No. 23-270

In the Supreme Court of the United States

COUNTY OF TULARE, ET AL.,
Petitioners,

v.

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

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal 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 provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The California State Association of Counties ("CSAC") is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by its Litigation Overview Committee, comprised of county counsels throughout the State. The

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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.

Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities ("Cal Cities") is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Given their extensive experience with local governments and local government law, *Amici* have a uniquely valuable perspective on the relevant issues in this case. *Amici* and their members have direct experience regarding the significant problems that the decision below will pose for local governments throughout the United States. Despite substantial state law tort remedies for many of the claims at issue, those governments face unwarranted and heightened Constitutionally-based due process liability under 42 U.S.C. § 1983 premised on the judicially-fashioned "State-created Danger" Doctrine when State action somehow enhances the risk that a private person will be harmed by another private person, even where the State exercises no coercion and inflicts no harm on the victim. The decision below embodies the unfettered expansion of this judicially-created doctrine—a doctrine about which the Circuits are irrevocably split.

Amici respectfully submit this brief to emphasize the significant negative impact that the decision below will have on local governments and to demonstrate the critical need for this Court to grant certiorari, and end the acknowledged Circuit conflict regarding the State-created Danger Doctrine.

SUMMARY OF THE ARGUMENT

In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), this Court held that "[a]s a general matter, … a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." This is in keeping with precedent recognizing that the Due Process Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure" interests "of which the government itself may not deprive the individual." *Id.* at 196.

As thoroughly explained in the Petition for Writ of Certiorari, based on a misreading of a single sentence in *DeShaney*, ten Circuits have added new constitutional protections under the guise of the State-created Danger Doctrine, even though such protections are not found in text of the Due Process Clause. This has resulted in the imposition of liability on local governments and their officials, employees and law enforcement officers through Section 1983 actions arising from wrongful, and often criminal, conduct committed by private parties. The largely unrestricted expansion of the State-created Danger Doctrine creates significant burdens on local governments.

These burdens are not warranted when they are based on a suspect theory that is not tethered to the language of

the Due Process Clause and that the courts have expanded exponentially, leading to perverse results. It is not difficult to imagine local governments being discouraged by the threat of Section 1983 actions premised on the dubious State-created Danger theory from providing even the most basic services, such as homeless encampment cleanups, libraries, and park and recreation activities. At a minimum, such a threat disincentivizes public servants from providing more than the lowest possible level of service to their constituents.

The regulation of torts, even those committed by government agencies and their agents, is generally left to the States. State and local governments have carefully designed tort schemes that balance competing interests in holding government accountable. Unchecked expansion of the State-created Danger Doctrine has run roughshod over federalism principles, inserting the national government into matters properly reserved to state and local determination.

The need for this Court's review is acute. The decision below deepens an entrenched Circuit split and is plainly in error. The Ninth Circuit's decision to expand liability for due process violations where the local government neither caused the harm nor exercised coercive control over the victim, cannot be squared with either the text of the Due Process Clause or this Court's decision in *DeShaney*. The Ninth Circuit's version of the State-created Danger Doctrine and decision below are wrong and will result in substantial and unjustified burdens on local governments.

This Court should grant Certiorari and resolve these critical issues now. As petitioners explain, all but one Circuit have taken sides on viability of the State-created Danger Doctrine, and the Circuits apply different

standards for determining when the doctrine is met. This nationwide lack of uniformity has severe consequences for *Amici* and their members and warrants this Court's immediate attention. The Petition for Certiorari should be granted and the decision below should be reversed.

ARGUMENT

I. State-Created Danger Doctrine Cases Are Exposing Local Governments To Liability For Problems They Did Not Create

A. Local Governments Face Significant Burdens When Courts Expand Substantive Due Process To Include Liability Under Section 1983 For The Wrongful Or Criminal Acts Of Non-State Actors

Without question, Section 1983 plays a critical role in protecting federal rights, as it serves to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). At the same time, and as this Court has recognized, Section 1983 lawsuits can impose significant burdens on municipalities and the public by saddling 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 warranted when a Section 1983 action is necessary to redress alleged violations of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. These significant burdens are not

warranted when, as with the State-created Danger Doctrine, the judiciary expands liability under Section 1983 for alleged Due Process violations where a state actor neither inflicted harm nor exercised coercion over the victim.

