No. 24-1050

In The Supreme Court of the United States

ESTATE OF TE'JUAN JOHNSON,
Petitioner,

v.

AMANDA RAKES, ADMINISTRATOR OF THE ESTATE OF AMYLYN SLAYMAKER AND NEXT FRIEND TO THE MINOR CHILDREN G.C. AND M.C.,
Respondent.

On Petition for a Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE LOCAL GOVERNMENT LEGAL CENTER, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, ILLINOIS MUNICIPAL LEAGUE, ACCELERATE INDIANA MUNICIPALITIES, ASSOCIATION OF IDAHO CITIES, GEORGIA MUNICIPAL ASSOCIATION, INC., KENTUCKY LEAGUE OF CITIES, LEAGUE OF OREGON CITIES AND VIRGINIA MUNICIPAL LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations advocating for local government positions before the Supreme Court. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The International Municipal Lawyers Association ("IMLA") is a non-profit organization of more than 2,500 members dedicated to advancing the interests and education of local government lawyers. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoints of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for the nation's 3,069 county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of the intent to file this brief.

governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of over 19,000 American cities, towns, and villages, collectively representing more than 218 million Americans. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The Illinois Municipal League ("IML") is a not-for-profit, non-political association that represents the interests of the 1,294 cities, villages, and towns in Illinois. IML's mission is to articulate, defend, maintain, and promote the interests and concerns of Illinois's municipalities, by advocating on their behalf before the Illinois General Assembly, as well as before the federal government and in courts.

Additional *amici* are associations devoted to promoting the interests of local government through education and advocacy, and join this brief to express their concerns over the state-created danger exception and the need for clarity regarding qualified immunity.

Amici's interest in this case flows from the negative impact the Seventh Circuit's fractured decision will have on legitimate law enforcement activity. By reframing an officer's innocuous comment as the predicate for a federal state-created danger claim and a violation of clearly established law, the Circuit overrode the primacy of fully adequate state remedies. Such repurposing of Due Process principles and indecipherable application of clearly established standards will ensure that more unfounded claims under 42 U.S.C. § 1983 are lodged against law enforcement. The result will be unwarranted costs to local government and hesitancy by public servants to go beyond the lowest level of service.

Amici have a uniquely valuable perspective on the relevant issues in this case, and are acutely aware of the significant problems that the decision below will pose for local governments throughout the United States. Under the Seventh Circuit's holding, which is at odds with more than 30 years of Supreme Court precedent, those governments will face increased liability premised on the judicially-fashioned "state-created danger" exception when a private person harms another, even where the State neither coerces nor inflicts any harm. Their officials will also face individual liability when wrongfully denied qualified immunity due to confusion as to clearly established law.

Amici respectfully submit this brief to demonstrate the negative impact the decision below will have on local governments and their officials and the critical need for this Court to end the Circuit conflict regarding the state-created danger exception and to clarify qualified immunity.

SUMMARY OF THE ARGUMENT

In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), this Court issued its foundational statement that the Fourteenth Amendment generally does not obligate a State or local government to protect one individual against violence from another: "As a general matter, … a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney* articulates that, while due process protects individuals from *governmental* deprivations of life, liberty or property, it accords no such affirmative protection against deprivations by *private* actors. The state created danger theory is a largely unsupportable exception to this rule.

Unsurprisingly, as explained in the Petition, the Circuits are sharply divided on the state-created danger exception. It has imposed unwarranted liability on local governments and their officials and employees, for wrongful, and often criminal, conduct committed by private parties. As documented below, the exception significantly burdens local governments and undermines officers making split-second decisions in the field.

This misadventure is not limited to law enforcement. It is easy to imagine local governments being discouraged by the threat of the exception to providing even basic services, such as libraries, park and recreation activities, or undertaking other duties such as homeless encampment cleanups. If a casual utterance creates governmental liability for a crime by a third party, other public servants may decline to offer anything more than the bare minimum of service to their constituents.

Importantly, there are remedies for miscues by law enforcement and other public officials without requiring federal causes of action. Recourse for tortious conduct, even if committed by local governments and their agents, is generally left to the States, which have carefully designed tort schemes that balance competing interests in holding government accountable. The state-created danger exception inserts the national government into matters properly reserved to state and local determination.

