. *McClendon*, 305 F.3d at 334 (Parker, J., dissenting). The Fifth Circuit's "indecision is a disservice to injured plaintiffs who are forced to litigate in endless uncertainty." Pet. App. 16a. (Higginson and Douglas, JJ., dissenting from denial of rehearing en banc). As it stands, individuals—including children and their parents and guardians—are left in suspense about whether they have a remedy for profound harm, based on nothing more than the state where they happen to live.

b. This split is unlikely to be resolved without this Court's review. Below, the Fifth Circuit once again refused to take up the question en banc. Pet. App. 1a-16a. Considering the many opportunities that the Fifth Circuit

has had to decide on its recognition of the state-created danger doctrine, its split from other circuits is as entrenched as a circuit conflict can possibly become. As Judge Wiener observed, the split could have been resolved "only . . . by taking this case en banc, but we have yet again failed to do so." Pet. App. 14a.

This Court's intervention is especially essential because the difficulty of this constitutional issue is substantial. The question is not answered by *DeShaney* or readily resolved by recourse to categorical claims about the history of the Due Process Clause or the words "due process of law." "[T]he difficulty, if not the impossibility, of framing a definition of this constitutional phrase" is well known. *Hurtado v. People of State of Cal.*, 110 U.S. 516, 533-34 (1884). This Court has a special role to play in the "ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion." *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1877).

c. The question presented by this petition is also raised in *County of Tulare v. Murguia*, No. 23-270 (2023). If the Court grants review in one of these cases, it should grant review in this case. Unlike *Murguia*, this case presents a simple yet typical fact pattern that will allow the Court to trace out the core elements of a state-created danger claim without grappling with difficult line-drawing problems presented by that case. Rather than resolve a "panoply of disputes," Petition for Writ of Certiorari at 35, *Cnty. of Tulare v. Murguia*, No. 23-270, review in this case would permit the Court to resolve just one: whether a state-created danger a claim is ever viable.

2. This case is the ideal vehicle for this Court to review the question presented. The case ended on a motion to dismiss and the question of whether the state-created danger doctrine is clearly established or should be established going forward was squarely raised at every

stage. "The extreme and uncontested facts of this case," Pet. App. 14a, present an ideal vehicle to recognize that the Due Process Clause prohibits state officials from knowingly placing a specific person at an unjustifiably high risk of serious harm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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