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 *AMICI CURIAE* THE NATIONAL SHERIFFS' ASSOCIATION, MAJOR COUNTY SHERIFFS OF AMERICA, CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS ASSOCIATION, AND CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Sheriffs' Association (NSA) is a non-profit association under I.R.C. §501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,086 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

The Major County Sheriffs of America (MCSA) is a professional law enforcement association of the 100+ largest Sheriff's Offices representing counties or parishes of 500,000 population or more. MCSA is dedicated to preserving the highest integrity in law enforcement and the elected Office of Sheriff. The membership of MCSA represents over 130 million citizens and is a united and powerful voice of community leaders on issues of public concern through sense of urgency, communication, education, advocacy, and research. MCSA has appeared in many past court cases as *amicus curiae* on behalf of law enforcement and Sheriffs across the country.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of this brief.

The California State Sheriffs' Association (CSSA) is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel in order to allow for the general improvement of law enforcement throughout the State of California.

The California Police Chiefs Association (CPCA) represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

The California Peace Officers' Association (CPOA) represents more than 25,000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

Amici have a strong interest in this case because the Ninth Circuit's opinion exposes *amici* and their members to additional and unwarranted lawsuits. *Amici* thus urge the Court to grant the petition.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"Faced with tragic facts," courts "may be tempted to expand the scope of constitutional rights to grant relief to injured parties in federal court." Pet. App. App. 96a-97a. (Bumatay, J., dissenting from denial of rehearing en banc). "Judges and lawyers, like other humans, are moved by natural sympathy … to find a way for [plaintiffs] to receive adequate compensation for the grievous harm inflicted upon them." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989). But courts may not "simply … 'make good the wrong done'" by creating new exceptions to constitutional rules that have no basis in text, history, or this Court's precedents. Pet. App. 96a (Bumatay, J., dissenting from denial of rehearing en banc) (quoting *Boule v. Egbert*, 998 F.3d 370, 374 (9th Cir. 2021)). Yet that is exactly what the Ninth Circuit did here.

The facts of this case are tragic. After trying to help Heather Langdon through a mental health crisis, police arranged for her to stay in a motel for the night, where she drowned her ten-month-old twins in the bathtub. Pet. App. 2a. Her husband and the twins' estates brought a Section 1983 suit against the officers and a social worker, alleging that they violated the twins' due process rights under the state-created danger doctrine. The district court dismissed the state-created danger claims, but the Ninth Circuit reversed. In doing so, it expanded the state-created danger doctrine to allow claims against the officers to proceed.

That decision is untenable for several reasons. First, the state-created danger doctrine is unsupported by the text of the Constitution, the

history of the Due Process Clause, or this Court's precedents. This Court has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of *government*'"—not protection against the action of *private* individuals. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). But based on a misreading of two sentences in this Court's decision in *Deshaney v. Winnebago*, eleven circuits have proffered "an exception to the general rule that government has no duty under the Due Process Clause to protect people from privately inflicted harms." *Fisher v. Moore*, 73 F.4th 367, 368-69 (5th Cir. 2023).

Even if there were a plausible textual or historical basis for the state-created danger doctrine, the inconsistent standards the circuits apply make this Court's review imperative. As Petitioners explain, the lower courts are "intractably divided" over the doctrine and how to apply it. Pet. 12. These disagreements have led to different outcomes in different jurisdictions. And the Ninth Circuit's version of the doctrine is the most expansive yet.

Importantly, expanding the state-created danger doctrine to impose liability on officers in difficult circumstances would have significant consequences for law enforcement departments. Opening new and expansive avenues of liability will deter law enforcement from acting promptly and effectively in carrying out their duties. It will also increase costs to law enforcement departments and the municipalities that indemnify them. Those costs would reduce vital department resources and discourage talented candidates from joining and staying on the force. At a time when law enforcement departments are critically

short staffed, under immense public pressure, and faced with a homelessness crisis and an uptick in violent crime, increased liability would significantly deter law enforcement officers from acting, resulting in harm to those who depend upon them.

Simply put, if left uncorrected, the Ninth Circuit's expansion of the state-created danger doctrine would harm law enforcement officers and the most vulnerable members of the public. The Court should grant the petition and reverse the decision below.

