No. 16-643

IN THE

Supreme Court of the United States

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; AND JOSEPH KOLONG,

Petitioners,

v.

JUAN JESUS RODRIGUEZ, Individually,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

Thomas S. Rice
Eric Ziporin
SENTER GOLDFARB & RICE, LLC
3900 E. Mexico Ave., Suite 700
Denver, CO 80210
(303) 320-0509

JOHN C. EASTMAN
Counsel of Record
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330 x2
jeastman@chapman.edu

Counsel for Respondent

QUESTION PRESENTED

The Respondent restates the question presented as follows:

> Whether the Tenth Circuit Court of Appeals correctly held that a 911 operator who, without malicious intent, directed a 911 caller to return to the city where he had been assaulted so that police could be dispatched to take his report, was entitled to qualified immunity from claims that the 911 operator was somehow responsible on a state-created danger theory for the caller's subsequent death at the hands of the same assailant who had previously assaulted him?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

Other Authorities

STATEMENT OF THE CASE

A. Factual Background

In the early morning hours of April 1, 2012, Ran Pal called 911 to report that several unknown men had broken his car window with a bottle. Pal reported, "somebody just like busted my vehicle" and "I'm just starting to recover 'cause I got hit with a bunch of shards." C.A. Appx., Vol. VII, p. 704. Pal reported that the original incident happened at 10th Avenue and Sheridan Boulevard in Denver, Colorado. Pal then indicated to the 911 operator that he was no longer inside the city limits of Denver, but was seven blocks away in a neighboring town. Pet.App. 38a.

Juan Rodriguez—Respondent here—was the emergency operator who took the call. Several times he told Pal that because the incident had happened in Denver he needed Pal to be inside Denver so that he could send an officer out to take his report. *Id.* Pursuant to his training and experience as an emergency operator, Rodriguez believed—erroneously, he later learned—that he could not request a dispatcher to send officers outside of Denver in this type of a call. C.A. Appx., Vol. VII, p. 684. At first, Pal demurred, advising that he was in "shock" and had been "hit with a bottle." Rodriguez repeated that the complaint needed to be handled by a Denver officer and again invited Pal to return to Denver to make a report. Rodriguez then asked Pal: "can you come back or do you want to … Are you going to start coming back right now or are you gonna … come back in a while?" As Rodriguez was asking this question, Pal said "yeah, I'm coming back right now." Pet.App. 38a-39a.

After stating he was returning to Denver, Pal described the underlying incident. Pal told Rodriguez

that they were driving when someone in a red Jeep threw a bottle through their back windshield. In response to Rodriquez's question of whether or not he was able to obtain a license plate number, Pal indicated that he tried to catch up to the assailants and was able to get a partial plate number. Pal then reported that they were crossing into Denver, and Rodriguez advised that he should stop at some point. Pal advised that he was going to stop at the intersection of 29th and Sheridan. Pet.App. 39a.

Rodriguez sent the call to police dispatch approximately one minute after Pal stated he had stopped in Denver. He could not send the call sooner as he did not have a fixed location for officers to respond to. C.A. Appx., Vol. VII, pp. 682, 687. As an emergency operator, Rodriguez did not have the capability to dispatch officers, as that task was within the sole province of a dispatcher. *Id.* at 681-82, 689. Rodriguez coded the call as a priority 2 call, which indicated to the dispatcher that the call was emergent. *Id. at* 687.

Rodriguez then sought to obtain information as to the nature of Pal's injuries and whether or not an ambulance was necessary. At one point, Pal indicated that he was bleeding, only to state moments later that it was not blood he was seeing on his shirt but, instead, his energy drink. Pal also indicated that an ambulance was not necessary. Pet.App. 40a.

Over eight minutes into the call (and after they had already returned to Denver), Pal mentioned for the first time that the assailants had had a gun. *Id.* Rodriguez immediately updated the call with information about the gun and used the "page" function to alert the dispatcher that this was now a more urgent call. C.A. Appx., Vol. VII, p. 688. Throughout the call,

Rodriguez told Pal several times that he was going to get an officer out to him, but never informed Pal that officers had been dispatched or were on their way. Pet.App. 41a-42a..

