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

PETITIONER'S REPLY BRIEF

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DeShaney v. Winnebago County Department of Social Services, decided 36 years ago, reinforced that although the Due Process Clause of the Fourteenth Amendment does not generally require governments to protect private citizens from harm, an exception exists for the "care and protection to particular individuals" who the government has deprived of the liberty to care for themselves. 489 U.S. 189, 198-99 (1989). Therefore, a constitutional claim had not been asserted against Winnebago County for returning young Joshua to his father's custody, despite a history of physical abuse. Although Joshua's subsequent injury may have been foreseeable, and perhaps actionable as a matter of tort law, the injury occurred "while he was in the custody of his natural father, who was not a state actor." *Id*. at 201.

Among the reasons supporting that conclusion, the Court noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id*. at 201. The lower courts since then have seized on this single statement to find that, in addition to the custodial context discussed in *DeShaney*, an exception *also* exists where the government created or increased the danger. In that noncustodial situation, the courts have reasoned that an affirmative obligation exists, also under the Due Process Clause, to protect a private person from harm. Compounding matters further, the circuits that have accepted the so-called state-created danger exception are anything but aligned in formulating the standard for its application. These divisions among the courts are perhaps on fullest display in this case

where three Seventh Circuit judges issued three separate opinions reaching three irreconcilable decisions as to whether a constitutional violation has been alleged, as well as the application of qualified immunity. It was only by the plurality of outcomes in the three decisions that the district court's dismissal of the complaint was reversed as to Officer Johnson.[1]

Emulating the proverbial ostrich, Respondent refuses to acknowledge that a growing number of judges have questioned whether a state-created danger exception is compatible with *DeShaney*, even in circuits that have recognized its existence. Likewise, Respondent insists that the disparity in the standards within those circuits is of no consequence, despite the lack of uniformity in their applications. Indeed, Respondent's claim, which is based on an assurance that an individual would be confined, if not foreclosed outright by *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), would have been rejected in the Third and Fourth Circuits as discussed below. *See Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc) and *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006).

Respondent's willful blindness aside, there are significant schisms both among and within the circuits in this area warranting this Court's attention. In addition, review of the denial of qualified immunity is warranted considering that four judges (three circuit judges and one district judge), who are constitutional scholars in their own rights, could not agree on the outcome. Given this, how

1. Officer Johnson has passed away such that his estate is the Petitioner in this Court.

could the constitutional line have been clearly established for Officer Johnson who is not as schooled in the law?

This Petition should be granted.

A. Whether State-Created Danger Presents a Valid Substantive Due Process Claim Is a Live Controversy in the Circuit Courts

In seeking review by this Court, Petitioner noted that the Fifth Circuit has not recognized state-created danger as a theory of liability under the Due Process Clause and that the theory has been outright rejected by the Eleventh Circuit. (Pet., p. 15.) Respondent insists that the Eleventh Circuit has recognized the exception, citing a passage in *Wyke v. Polk County School Board*, 129 F.3d 560 (11th Cir. 1997), that "[t]he language of *DeShaney* does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it." *Id.* at 567. (Resp., p. 13 & n. 2). That statement, however, arose in the context of a finding that the Section 1983 claim, although properly dismissed, was not so insubstantial so as to deprive the district court of subject matter jurisdiction. Moreover, "leaving room" for liability is a far cry from enshrining it as a constitutional claim under the Fourteenth Amendment. Removing any possible doubt, the Eleventh Circuit stated sixteen years later in *Perez-Guerrero v. U.S. Attorney General*, 717 F.3d 1224 (11th Cir. 2013), that "only custodial relationships automatically give rise to a governmental duty, under substantive due process, to protect persons from harm by third parties." *Id.* at 1233 (*quoting Doe v. Braddy*, 673 F.3d 1313, 1318 (11th Cir. 2012)).