Beyond improperly elevating a matter that should be resolved by state mechanisms, the decision below also confuses and erodes qualified immunity. It is textbook law that qualified immunity applies "when an official's conduct 'does not clearly violate established statutory or constitutional rights of which a reasonable person would

have known.'" *White v. Pauly*, 580 U.S. 73, 78-79 (2017), quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Here, as the Petition explains, little was "clearly established," as evidenced by confusion among the Circuit Judges. If jurists formally trained in constitutional law cannot make a reasoned decision, how could an officer in a crisis situation know whether his actions violated clearly established law? As discussed below, the Circuit's confusion under the facts of this case is only part of a broader uncertainty about qualified immunity as a whole.

The nationwide lack of uniformity on the state-created danger exception and the confusion surrounding qualified immunity require this Court's attention. The Petition should be granted and the decision below should be reversed.

ARGUMENT

A. State-created danger exception cases subject local governments to liability for problems they did not create

1. Local governments face significant burdens when courts expand due process to include liability for wrongful or criminal acts of non-State actors

While Section 1983 plays a critical role in protecting federal rights, this Court has recognized that it also saddles local governments with tremendous "expenses of litigation" and "diversion of official energy from pressing public issues." *Crawford-El v. Britton*, 523 U.S. 574, 590 n. 12 (1998). These burdens are not warranted for alleged Due Process violations where a state actor neither inflicted harm nor coerced the victim.

The Seventh Circuit's decision creates particular dilemmas for law enforcement given massive increases in two societal problems: mental illness and addiction. A nationwide survey of 2,406 senior law enforcement officials showed that police are overwhelmed dealing with the severely mentally ill. Michael C. Biasotti, *Management of the Severely Mentally Ill and Its Effects on Homeland Security* (Naval Postgraduate School Thesis, 2011), 28, 33, 79, available at https://mentalillnesspolicy.org/crimjust/homelandsecuritymentalillness.html (last accessed Apr. 8, 2025).

Law enforcement officers are often the first responders to individuals experiencing a mental health crisis. Nathan James, Jonathan H. Duff, Jill C. Gallagher, Isobel Sorenson, *Issues in Law Enforcement Reform: Responding to Mental Health Crises*, Congressional Research Service R47285 (Oct. 17, 2022), 1, available at https://www.congress.gov/crs-product/R47285 (last accessed Apr. 8, 2025). Cities and other local agencies have undertaken programs to train law enforcement officers and support them with other professionals for these types of encounters. *Id.* 3-8.

These programs may reduce use of force during an encounter between a seriously mentally ill person and a law enforcement officer, but they will not reduce the number of such interactions. And they are unlikely to reduce the risk that can arise after the encounter. What happens after the police leave can unfairly give rise to liability under the state-created danger exception. *See*, *e.g.*, *Murguia v. Langdon*, 61 F.4th 1096, 1113-1115 (9th Cir.) reh'g denied 73 F.4th 1103 (9th Cir. 2023), cert. denied 144 S. Ct. 553 (2024) (father pled plausible liability under state-created danger exception by alleging that police officer knew that mother was experiencing mental health crisis, but nevertheless left children alone with

mother in motel room overnight, where mother later drowned them).

Structural factors worsen the situation. Plaintiffs with grievances against their local governments often bring these suits, encouraged by plaintiff's lawyers seeking to recover attorneys' fees. *See* Philip Matthew Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Litigation Pursuant to 42 U.S.C. § 1983 as a Correlate of Police Crime*, 30 Crim. Just. Pol'y Rev. 223, 227 (2019) (attributing the "explo[sion]" of § 1983 litigation in cases alleging police misconduct in part to the availability of attorneys' fees under §1988 [hereinafter Stinson & Brewer]. Given those incentives, expansion of the state-created danger exception will only increase the already-substantial volume of Section 1983 suits facing local governments.