ARGUMENT

I. The state-created danger doctrine is unsupported by the text of the Constitution, the history of the Due Process Clause, or this Court's precedents.

The state-created danger doctrine "finds no support in the text of the Constitution, the historical understanding of the 'due process of law,' or even Supreme Court precedent." Pet. App. 97a. (Bumatay, J., dissenting from denial of rehearing en banc). The Fourteenth Amendment's 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, cl. 3. That text is plainly "phrased as a limitation on a State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. Indeed, "nothing in the language of the Due Process Clause itself requires the State" to affirmatively "protect the life, liberty, and property of its citizens against invasion by private actions." *Id.* Nor is the Due Process Clause "a guarantee against incorrect or ill-advised

[government] decisions." *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992).

The Due Process Clause's history shows the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516, 527 (1884). In the wake of reconstruction, the federal government was concerned southern states would reimplement de facto slavery by systematically depriving newly freed African Americans of the same rights granted to whites. *See* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). Thus, the Due Process Clause was "intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney*, 489 U.S. at 196. It would serve as the "last line of defense against improper state infringement" on important rights, not a mandate on states to provide substantive guarantees. Natalie M. Banta*, Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 Wyo. L. Rev. 151, 162 (2013).

Early cases interpreting the Due Process Clause confirm it serves as a limitation on state action. In the *Slaughter-House Cases*, the Court explained the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's Due Process Clause function in the same way: as "additional restraints upon those [powers] of" government. 83 U.S. 36, 81 (1872). Similarly, in *United States v. Cruikshank,* the Court declined to hold the Due Process Clause required states to provide substantive benefits to citizens. 92 U.S. 542, 554 (1875). Instead, the Court reinforced the

historical understanding of the clause, explaining that it "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." *Id.*

It may be the case that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety or general well-being." *DeShaney*, 489 U.S. at 199-200. When the state "incarcerat[es]", "institutionaliz[es]," or "similar[ly] restrain[s] … personal liberty," for example, a "special relationship" may exist that obligates the state to provide certain guarantees. But in those cases, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf" … which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *Id.* at 200. It is not the state's "failure to act to protect his liberty interests against harms inflicted by other means." *Id.*

Moreover, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in original). Indeed, "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act," and this Court has been careful "not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Id.* at 330 (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring).

Rather than in the text, history, or early precedents, the state-created danger doctrine purportedly finds its roots in two sentences of this Court's decision in *Deshaney v. Winnebago*. 489 U.S. at 201. There, a young boy, Joshua DeShaney, and his mother brought a §1983 action against county social workers after he was temporarily removed and then returned to his abusive father, where he was severely beaten and put into a coma. DeShaney alleged that by being aware of the abuse and failing to protect him, the government violated his rights under the Due Process Clause. This Court, however, rejected that argument, holding that the Clause provided no "affirmative obligation on the State to provide the general public with adequate protective services." *Id.* at 197. The Court explained that "[w]hile the State may have been aware of the danger 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 … it placed him in no worse position than that in which he would have been had it not acted at all." *Id.*

From these two lines, eleven circuits have discovered "an exception to the general rule that government has no duty under the Due Process Clause to protect people from privately inflicted harms." *Fisher*, 73 F.4th at 368-69. But *Deshaney* itself created no new exception. Rather, from the Court's suggestion that its analysis *may* have been different with alternative facts, the circuits have invented a new exception for so-called state-created dangers. But as Judge Bumatay explained, "the Court was not proposing a new exception" in *DeShaney*. Pet. App. 111a. (Bumatay, J., dissenting from denial of rehearing en banc). Instead, the Court was "merely

providing further explanation for why the special relationship exception did not apply" in that case. *Id.*; *see also Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 493 (6th Cir. 2019) (Murphy, J., concurring) ("The point of this sentence was to distinguish cases holding that a state must protect individuals (like prisoners) who are in custody and whose liberty the state has, in fact, restricted."). In all events, "it is doubtful that the Supreme Court meant to fashion a novel theory of substantive due process liability through such incidental language." Pet. App. 110a. (Bumatay, J., dissenting from denial of rehearing en banc).