But wait, Respondent asserts, the Eleventh Circuit essentially recognizes the state-created danger exception by applying the "shock the conscience" standard to government conduct to find a substantive due process violation. (Resp., p. 17.) Again, however, Respondent is mistaken. Admittedly, the Eleventh Circuit had stated, in *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989) that government officials could be liable for substantive due process violations by placing victims in "special danger" by their affirmative acts. However, the Eleventh Circuit overruled *Cornelius* in 1999, finding the "special danger" doctrine was foreclosed by this Court's intervening decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992):

> After *Collins*, it appears the only relationships that automatically give rise to a governmental duty to protect individuals from harm by third parties under the substantive due process clause are custodial relationships, such as those which arise from the incarceration of prisoners or other forms of involuntary confinement through which the government deprives individuals of their liberty and thus of their ability to take care of themselves.

White v. Lemacks, 183 F.3d 1253, 1258-59 (11th Cir. 1999). Thus, the Eleventh Circuit applies the "arbitrary or conscience-shocking" test to claims of direct harm by a government official. *See, e.g.*, *DeMarcus v. University of South Alabama*, 133 F.4th 1305, 1316-1318 (11th Cir. 2025) (allegations that college volleyball coach mistreated players)*; Nix v. Franklin County School Dist.*, 311 F.3d 1373, 1378-79 (11th Cir. 2002) (student accidentally

electrocuted after he touched live wire during class demonstration). Respondent cannot credibly deny that the law in the Eleventh Circuit stands in stark contrast to the circuits that allow recovery for the state's failure to protect private citizens from harm outside the custodial context that gives rise to a "special relationship." *See also Fisher v. Moore*, 73 F.4th 367, 373 n. 13 (5th Cir. 2023) (omitting the Eleventh Circuit from the circuits that have adopted state-created danger exception), *cert. denied*, 144 S. Ct. 469 (2024); *Irish v. Fowler*, 979 F.3d 65, 73 (1st Cir. 2020) (same); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061, n.1 (9th Cir. 2006) (same).

Turning to the Fifth Circuit, Respondent argues that court has merely not reached the issue as opposed to rejecting it outright. (Resp., p. 17.) The Fifth Circuit, however, continually upholds qualified immunity for substantive due process claims premised on the state-created danger exception. *Fisher*, 73 F.4th at 372-374 & nn. 12-14, 18, 21 (citing numerous cases), *cert. denied*, 144 S. Ct. 469 (2024). The consistent application of qualified immunity by the Fifth Circuit necessarily means that the exception was *not* clearly established by *DeShaney*. Along with the Eleventh Circuit, therefore, the law in the Fifth Circuit contrasts with the circuits that allow recoveries for the state's failure to protect outside the custodial context.

Undeterred, Respondent contends that the concurring and dissenting opinions cited in the Petition are irrelevant because they do not constitute circuit precedent "and cannot create a circuit split." (Resp., p. 18.) These disparate opinions, however, reflect the divide *even within the circuits* that have adopted the state-created danger exception as a theory of recovery. (Pet., pp. 15-18 (citing

cases)). Indeed, *since the time that the Petition in this case was filed*, a Ninth Circuit judge dissented that the exception "was manufactured out of whole cloth by courts and aggressively expanded by the Ninth Circuit." *Estate of Soakai v. Abdelaziz*, 137 F.4th 969, 992-93 (9th Cir. 2025) (Bumatay, J., dissenting). The need for this Court to resolve the sharply divided opinions within and among the circuit courts that remain 36 years after *DeShaney* could not be clearer.

In addition to the divisions as to the existence of the theory, the circuits that recognize state-created danger claims apply disparate standards, as Petitioner has explained. (Pet., pp. 15-18.) Respondent dismisses this discord by insisting that there is no "meaningful difference" in phrasing "the level of culpability in different terms—deliberate indifference, or conduct shocking the conscience." (Resp., p. 18). The differences in these standards cannot be so flippantly regarded. As this Court has explained,

> Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Cnty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998); *see also id.* at 851 ("[a]s the term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical.") Further, this Court wrote, "just as the description of the custodial prison

situation shows how deliberate indifference can rise to a constitutionally shocking level, so too it does suggest why indifference may well not be enough for liability in the different circumstances of a case . . . " *Id.* at 852. Respondent is thus plainly wrong (again) in conflating the two standards—deliberate indifference and conscience-shocking—as functionally one and the same. While more than mere negligence is required under the due process clause, certiorari is warranted to address the appropriate level of culpability if state-created danger is recognized as a theory of recovery.