The detrimental impact of those cases will be significant. The average jury award against a municipality in such cases is estimated to be approximately $2 million, and a "six- or seven-figure award against a city" is "not uncommon." Larry K. Gaines & Victor E. Kappeler, *Policing in America* 346 (9th ed. 2021). One study of 151 local law enforcement agencies found an average annual legal liability of around $13.8 million. *Id.* To mitigate the risk of such awards, local governments are often forced to secure "extremely expensive" liability insurance, only to find that "premium rates can skyrocket, or companies may refuse to insure the [municipality] at all" if the municipality finds itself litigating multiple suits in defense of itself and its local officials. *Id.*

For cash-strapped local governments, these costs cause severe financial difficulties, wreaking havoc on municipal budgets and diverting funds away from critical local priorities.

And faced with the risk of these exorbitant costs, local governments often make the Hobson's choice to settle even meritless Section 1983 actions. *Cf.* Gaines & Kappeler, *supra*, at 346-47 (noting that "more than half" of all cases alleging police misconduct are settled out of court); Stinson & Brewer, *supra*, at 226. Unfortunately, these settlements "can lead to the filing of frivolous lawsuits" aimed at procuring even more settlements. *Id.* The bottom line is that Section 1983 actions "have nearly bankrupted some municipalities and townships." *Id.* at 346.

Local governments are increasingly challenged to find insurance against this litigation, facing steep increases in municipal insurance premiums. Benchmark Analytics, *Three Factors Driving Increases in Municipal Insurance Premiums* (Jan. 14, 2022), p. 1, available at https://www.benchmarkanalytics.com/blog/three-factors-driving-increases-in-municipal-insurance-premiums/ (last accessed April 8, 2025).

A primary driver of that increase is police liability insurance premiums, which are considerably higher than in the past. Kenneth S. Abraham, *Police Liability Insurance After Repeal of Qualified Immunity, and Before*, 56 Tort, Trial & Insurance Practice Law Journal 31, 38 (2021). Insurers perceive that police officers and their employers are more likely to be held liable, and the size of the judgment is likely to be higher, when police misconduct is alleged. *Id.* Cities are presented with a difficult decision – cave to exorbitant settlement demands or take their chances at trial. *See* Jonathan Bilyk, *City Council committee rejects $1.25 M for family of Dexter Reed, who shot at cops*, Cook County Record (Apr. 11, 2025), available at https://cookcountyrecord.com/stories/670850384-city-council-committee-rejects-1-25m-for-family-of-dexter-reed-who-shot-at-cops (last accessed Apr. 29, 2025).

Large municipal payouts for alleged police misconduct may have encouraged the recent rise in private civil rights filings in the federal courts. *See* Table 1, https://imla.org/wp-content/uploads/2025/05/Table-1-Total-U.S.-District-Courts-PRIVATE-Civil-Cases-Based-on-Federal-Question-Based-on-Civil-Rights-Other-Civil-Rights-Category-c1-c1.pdf; Office of the Clerk of the Court, *Caseload Statistics Data Tables*, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last accessed Feb. 19, 2025), Table C-2 U.S. District Courts – Civil Cases Filed, by Jurisdiction and Nature of Suit (September 30, 2000-2024) (total U.S. District Courts, Private Civil Cases, Based on Federal Question, Based on Civil Rights – Other Civil Rights).[2] Private civil rights filings in the U.S. district courts increased from 13,665 to 14,626 during the 12 months ending September 30, 2023, compared to the prior period, an increase of seven percent. *Id.* Private civil rights filings increased to 16,476 during the next 12 months, ending September 30, 2024, an increase of 12 percent. *Id.* The number of private civil rights filings in the 12 months ending September 30, 2024 was the highest since 2006. *Id.*

The burden on federal courts from this increase is substantial. In the Southern District of Indiana, where

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[2] These numbers include all actions in the federal district courts categorized by the Office of the Clerk of Court as "Private Civil Cases, based on Federal Question" and "Other Civil Rights" for the years 2000-2024. Caseload Statistics, *supra*, Table C-2. "Civil rights cases – other" exclude actions for voting, employment, housing, welfare, ADA-employment, ADA-other, and education, depending on the year. *Id.* The federal courts do not report Section 1983 cases in their statistical reports. *See id.*; Stinson & Brewer, *supra*, at 226-227. But the bulk of these civil rights cases are § 1983 actions—and the total number of § 1983 actions may be even higher, because the numbers above do not include employment discrimination suits or prisoner petitions. *Id.*