Given its lack of textual or historical support, this Court should grant the petition, clarify what *DeShaney* means, and reject the "judicial improvisation" of the state-created danger doctrine. *Fisher*, 73 F. 4th at 374.

II. The inconsistent standards the circuits apply demonstrate that this Court's guidance is badly needed.

Even if there were a plausible textual or historical basis for the state-created danger doctrine, "the inconsistent approaches taken by the lower courts," demonstrate that this Court's guidance is badly needed. *DeShaney*, 489 U.S. at 194. Most circuits now agree that, based on *DeShaney*, "state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm." *Seamons v. Snow,* 84 F.3d 1226, 1236 (10th Cir. 1996) (quoting *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995)). They disagree, however, on how egregious a state actor's conduct must be to count as a state-created danger. Pet. App. 116a-18a (Bumatay, J., dissenting

from denial of rehearing en banc). They disagree about whether inaction can become action. *Id.* They disagree about whether the use of quintessential state authority is required. *Id.* They disagree about whether knowledge of danger is required. *Id.* They disagree about whether a three-factor test or a five-factor test applies. *Id.* And, of course, some even disagree about whether the doctrine exists at all. *Id.*

These disagreements have, predictably, led to different outcomes depending on where plaintiffs live. For example, take two tragic cases of student suicide after leaving school. In New Mexico, a high school student who had expressed suicidal ideation to school officials in the past, was "verbally reprimanded ... for harassing an elementary student." *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1256 (10th Cir. 1998). After he became violent and threatened to harm a teacher in response to the reprimand, the school suspended him on an emergency basis and had him driven home without notifying his parents in violation of school policy. *Id.* at 1256-57. The student's parents returned home and found their child dead of a self-inflicted gunshot wound. *Id.* at 1257. The Tenth Circuit found that the allegations of a state-created danger were sufficient to permit the case to go to trial. *Id.* at1264.

A few years later, however, a court in Wisconsin came to the opposite conclusion based on materially similar facts. In that case, after catching a student with a cigarette hidden in a sock in her locker, the principal suspended the student for three days, then sent her home on the bus without notifying her parents in violation of school policy. *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 704-06

(7th. Cir. 2002). The student was distressed and committed suicide upon returning home. *Id.* at 705. The Seventh Circuit concluded that the school did not "create or increase a risk" to the student "by suspending her from school, even if that action caused severe emotional distress." *Id.* at 710. The court acknowledged the facts were similar to those in *Armijo*. *Id.* at 710-11. But it explained that in *Armijo*, the student had been suspended and sent home *during* the school day, while in *Martin*, the student had been suspended and sent home *at the end* of the school day. *Id.* at 711. Thus, the existence of a state-created danger and a violation of the Fourteenth Amendment depended on a matter of hours.

These divergent results are just the tip of the iceberg. "Practically every circuit that's endorsed the state-created danger [doctrine] has come up with a different test for when" and how it should apply. Pet. App. 115a. (Bumatay, J.). Yet none of these tests is based on a proper understanding of the Due Process Clause or of *DeShaney*. In fact, "[m]ore than any other case," *DeShaney* "teaches that the Due Process Clause's text—focused on *state* deprivations of life, liberty, or property without adequate process—makes the clause a poor fit for claims that the state refused to protect a person from *private* deprivations of life, liberty, or property." *Estate of Romain*, 935 F.3d at 493 (Murphy, J., concurring) (emphasis in original). Without any foundational underpinning to anchor any of these tests, the circuits "produce[] absurd results." Pet. 31. And "run-of-the-mill mistakes in police or government conduct are treated as violations of the Constitution." *Id.*

The Ninth Circuit employs the most aggressive version of these tests to date. *See* Pet. 32. While many of the circuits require a "shocks the conscience" element to find a due process violation, App. 116a-18a, the Ninth Circuit "now creates a due process violation 'based solely on negligence and mistake.'" Pet. App. 114a (Bumatay, J., dissenting from denial of rehearing en banc) (quoting App. 54a, Ikuta, J., dissenting). This, despite the fact that that "[n]o case" in this Court "has held that recklessness or deliberate indifference is a sufficient level of culpability to state a claim of violation" of due process rights "in a non-custodial context." *Waldron v. Spicher*, 954 F.3d 1297, 1310 (11th Cir. 2020).