The Ninth Circuit's decision below ignores these concerns. It subjects local governments and their officials, employees and law enforcement officers to substantial litigation costs and potentially enormous awards for damages and attorneys' fees, *see* 42 U.S.C. §§ 1983, 1988, arising from harm committed by conduct of non-state actors.

The Ninth Circuit's expansion of the State-created Danger Doctrine beyond the text of the Due Process Clause and this Court's decision in *DeShaney* will exacerbate the flood of Section 1983 litigation that local governments face. Civil rights cases constituted sixteen to twenty-six percent of the cases filed in the United States District Court for the Eastern District of California, where the case below arose, during 2014-2022. Office of the Clerk of the Court, *Federal Judicial Caseload Statistics, Civil Cases Filed, by Jurisdiction, Nature of Suit, and District* (2014-2022), https://www.uscourts.gov/federal-judicial-caseload-statistics-2022-tables ("Caseload Statistics") Table C-3 (last visited October 13, 2023). The fewest number of civil rights cases in any one of those years totaled 788 cases. *Id.* With just six full-time district court judges in the Eastern District, that works out to 131 new civil rights case filings per judge per year. *Id.*; United States District Court, Eastern District of California, Judges, https://www.caed.uscourts.gov/caednew/index.cfm/judges

/all-judges/ (last visited October 13, 2023).[2] Nationwide, at least 14,000 civil rights actions are filed in the federal district courts each year, averaging out to about four new civil rights actions each year for every county in the United States. See Caseload Statistics, *supra*, Table C-2; World Population Review, States with the Most Counties 2023, https://bit.ly/3vSDP3j (last visited October 11, 2023) (tallying 3,243 county equivalents nationwide); *see also* 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).[3]

Structural factors worsen the flood of Section 1983 actions. Plaintiffs with perceived grievances against their local governments often feel strong personal incentives to bring these suits and are often encouraged by plaintiff's lawyers hoping to recover attorneys' fees under Section 1983 if the action is successful. *See* Stinson & Brewer,

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[2] These numbers include all actions in the Eastern District of California categorized by the Office of the Clerk of Court as "Civil Rights – US" and "Civil Rights - Private" for the years 2014-2022. Caseload Statistics, *supra*, Table C-3. Civil rights filings are not otherwise broken down by type. *Id.*

[3] These numbers include all actions in the federal district courts categorized by the Office of the Clerk of Court as "civil rights cases – other" for the years 2014-2022. 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 Section 1983 actions—and the total number of Section 1983 actions may be even higher, because the numbers above do not include employment discrimination suits or prisoner petitioner. *Id.*

supra, at 227 (attributing the "explo[sion]" of Section 1983 litigation in cases alleging police misconduct in part to the availability of attorneys' fees under Section 1988; Thomas A. Eaton & Michael Wells, Attorney's Fees, Nominal Damages, and Section 1983 Litigation, 24 Wm. & Mary Bill Rts. J. 829, 837 (2016) (recognizing the "systemic value [of fees under §1099] in encouraging litigation"). Given those reinforcing incentives, any judicial expansion of the Due Process Clause and the State-created Danger Doctrine will increase the already-substantial volume of Section 1983 suits that local governments face.

It is not just the number of Section 1983 cases that burdens local governments but also the potentially massive awards of damages and attorneys' fees if the plaintiffs prevail. The average jury award of liability 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. Gains & Kappeler, *supra*, at 346. 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.*[4]

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[4] Even where the only named defendants are governmental officials, employees or police officers, "most municipalities … indemnify officials sued for conduct within the scope of their authority … ." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 713 n. 9 (1978) (Powell, J., concurring).

For cash-strapped local governments, these costs can cause severe financial difficulties by wreaking havoc on local government budgets and diverting funds away from critical local priorities. Moreover, ultimately, the "resulting financial loss" from the costs of litigation, any adverse judgment, and any award of attorneys' fees will be "borne by all the taxpayers" of the municipality, who are innocent of any wrongdoing. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980).