this case was filed, there were 480 private civil rights cases filed in the 12 months ending September 30, 2024. *See* Table 2, https://imla.org/wp-content/uploads/2025/05/Table-2-U.S.-District-Court-PRIVATE-Civil-Cases-Based-on-Civil-Rights-for-SD-Ind.-7th-Cir-c1-c1.pdf; Office of the Clerk of the Court, Federal Judicial Caseload Statistics, Civil Cases Filed, by Jurisdiction, Nature of Suit, and District, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last accessed Feb. 19, 2025), Table C-3 U.S. District Courts – Civil Cases Filed by Jurisdiction, Nature of Suit, and District (September 30, 2000-2024) (U.S. District Court, Private Civil Cases, Based on Civil Rights, for the Southern District of Indiana).[3]

The Southern District of Indiana has just four full-time district court judges. See https://www.insd.uscourts.gov/court-information (last accessed Feb. 19, 2025). That works out to 135 new private civil rights filings per judge for the 12 month period ending September 30, 2024. The expansion of the state-created danger exception will only increase these numbers.

2. The expansion of the state-created danger exception has led to perverse results that further burden local governments

Several Circuits have expanded the state-created danger exception, leading to perverse results where simple oversights by governmental actors are treated as constitutional violations.

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[3] These numbers include all actions in the Southern District of Indiana categorized by the Office of the Clerk of Court as "Civil Rights – US" and "Civil Rights – Private" for the years 2000-2024. Caseload Statistics, *supra*, Table C-3. Civil rights filings are not otherwise broken down by type. *Id.*

The Seventh Circuit's split decision below – where an officer's two utterances of the word "yeah" were deemed to result in a violation of the Fourteenth Amendment – is a prime example of this misapplication of due process.

Murguia v. Langdon, *supra*, is one such case. There, a mother who was experiencing a mental health crisis tragically drowned her ten-month-old twins. The Ninth Circuit held an officer potentially liable because he drove the mother and the infants from a shelter to the motel where the mother drowned them; a social worker was potentially liable because she gave the officer incorrect information, omitting that the mother had a history of child abuse. *Murguia v. Langdon*, 61 F.4th at 1110-1117.

Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) is another example. There, police arrested the driver of a vehicle – who was sober – and allowed the passenger – who was drunk – to remain in the car with the keys to the vehicle. *Id.* at 1123. Approximately two hours later, the passenger drove the car and caused a head-on collision. *Id.* The court found these allegations sufficient to state a claim under the state-created danger exception. A similar scenario arose in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); the court found potential liability on a state-created danger theory where police arrested a drunk driver, impounded the vehicle, and left the plaintiff on the side of the road, where she accepted a ride from a stranger and was raped. *Id.* at 586.

In *Irish v. Fowler*, 979 F.3d 65, 68-69 (1st Cir. 2020), the plaintiff was kidnapped and raped by her ex-boyfriend, who also threatened to kill her. The plaintiff reported the rape to the police, who later called the ex-boyfriend and left a voicemail asking for a return call. The boyfriend heard the message and went on a crime

spree, murdering the plaintiff's current boyfriend, shooting her mother, and again kidnapping and raping her. *Id.* at 67-71. The plaintiff alleged that the police failed to protect her – and the court agreed that these facts stated a claim under the state-created danger exception. *Id.*

Like Amylyn Slaymaker, the plaintiffs in *Murguia*, *Reed*, *Wood*, and *Irish* unquestionably were victims of horrible crimes. But State actors did not commit those crimes – a mentally ill mother, a violent husband, a drunk driver, a rapist, and a rapist-murderer with a prior criminal record did.

3. The expansion of the state-created danger exception threatens to discourage local government from providing basic services

Beyond the myriad possibilities for error when law enforcement personnel encounter mentally ill or addicted persons, state-created danger liability interferes with a much wider range of local services. Consider code enforcement regarding homeless encampments. There are hundreds of thousands of unhoused individuals in the United States. *LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947, 952 (9th Cir. 2021). Local agencies have attempted to clean up homeless encampments, to secure access to public parks and sidewalks for all, protect the environment, and minimize public health risks. *See, e.g., id.* at 953. The potential for miscue is great: in conducting a cleanup, a local agency may ask that homeless individuals move their encampment. What happens if a third party steals the homeless individual's property while the individual is moving? What happens if a homeless individual is

assaulted by a third party at their new location? What happens if a homeless person assaults a third party at a new encampment?

