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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

California Association of Joint Powers Authorities ("CAJPA") is a statewide association for risk-sharing pools that has served as an information and educational network for joint-powers authorities ("JPAs") since 1981. CAJPA provides leadership, education, advocacy and assistance to public-sector risk pools to enable them to enhance their effectiveness and it advocates both in court and in the Legislature on behalf of JPAs. Its membership consists of more than 80 JPAs representing municipalities, school districts, transit agencies, fire agencies and similar public entities throughout the State of California.

CAJPA and its members have a significant interest in the outcome of this case because the decision in question by the Ninth Circuit has a direct and negative impact on many public entities, including (but not limited to) those whom CAJPA represents. Accordingly, CAJPA supports the certiorari petition ("Pet.") filed by the County of Tulare, et al. ("Petitioners").

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief, in whole or in part, and that no entity or person (aside from *amicus curiae*, its members and its counsel) made any monetary contribution toward the preparation or submission of this brief. *Amicus curiae* provided counsel of record for all parties timely notice of the intent to file this brief pursuant to Supreme Court Rule 37.2, and no counsel of record for any party communicated any objection to this filing.

ARGUMENT

This case presents the question whether, and under what circumstances, an exception exists to this Court's determination that "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). In this case, the Ninth Circuit deepened a circuit split on this question and unwisely applied and expanded a dubious exception to the *DeShaney* holding.

The incorrect creation, application and expansion of this would-be exception, often referred to as the state-created danger exception, is untenable. *See Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 866 (5th Cir. 2012) (en banc) (refusing to find liability "under the state-created danger theory, even if that theory were viable in this circuit"); *id.* at 874 (Higginson, J., concurring in the judgment) (explaining that the Fifth Circuit has avoided this theory because embracing it would amount to an improper "judicial enlargement of liability").

If left uncorrected, the perpetuation of this invalid and poorly defined exception, as well as the Ninth Circuit's ill-advised expansion of it, will harm public entities throughout the nation as well as the public that such entities are there to serve.

Indeed, "[p]ractically every circuit … has come up with a different test" to determine when and how the problematic exception applies, and those tests "have varied wildly." App. at 110a and 115a (Bumatay, J., dissenting from the denial of en banc review, joined by Callahan, Ikuta, and Nelson, JJ.). Meanwhile, the Ninth Circuit has fashioned a distantly peripheral and unstinting application that runs far afoul of due-process principles.

For example, as noted by Petitioners, "the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits … hold that … [a] plaintiff must identify state action that shocks the conscience" in order to establish the state-created danger exception. Pet. 16-17 (citing authorities). Despite the consistent use of this minimal floodgate by these other circuits, the Ninth Circuit has refused to apply this shocks-the-conscience brake to moderate this precarious exception. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064-65 (9th Cir. 2006).

The Ninth Circuit is also an outlier in holding that deliberate indifference alone may trigger the exception. Pet. 18-20 (surveying how the various circuits have analyzed this factor). And while many other circuits have required a state either to cause or increase greatly the risk of harm to citizens in order for the exception to apply, the Ninth Circuit liberally allows the exception if the state has increased the risk of harm by any degree. Pet. 20-21.

This troubling nationwide asymmetry provides ample, but not the only, grounds on which to issue a writ of certiorari per Supreme Court Rule 10(a). Specifically, the judicial creation and expansion of this misguided exception, most radically by the Ninth Circuit, is a drastic departure from this Court's well-established jurisprudence on an important question of law. *See County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998) (mandating that a state defendant's conduct must "shock the conscience" to support substantive due process liability); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (reiterating that courts must be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting a similar expansion that would "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States").

The negative impacts of permitting the Ninth Circuit to continue misapplying this exception stretch far beyond the parties in this case and well past CAJPA's members in California. Government agencies throughout the Ninth Circuit whose employees make run-of-the-mill mistakes with little or no culpability are subject to liability for would-be constitutional violations.

Broadly imposing such liability on a vast range of official conduct simply because it negligibly increases some risks to some members of

the public is a slippery slope to highly undesirable outcomes. States and local government agencies are and will continue to be forced to expend substantial public resources in defending these types of claims, which typically result in protracted litigation. At the same time, permitting this short-sighted exception runs a great risk of promoting a wide variety of undesirable conduct by state actors (particularly those in law enforcement).

For instance, the prospect of avoiding the risk of liability would incentivize some police officers to intervene more forcefully and extensively in intense situations. Other officers simultaneously would be incentivized to refrain from providing certain services that might require quick judgments with limited information. Still other officers might be paralyzed by indecisiveness in trying to determine which path would most likely diminish the risk of such liability.

CAJPA members, as well as other public entities in California, already are subject to a carefully crafted yet complex scheme detailing when public employees can—and cannot—be held liable for tortious conduct. See, e.g., Cal. Gov't Code §§ 814-895.8 (charting the procedure for pursuing such claims and establishing various immunities). Permitting the judicially created and unwieldy exception at issue here to add to that complexity intrudes on principles of federalism.

CONCLUSION

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

Respectfully submitted,

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