Due to these inconsistent outcomes based on tests that are unmoored from a proper understanding of the Due Process Clause, this Court should grant the petition to standardize the approach across the country.

III. If left uncorrected, the Ninth Circuit's expansion of the state-created danger doctrine will harm law enforcement officers and the most vulnerable members of the public.

A. Expanding the state-created danger doctrine will deter law enforcement from acting promptly and effectively.

Expanding the state-created danger doctrine to impose liability on officers in difficult circumstances would have significant consequences for law enforcement departments. Chief among them, the threat of additional liability would deter and distract officers from the "effective performance of their []

public duties." *Briscoe v. Lahue*, 460 U.S. 325, 343 (1983). That is a dangerous result for the public—especially its most vulnerable members.

This Court has long recognized that threats of personal liability against government officials performing job-related duties threaten the public good. From the start, the common law "recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974). That immunity rests on two principles: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 239-40. Of course, "[i]mplicit in the idea that officials have some immunity" for their acts, "is a recognition that they may err." *Id.* at 242. But the entire "concept of immunity" assumes that "it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.*

Yet that is what expanding liability would do: discourage police officers from acting effectively or from "act[ing] at all." *Id.* As Judge Learned Hand correctly recognized a half-century ago: "[T]o submit all officials ... to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Mateo*, 360 U.S. 564, 571 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.

1949)). It is wrong to "subject those who try to do their duty to the constant dread of retaliation." *Id.*

Each year, police interact with civilians tens of millions of times. In 2020 alone, police interacted with 53.8 million U.S. residents. *See* Susannah N. Tapp & Elizabeth J. Davis, *Contact Between Police and the Public, 2020*, U.S. Dep't of Justice (Nov. 2022), perma.cc/RJW7-UTXC. In these millions of interactions, officers must often make split second decisions. Fearing the potential for liability, officers may "refrain from acting, may delay their actions, may become formalistic by seeking to 'build a record' with which subsequently to defend their actions, or may substitute 'safe' actions for riskier, but socially more desirable, actions." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 652 (1987) (citation omitted). This kind of overthinking will both slow down policing, decrease officer safety, and harm those who need help.

At a time when law enforcement departments are short staffed and under immense public pressure, increased liability would further incapacitate officers and those who depend on them. Police departments are already struggling to cope with increased violent crime and rampant homelessness. Crime statistics show recent surges in violent crime in general and homicide in particular. Cong. Rsch. Serv., *Violent Crime Trends, 1990-2021* (Dec. 12, 2022), perma.cc/38X7-JWN7. In a July 2023 survey of 37 American cities, "violent crimes remained elevated compared to 2019," with 24 percent more homicides during the first half of 2023 compared to the first half of 2019. Council on Criminal Justice, *Crime Trends in U.S. Cities: Mid-Year 2023 Update* (July 2023),

perma.cc/R8HL-UZH4. And a dozen major cities, including Philadelphia, New York, and Los Angeles, "hit all-time homicide records" in 2021. Bill Hutchinson, *'It's just crazy': 12 Major Cities Hit All-Time Homicide Record*s, ABC News (Dec. 8, 2021), perma.cc/7R9R-HMK4.

Cities and municipalities across the country have also faced rapid increases in homelessness. Since 2017, homelessness has increased about 6 percent every year. Khristopher J. Brooks, *Homelessness Rose in the U.S. After Pandemic Aid Dried Up*, CBS News (June 21, 2023), perma.cc/8XQS-NJUH. Nearly half a million people "were homeless in the U.S. last year." *Id.* "Police are often the first" and "sometimes the only" "point of government contact" for these individuals, who work to get them access to medical care and other critical services. Sean E. Goodisoon et al., *The Law Enforcement Response to Homelessness*, Rand Corp. (2020). And "law enforcement regularly responds to service calls for individuals with mental illness who may be in crisis." U.S. Dep't of Just., *Law Enforcement Response to the Mental Health Crisis: Resources and Publications* (2018), perma.cc/GP3B-48CH. But with the threat of increased liability hanging over their heads, officers will struggle to know how to help the homeless, those suffering from mental health issues, and other vulnerable members of the public.