Fearful of incurring liability for the acts of third parties, local agencies might be compelled to let the encampment remain in place, regardless of the burdens posed on the community-at-large.

It is not hard to imagine other innocuous governmental directions could become unjustified fodder for state-created danger litigation. For example, if public works employees close stretches of roads and highways from time to time for maintenance, what if a motorist suffers a breakdown or accident at the hands of a third party while following the detour route, and is then assaulted?

Public facilities such as libraries, swimming pools, and gymnasiums are open to the public for certain hours of the day. At closing time patrons are directed to leave the premises. What if a patron expresses fear of having to wait outside for their ride to show up, but is told by facility staff that it is closing time, is assured it is safe outside, and is directed to leave? What if the patron is later assaulted, or worse, outside while waiting for their ride?

The unwarranted liability that arises from judicial rewriting of the Due Process Clause counsels against local governments undertaking taking any such risks.

B. Federalism principles require that local agency liability for harms inflicted by third parties be resolved by state tort law

Petitioner correctly points out that the state-created danger exception intrudes on the most traditional of state roles, regulating "ordinary torts," including those "that

happen to be committed by State actors." Pet'n 18, quoting *Murguia v. Langdon*, 73 F.4th 1103, 1104 (9th Cir. 2023) (Bumatay, J. dissenting, joined by Callahan, J., Ikuta, J. and R. Nelson, J.) (internal quotation marks omitted). The facts in this case point not to a federal remedy but to state law negligence principles, if anything.

The Seventh Circuit's disregard of federalism precepts requires review by this Court, which has held that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government," and "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." *Bond v. United States*, 564 U.S. 211, 225 (2011). Just last year, this Court re-affirmed federalism principles in concluding that the Eighth Amendment's prohibition on cruel and unusual punishment did not preclude local ordinances that prohibited sleeping and camping on public property and established progressive discipline beginning with civil fines and ultimately allowing criminal prosecution for trespass. *City of Grants Pass, Oregon v. Johnson,* 603 U.S. 520, 560 (2024). *Grants Pass* stressed that principles of federalism preclude federal courts taking questions that are traditionally within the province of the States away "from the people and their elected leaders." *Id.* at 556.

This Court and lower federal courts have repeatedly held that Congress did not intend to preempt State tort law. *E.g.*, *Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (State law failure-to-warn claim not preempted by federal law); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 195 (3d Cir. 1998) (State law defamation claims not preempted by federal law); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 725 F.3d 65, 79, 104 (2d Cir. 2013) (State law tort claims for

negligence, trespass, public nuisance, and failure-to-warn not preempted by federal law); *Bui v. Am. Telephone & Telegraph Co. Inc.*, 310 F.3d 1143, 1147 (9th Cir. 2002) (joining Third, Fifth, and Tenth Circuits in holding that ERISA preemption clause does not preempt State-law actions "involving allegation of negligence in the provisions of medical care").

Limiting the Fourteenth Amendment to affirmative deprivations by state actors does not deprive victims of recourse. States typically have statutes waiving sovereign immunity, enabling plaintiffs to hold State and local governments and their agents liable for negligence and tortious failures to act. *See, e.g.*, Fla. Stat. § 768.28(5)(a) ("[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances"); Idaho Code § 6-903(1) ("every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties"); Mass. Gen. Laws Ann. ch. 258, § 2 ("[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances").

State statutes waiving sovereign immunity are consequential: state and local governmental entities and their agents are regularly held liable under State tort law. *See, e.g., Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 221 (1991) (upholding $150,000 jury verdict, where plaintiff presented evidence that police officer misused official authority by sexually assaulting woman whom

officer detained); *Bonilla v. City of Covina*, 2019 WL 8013104 *4 (C.D. Cal. Aug. 22, 2019) (denying city's motion for judgment on the pleadings re: negligence claim arising out of plaintiff's arrest); *Shattuck v. Anderson*, 2021 WL 466489 *30-35 (S.D. Ind. Feb. 9, 2021) (granting summary judgment in favor of plaintiff and against sheriff's department under state law claims of trespass and false imprisonment); *Abalos v. Bernalillo County Dist. Atty's Office*, 105 N.M. 554, 560, 734 P.2d 794 (1987) (plaintiff stated claim for negligence against city and director of city jail for releasing suspect from incarceration who sexually assaulted plaintiff).