Faced with the risk of these exorbitant costs, local governments often make the Hobson's choice to settle even meritless Section 1983 actions. *Cf.* Gaine & 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. Such settlements require local government to "pay [plaintiffs and their lawyers] large sums of money, even in cases" where the local government and its officials, employees and officers might not have been found liable. Gaines & Kappeler, *supra*, at 347. Even worse, settlements entered into to avoid the costs and risks of litigation "can lead to the filing of frivolous lawsuits" aimed at procuring more settlements. *Id.* The end result is that "whether through "enormous awards [or]settlements," Section 1983 actions "have nearly bankrupted some municipalities and townships." *Id.* at 346.

Section 1983 actions impose significant costs and burdens on municipalities. These costs and burdens may be justified when state actors have deprived a plaintiff of their Constitutional rights. But they are not justified when a non-State actor's intervening wrongful and often criminal conduct causes the harm. The Petition for Certiorari should be granted so local governments will not

be unfairly burdened by Section 1983 actions premised on a misreading of one sentence in *DeShaney*.

B. The Unfettered Expansion Of The State-Created Danger Doctrine Has Led To Perverse Results That Further Burden Local Governments

Several Circuits have exponentially expanded the State-created Danger Doctrine leading to perverse results where run-of-the-mill mistakes by government are treated as constitutional violations.

This is perhaps best demonstrated by the cases where courts found viable due process claims on State-created Danger theories even though the ultimate harm to the victim/plaintiff resulted from criminal conduct of non-State actors. The Ninth Circuit's decision below is a prime example of this, as thoroughly explained in the Petition.

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 with the plaintiffs causing serious injuries and one fatality. *Id.* The court found these allegations sufficient to state a claim under the State-created Danger Doctrine. Where the court found the potential for liability in *Reed* based on allowing the passenger to remain in the car, in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), the court found potential liability on a State-created Danger theory where police removed the passenger from an impounded car. There, the police arrested a drunk driver, impounded the vehicle, and left the plaintiff, who was a passenger in the

vehicle, on the side of the road in a dangerous neighborhood, 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 and the police later called the ex-boyfriend and left a voicemail asking for a return call. After the boyfriend heard the message, he went on a crime spree, murdering the plaintiff's current boyfriend, shooting her mother, and once again kidnapping and raping her. *Id.* at 67-68. The plaintiff alleged that the police violated her due process rights because their voicemail message enraged the ex-boyfriend and the police then failed to protect her—and the court agreed that these facts stated a claim under the State-created Danger Doctrine. *Id.*

The plaintiffs in *Reed*, *Wood* and *Irish* unquestionably were victims of horrible crimes. But State actors did not commit those crimes—a drunk driver, a rapist and a rapist-murderer with a prior criminal record did. The runaway expansion of the State-created Danger Doctrine is leading to perverse results where State actors are being held liable for due process violations for the wrongful and criminal acts of private parties. Certiorari should be granted to press the brakes.

C. The Further Expansion Of The State-Created Danger Doctrine Threatens To Discourage Local Government From Providing Basic Services

The boundless expansion of State-created danger liability unreasonably interferes with a wide range of local

services. One example is public code enforcement services regarding homeless encampments. There are hundreds of thousands of unhoused, or "homeless," individuals in the United States. United States Dep't of Housing and Urban Development, *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress*, https://www.huduser.gov/portal/sites/default/files/pdf/2022-ahar-part-1.pdf, pp. 10-11 (last visited October 16, 2023). 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., LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947, 953 (9th Cir. 2021). In conducting a cleanup, a local agency may ask that homeless individuals move their encampment, if only temporarily. What happens if a third party steals the homeless individual's property while the homeless individual is moving their encampment? What happens if a homeless individual is assaulted by a third party at their new encampment location?

The Ninth Circuit's broad reading of the State-created Danger Doctrine discourages local agencies from "doing too much" to respond to homeless encampments. Understandably fearful of incurring liability for the acts of third parties when a homeless person is compelled to move their encampment, local agencies might be impelled to let the encampment remain in place, regardless of the burdens posed on the community-at-large. Ninth Circuit constitutional jurisprudence outside the State-created Danger Doctrine already severely restricts the ability of local agencies to address the hazards posed by homeless encampments to homeless individuals and the community as a whole. E.g., *Lavan v. City of Los Angeles*, 693 F.3d

1022, 1033 (9th Cir. 2012) (city may not summarily seize and destroy unattended personal property on the sidewalk); *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1116 (9th Cir. 2021) (city may not discard homeless individuals' bulky items that are stored in public areas); *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) (city may not impose criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter); *Johnson v. City of Grants Pass*, 72 F.4th 868, 896 (9th Cir. 2023) (city may not impose criminal penalties for using rudimentary forms of protection from the elements for homeless individuals who cannot obtain shelter). The Ninth Circuit's expansive interpretation of the State-created Danger Doctrine threatens to discourage local agencies from doing much of anything to address homeless encampments.