Ultimately, expanding liability for law enforcement does more harm than good. It threatens effective and efficient policing. Police officers "should be free to exercise their duties unembarrassed by the fear of" lawsuits "which would consume time and energies which would otherwise be devoted to

governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Mateo*, 360 U.S. at 571. This Court should "'decline to place officers in the untenable position of having to consider, often in a matter of seconds' whether to risk … incurring personal liability in order to neutralize'" tricky or "'volatile situation[s] confronting them.'" Brief for U.S. as *Amici Curiae* Supporting Petitioner, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444), 2002 WL 31100916, at *25 (quoting *New York v. Quarles*, 467 U.S. 649, 657-58 (1984)).

B. Expanding the state-created danger doctrine would strain law enforcement budgets and hinder the ability to recruit and retain quality officers.

Expanding the state-created danger doctrine would also increase costs to law enforcement departments and the municipalities that indemnify them. In turn, those costs would reduce vital department resources and discourage talented candidates from joining and staying on the force.

Since most municipalities indemnify their officers for job-related actions, Section 1983 suits can "absorb undue shares of public budgets." Eisenberg & Schwab, *supra*, at 650. Indemnification policies are often "needed to allay employees' 'fear of personal liability' for actions they may take in the line of duty [which may] 'tend to intimidate all employees, impede creativity and stifle initiative and decisive action.'" *Id.* at 652 n.59 (quoting Attorney General Ed Meese III). Section 1983 lawsuits drain local government resources in three primary ways: (1) "cities spend inordinate amounts of money to satisfy judgments,"

(2) "cities must pay the prevailing plaintiff's legal fees," and (3) liability insurance premiums skyrocket. *Id.* at 650-51. Opening yet another avenue of liability—as the Ninth Circuit's decision does—will increase the already overwhelming costs that municipalities bear for Section 1983 lawsuits.

This Court should be hesitant to expand liability when it would "impose significant burdens on ... law-enforcement resources." *Briscoe*, 460 U.S. at 343. Not only must officers and their departments each retain counsel, but "[p]reparation for trial, and the trial itself, [] require[s] the time and attention of the defendant officials, to the detriment of their public duties." *Town of Newton v. Rumery*, 480 U.S. 386, 395-96 (1987).

Current data on law enforcement-related lawsuits across the country confirms these inevitable adverse impacts. Section 1983 lawsuits have "exploded over the past 40 years." Philip M. Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Crime*, 30 Crim. Just. Pol'y Rev. 223, 227 (2019); *see also* United States Courts, *Over Two Decades, Civil Rights Cases Rise 27 Percent* (June 9, 2014), bit.ly/3CigWc9. Indeed, they inundate the federal courts every year. *Id.* Although it is difficult to "accurately determine the extent of litigation against the police" due to lack of official statistics, "[r]ecent estimates suggest that approximately 30,000 police misconduct lawsuits are filed each year in state and federal courts against police officers, their employing agencies, and municipalities." Stinson & Brewer, *supra*, at 226. These cases total about 13% of all civil cases filed in federal district courts. *Id.* at 227.

Although many of these suits are "marginal" or "frivolous," they are expensive and can last for years. *Rumery*, 480 U.S. at 395. Even "when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial." *Id.* And the cost to litigate or settle those suits is astonishing. Over the past ten years, Los Angeles alone has spent close to $330 million on police settlements. Amelia Thomson-DeVeaux, Laura Bronner & Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FiveThirtyEight (Feb. 22, 2021), perma.cc/4W8A-XRHN. And between 2004 and 2019, lawyers cost Chicago $213 million. Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: $213 Million to Private Lawyers Since 2004*, Chicago Tribune (Sept. 12, 2019), bit.ly/35nbnhe. The average jury award is also highly costly—coming in at roughly $2 million per award. Larry K. Gaines, Victor E. Kappeler & Zachary A. Powell, *Policing in America* 346 (9th ed. 2021).