B. Liability Based on Unfulfilled Assurances that a Third Party will be Confined is Seemingly at Odds with *Castle Rock*

As discussed in the Petition, finding Officer Johnson liable for (allegedly) assuring Amylyn Slaymaker that her husband would be confined at the hospital for at least 24 hours may be foreclosed by this Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). (Pet., pp. 19-21.) Respondent dismisses this notion by insisting that *Castle Rock* addressed a procedural due process claim only. (Resp., p. 23). Plainly, however, the Court held that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural *nor in its 'substantive' manifestations*." *Id*. at 768 (emphasis added).

Respondent similarly minimizes the discord between allowing the claim in this case to proceed and the circuit court decisions in *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc) and *Bright v. Westmoreland County*, 443

F.3d 276 (3d Cir. 2006) that are discussed in the Petition. (Pet., pp. 20-21.) According to Respondent, *Pinder* and *Bright* merely held that "an officer's promise to arrest someone does not create the kind of duty to protect private citizens that *DeShaney* specifically rejected." (Resp., p. 19.) Yet there is no material difference between an assurance that a violent person will be confined in jail overnight and an assurance that a violent wrongdoer will be confined in a hospital for 24 hours. Contrary to Respondent's characterization, failing to detain someone is not an "affirmative act" that triggers a duty to protect. *See Pinder*, 54 F.3d at 1175 ("By this measure, every representation by the police and every failure to incarcerate would constitute 'affirmative actions,' thereby giving rise to liability.")

C. Review is Warranted to Reinforce the Scope of Qualified Immunity

In the alternative that a constitutional violation was asserted, Respondent cannot ignore that the district judge and the three circuit judges could not agree on the analysis, with two finding no constitutional violation at all and two who would find Officer Johnson immune from suit. Respondent nevertheless suggests that qualified immunity should be denied based on *Taylor v. Riojas*, 592 U.S. 7 (2020) that involved shockingly insanitary prison conditions. (Resp., p. 25.) No comparably shocking facts in that situation could clearly establish a constitutional violation in this case. Nor can Respondent rely on the Seventh Circuit's decision in *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998). (Resp., p. 26.) Even if *Monfils* was decided correctly (which is questionable as addressed immediately below), its circumstances were distinguished

thoroughly by Judge Brennan in the opinion below. (Pet. App., 36a-37a.)

Moreover, it is doubtful that *Monfils* is good law even in the Seventh Circuit. As observed in *Sandage v. Board of Commissioners of Vandenburgh County*, 548 F.3d 595 (7th Cir. 2008), *Monfils* "may well have been superseded by *Castle Rock*." *Id.* at 599. If the Seventh Circuit questioned *Monfils*' vitality in 2008, the case could hardly *clearly* establish a constitutional principle so as to deprive Officer Johnson of immunity over a decade later in 2019. The Court should either summarily reverse due to the Seventh Circuit's patent legal error in stripping Officer Johnson of immunity or grant certiorari to reiterate the clarity with which the legal standard must be established for purposes of qualified immunity.

D. The Questions Presented Are Critical for Review by the Court

Finally, Respondent contends that the Court has denied 29 petitions since 1997 raising issues relating to the state-created danger exception, purportedly reflecting this Court's disinterest in the issue. (Resp., pp. 27-28 & n. 10). A review of the petitions shows that only two questioned the validity of the state-created danger exception as a theory of recovery, one of which was filed 27 years ago. *County of Tulare v. Murguia*, 144 S. Ct. 553 (2024); *Settles v. Penilla*, 524 U.S. 904 (1998). Certainly, none of the petitions involved the unique circumstances presented here where the three circuit judges wrote three different opinions with three different outcomes on the existence of a constitutional violation and the application of qualified immunity. Respondent's presumptions of this

Court's indifference aside, review is warranted for the reasons provided herein.

CONCLUSION

WHEREFORE, the Petition should be granted.

Respectfully submitted,

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