Local governments often provide public library services. The right to receive information in a public library is protected by the First Amendment. *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 869 (1982). Consider the following hypothetical. An individual goes to a public library and asks the librarian for help finding books on monsters. The librarian shows the individual Bram Stoker's Dracula and Mary Shelley's Frankenstein. While checking out the books at the circulation desk, the individual confides in the librarian that the individual often feels like a monster, makes vague threats about harming people, and hopes the books will teach the individual what to do. What if the individual later assaults someone, and after their arrest credits the books recommended by the librarian for "inspiration?" The Ninth Circuit's interpretation of the State-created Danger Doctrine risks discouraging

libraries from carrying books that might be upsetting to some individuals. This diminishes the open marketplace of ideas protected by the First Amendment. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 884 (2010).

Many cities, counties, and special districts provide park and recreational services, including sports programs for youths. *See, e.g.*, *Risse v. Porter*, 2020 WL 1433144 *4 (E.D. Cal. March 24, 2020). Imagine a parent believes that a team member on the opposing team is targeting the parent's child on the field, becomes upset, and starts yelling obscenities during a game. Following complaints by another spectator, the city-run league ejects the parent from the stands and bars the parent and the parent's child from further participation pursuant to league policy. The parent warns the city at the debarment hearing that "this is not the end" and that the parent will "get back at" those responsible. What if the parent then seeks out the spectator who complained and assaults them? The Ninth Circuit's open-ended interpretation of the State-created Danger Doctrine threatens to discourage government recreation providers from enforcing policies to maintain safe places for play, or from offering recreational services at all.

II. Federalism Principles Require That Local Agency Liability For Harms Inflicted By Third Parties Be Resolved By State Tort Law

Petitioners correctly point out that the State-created Danger Doctrine "trespasses on the most traditional of state roles," the "regulation of torts," including those committed by "someone cloaked with state authority." Pet'n 33-34. The Ninth Circuit's expansive construction of

the State-created Danger Doctrine infringes on State and local governments' ability to enact policies that balance competing interests and meet their communities' needs. The Ninth Circuit's disregard of federalism principles calls for review by this Court.

This Court 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). Federal preemption of State law will not be found lightly. The Court and lower federal courts have repeatedly held that Congress did not intend to preempt State tort law in a variety of contexts. *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").

Federal case law recognizes that tort law, including regarding negligence and failure to act, is a matter of State concern. The decision below effectively supersedes State law by superimposing a federal cause of action where a State actor does something that marginally

increases the danger faced by a plaintiff and the plaintiff is injured by a third party. The Ninth Circuit has lost sight of Section 1983's purpose, which is to provide relief where State actors refuse to enforce federal civil rights. *See Mitchum v. Foster*, 407 U.S. 225, 240-242 (1972). States already provide ample legal protections to enable 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 ("[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 and allowing tort claims to proceed against local governmental entities and their agents are meaningful. 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 jury verdict for plaintiff against city in the amount of $150,000, 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 with respect to negligence claim arising out of plaintiff's arrest); *C.A. a Minor, etc. v. William S. Hart Union High School District* 53 Cal. 4th 861, 879 (2012) (holding that a public school district may be vicariously liable for the negligence of administrators or supervisors in hiring, supervising, and retaining a school employee who sexually harasses and abuses a student); *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, where plaintiff alleged city and director negligently released suspect from jail who later sexually assaulted plaintiff).

States and local governments have an interest in enacting tort claims statutes to define the liability of governmental entities and their agents for their acts and omissions. States have done so. States provide ample legal protections to plaintiffs injured by the actions and inactions of governmental entities and their agents. There is no need to expansively interpret the State-created Danger Doctrine to fill a gap left by State inaction here. There is no need to override State autonomy in this area of State concern.

CONCLUSION

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

Respectfully submitted,

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