Moreover, after a loss, municipalities generally must pay the legal fees of the winning side. These fees often exceed the damages or settlements by several orders of magnitude. *See* Elliott Averett, *An Unqualified Defense of Qualified Immunity*, 21 Geo. J.L. & Pub. Pol'y 241, 264-65 (2023) (citing e.g., *Lilly v. City of New York*, 934 F.3d 222, 226 (2d Cir. 2019) ($28,128 in fees for a $10,001 settlement); *Bravo v. City of Santa Maria*, 810 F.3d 659, 666 (9th Cir. 2016) ($1.023 million in fees for a $5,002 verdict); *Winston v. O'Brien*, 773 F.3d 809, 811 (7th Cir. 2014) ($187,467 in fees for a $7,501 verdict); *Richardson v. City of Chicago*, 740 F.3d 1099, 1103-04 (7th Cir. 2014) ($123,000 in fees for a $3,001 verdict); *McAfee v.*

Boczar, 738 F.3d 81, 94-95 (4th Cir. 2013) ($100,000 in fees for a verdict of under $3,000); *Barbour v. City of White Plains*, 700 F.3d 631, 632 (2d Cir. 2012) (per curiam) ($286,065 in fees for a $30,000 settlement); *Marryshow v. Flynn*, 986 F.2d 689, 691 (4th Cir. 1993) ($20,808 in fees for a $14,500 verdict); *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993) ($49,000 in fees for a $11,000 judgment); *McCown v. City of Fontana*, 711 F. Supp. 2d 1067, 1069 (C.D. Cal. 2010) ($148,250 in fees for a $20,000 settlement), *aff'd* 464 F. App'x. 577, 579 (9th Cir. 2011)).

Liability insurance, too, costs municipalities dearly. And they have faced skyrocketing premiums and decreased insurance availability as Section 1983 has expanded over time. *See* Kenneth S. Abraham, *Police Liability Insurance After Repeal of Qualified Immunity, and Before*, Tort Trial & Ins. Prac. L.J. 31, 52 (2021); Judy Greenwald, I*nsurers back away from police liability*, Bus. Ins. (June 1, 2023), perma.cc/U4MY-SPLL. As multimillion dollar civil rights judgments increase nationwide, police departments have faced insurance rate increases of 30 to 100 percent. *See* Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to it*, Wash. Post (Sept. 14, 2022), perma.cc/KAA7-6UC9. These increases disproportionately affect small and mid-sized jurisdictions, since large cities often self-insure. Thus, as new roads of civil liability open, law enforcement departments have access to fewer and fewer resources from the financially overburdened municipalities that fund them.

Finally, extending liability to situations like those present here would hinder a department's ability to attract and retain quality officers. *See Harlow v.*

Fitzgerald, 457 U.S. 800, 814 (1982) (explaining that extensive liability imposes social costs, including "the deterrence of able citizens from acceptance of public office."). Despite recent increases in violent crime, homelessness, and mental health crises, there is "a shortage of police officers across the country." Associated Press, *The U.S. is Experiencing a Police Hiring Crisis*, NBC (Sept. 6, 2023), perma.cc/L2VB-U6GV. "Fewer people are applying to be police officers," and a growing number of officers are resigning or eligible for retirement. *Id.; see also* Police Exec. Rsch. F., *The Workforce Crisis, And What Police Agencies Are Doing About It* 8 (Sept. 2019). In 2019, 41 percent of police departments reported worsening personnel shortages. *Id.* at 19-20. This is in no small part due to "the exposure to liability." Nicolas Dubina, *Police Departments Struggling to Recruit New Officers Amid Shortages*, WETM (May 18, 2023), perma.cc/6L3Z-DGYZ. According to one estimate, more than a quarter of police officers have been sued at least once. Gaines et. al, *supra*, at 341. And due to the sheer number of police interactions, Section 1983 lawsuits "'could be expected with some frequency.'" *Briscoe*, 460 U.S. at 343. The threat of additional lawsuits thus adds additional risks to an already-risky job. Those risks may, in turn, discourage talented individuals from joining the force in the first place and deter good officers from staying on.

In short, allowing the decision below to stand would force substantial financial burdens on already overwhelmed police departments and municipalities.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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