Some states have gone further to hold themselves accountable. Colorado has fully repealed qualified immunity in suits against police under state law, Colorado Statutes 13-21-131(2)(b), and Ohio is on the verge of a similar repeal, *Summary of Petition to End Qualified Immunity for Police Officers and Other Government Employees Certified*, https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2025/Summary-of-Petition-to-End-Qualified-Immunity-for (last accessed Apr. 30, 2025). Illinois law imposes liability on law enforcement officials for certain acts and omissions, where "a result of willful or wanton misconduct." Illinois Compiled Statutes Chapter 750, Act 60, § 305. The Indiana Tort Claims Act lists several immunities, including for "enforcement" or failure to "enforce . . . a law" and "[m]isrepresentation if unintentional." Indiana Statutes § 34-13-3-3(8), (14). The variety in these approaches is the very essence of American federalism.

In sum, States have an interest in enacting tort claim statutes to define the liability of their governmental entities and agents for acts and omissions. As indicated in the references above, States have done so. There is no

gap left by State inaction that requires expansion of a state-created danger exception to federal due process.

C. Certiorari is warranted to clarify what authority is necessary for the law to be "clearly established" for the purposes of qualified immunity

The decision below reveals fundamental uncertainty about the parameters of qualified immunity. In so doing, it subjects more than 55,150 law enforcement officers in the Seventh Circuit to liability by fumbling the standards in Supreme Court precedent.[4]

The Seventh Circuit's confusion is understandable. For decades, local government officials, courts, and litigants have understood that a government official is not liable under Section 1983 for a constitutional violation unless it was clearly established at the time of the violation that the conduct in question violated the law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 611 (2015), *quoting Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011) (explaining "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent ... placed the statutory or constitutional question beyond

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[4] *Police Officers by State 2025*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/police-officers-by-state (last accessed April 23, 2025), for states of Indiana, Illinois and Wisconsin.

debate.") (internal quotations and citations omitted). The *Harlow* Court explained the importance of this requirement: an official could not "fairly be said to 'know' that the law forbade conduct" if it was "not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

But *Harlow* expressly left open the question of *what* decisional authority – that of the Supreme Court, Courts of Appeals, or even district courts – could clearly establish the law. *Harlow,* 457 U.S. at 810, n. 32. That question has been percolating in the lower courts for more than forty years and there is sharp disagreement among the Circuits regarding the question. That uncertainty has serious consequences for local governments and their officials who need sufficient notice to avoid liability in the almost limitless number of situations where they may encounter the public.

This Court has implicitly acknowledged this open question without deciding it. *See Sheehan,* 575 U.S. at 614 (noting "*even if* a controlling circuit precedent could constitute clearly established federal law in these circumstances" it did not do so in this case) (internal quotations omitted) (emphasis added); *Carroll v. Carman,* 574 U.S. 13, 17 (2014) (accord *Reichle v. Howards,* 566 U.S. 658, 665 (2012) ("[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances" but finding that it failed to do so in the particular case). Although the Court in *Wilson v. Layne* had implied that controlling authority from the jurisdiction in question or even a "consensus of cases of persuasive authority" might clearly establish the law for qualified immunity

purposes. 526 U.S. 603, 617 (1999), that dicta predates *Sheehan*, *Carroll*, and *Reichle*, which all imply that only a Supreme Court precedent or at the very least a controlling circuit court precedent from the jurisdiction might suffice, leaving litigants and courts guessing as to what authority may clearly establish the law. The Court in *Sheehan* also undermines the idea that *Wilson* required a "consensus of authority" when *Sheehan* noted "**to the extent** that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, no such consensus exists here." *Sheehan*, 575 U.S. at 617 (emphasis added).

That lack of clarity has spawned complete disarray in the circuit courts. For example, the Third and Fourth Circuits look to the Supreme Court, their own decisions, decisions of the highest state court, or absent that, persuasive authority from other circuits to determine if the law is clearly established. *See Owens ex rel. Owens v. Lott*, 372 F.3d 267, 280 (4th Cir. 2004); *Williams v. Bitner*, 455 F.3d 186, 192–93 (3d Cir. 2006). The DC Circuit limits the use of case law from other circuits to only circumstances where there are "no cases of controlling authority" in its own jurisdiction. *Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004), *rev'd on other grounds*, 547 U.S. 250 (2006).

Meanwhile, the First, Fifth, Seventh, Eighth, and Ninth Circuits take what appears to be a broader view of what decisional authority may clearly establish the law. These courts not only consider their own circuit authority, but also district court decisions, including in some cases, unpublished district court opinions. *See Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) (explaining "'[i]n the

absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.'"); *Hatch v. Dep't for Child., Youth & Their Fams.*, 274 F.3d 12, 23 (1st Cir. 2001) (providing "[t]o determine the contours of a particular right at a given point in time, an inquiring court must look not only to Supreme Court precedent but to all available case law."). The Seventh Circuit also surveys "all relevant case law in order to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Denius v. Dunlap,* 209 F.3d 944, 951 (7th Cir. 2000) (internal quotations omitted). The Fifth Circuit has relied on *Wilson* to conclude that absent its own direct controlling authority, a "consensus of cases of persuasive authority might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful." *McClendon v. City of Columbia,* 305 F.3d 314, 329 (5th Cir. 2002) (internal quotations omitted). While these approaches all vary slightly, the upshot is that government officials in these jurisdictions seem to be required to read all relevant case law throughout the country to stay abreast of possible "clear trends" even from outside their jurisdiction in order to understand the contours of the law and avoid liability.

The Sixth Circuit takes a slightly narrower approach, looking only to beyond Supreme Court and Sixth Circuit precedent in "extraordinary cases." *See Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993), *superseded by statute on other grounds as*

recognized in Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397, 407 (6th Cir. 2007). The Sixth Circuit explained

> decisions [from other courts] must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Walton, 995 F.2d at 1336, quoting *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). Local government officials in Ohio, Tennessee, Michigan, and Kentucky can't stay abreast of only Supreme Court and Sixth Circuit case law – as well as situations where a large number of decisions from outside the circuit "unmistakably" point to the unconstitutionality of the conduct.

In sharp contrast, the Second and Eleventh Circuits will only find the right was clearly established if a Supreme Court case is directly on point or there is a decision from the controlling circuit clearly establishing the right. *See Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) (explaining "[w]hen neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly

established within the Second Circuit"); *Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002) (noting that decisions from other circuits are "immaterial to whether the law was 'clearly established' in this circuit…"). Thus, local government officials in Georgia, Alabama, Florida, Vermont, Connecticut and New York have perhaps the clearest parameters of how to understand the contours of the law to avoid liability.

The Tenth Circuit's approach is unclear. Recently, it appeared to side with the Second and Eleventh Circuits, concluding that only Supreme Court or Tenth Circuit precedent may provide the necessary authority to clearly establish a right for purposes of qualified immunity; however, earlier Tenth Circuit cases suggest that courts in that circuit may look elsewhere to persuasive authority. *Compare Pauly v. White,* 874 F.3d 1197, 1222 (10th Cir. 2017) *with Medina v. City & Cty. of Denver,* 960 F.2d 1493, 1498-99 (10th Cir. 1992), *overruled on other grounds as recognized by Morris v. Noe,* 672 F.3d 1185, 1196 n. 5 (10th Cir. 2012). Local government officials in the Tenth Circuit may therefore need to err on the side of caution and take a more expansive approach to reviewing the case law in order to avoid liability under Section 1983.

This lack of certainty as to whether the law is clearly established leads to increased litigation and a lack of predictability. More fundamentally, it erodes the very purpose of qualified immunity and the foundational requirement that the law be clearly established to hold a government official liable for violating the Constitution or federal law. When different judges reviewing the same set of facts and precedents cannot agree that the law is clearly

established, how can a public official be on notice that the conduct at issue violates the law? What constitutes clearly established law for the purposes of qualified immunity is a critical issue that impacts millions of public servants working for local government. The answer to that question cannot be a matter of geography or happenstance. This Court should grant certiorari to provide needed clarity on the issue, both for those public servants and for the courts across the nation.

CONCLUSION

The Court should grant the Petition and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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