Rodriguez instructed Pal to illuminate his hazard lights so officers could find them. *Id.* at 41a. At no point did Pal (or any other passenger) protest this instruction, indicate that they felt unsafe, or say that they thought the assailants might return and see them. In what he thought was the conclusion to the call, Rodriguez told Pal to call 911 right away if the assailants came back. *Id.* Almost immediately, Pal reported that the assailants had returned. Pal then told Rodriguez that his brother, Jimma Pal Reat, who had been riding in the passenger seat, had been shot. The dispatcher dispatched officers to Pal's location approximately one minute after Pal reported the shooting. *Id.* Reat was transported to the hospital and later died of his gunshot wound.

B. Procedural History

The Estate of Jimma Pal Reat and several of Reat's relatives and friends filed suit in federal court, asserting (in addition to state law tort claims) a claim pursuant to 42 U.S.C. § 1983 that Respondent violated Reat's constitutional rights to Due Process and Equal Protection. First Amended Complaint, First Claim for Relief, p. 24, D.Ct. Dkt. # 31 ("FAC"). Although this Court made clear in *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 197 (1989), that the Due Process Clause does not impose on the government any constitutional obligation to provide protection from harms caused by third parties, it also explicitly recognized one exception to that rule, and implied another. The explicit exception

arises when the government has a "special relationship," such as occurs when an individual is in government custody, that prevents the individual from caring for himself. *Id.* at 200. The implied exception is derived from language in the opinion noting that the government has no duty to protect someone from third-party harms where the government "played no part in their creation, nor did it do anything to render" the individual "more vulnerable" to danger—the state-created danger exception. *Id.* at 201. The Tenth Circuit has long recognized both exceptions to the general *DeShaney* rule. *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996)

In their First Amended Complaint, Petitioners alleged causes of action under both of the *DeShaney* exceptions. They alleged that Respondent owed Petitioners "a duty to perform emergency assistance . . . as a limited group of passengers in known danger of private violence (which the district court understood as a "special relationship" claim, Pet.App. at 32a), a duty that he allegedly breached in violation "clearly established substantive due process constitutional right[s]." FAC ¶¶ 137-39. They also alleged that Respondent "created and increased the danger" that resulted in Reat's death at the hands of an unknown assailant by advising Pal that he needed to return to Denver so that police could be dispatched to take his report. *Id.* ¶ 145.

Because, even accepting Petitioners' version of the facts in their most favorable light, the complaint did not state viable constitutional claims at all, much less clearly established ones, Respondent Rodriguez moved to dismiss the complaint on grounds of quali-

fied immunity. The motion was assigned to a magistrate judge, who recommended dismissal of the Fourteenth Amendment Equal Protection and Due Process claims, including the Due Process claim based on the "state created danger" exception because Plaintiffs had not plausibly demonstrated that Rodriguez's actions met the "high level of outrageousness" required to shock the conscience of a federal court. Pet.App. 66a. After Plaintiffs objected to the Magistrate's recommendation, the district court granted Respondent's motion with respect to the Equal Protection claim and the "special relationship" Due Process claim, but denied it with respect to the "state-created danger" Due Process claim, finding that Plaintiffs had plausibly alleged conscience shocking behavior that violated clearly established constitutional rights at the time of the incident. Pet.App. 22a-23a.

Instead of immediately appealing that ruling, as was his right, Respondent engaged in discovery so that his qualified immunity claim could be assessed against an actual factual record of what he knew at the time, *see, e.g.*, *DeShaney*, 489 U.S. at 202, rather than mere allegations in the complaint. He then renewed his assertion of qualified immunity in a motion for summary judgment. The district court denied Respondent's motion for summary judgment, simply asserting that "[t]he legal authority and analysis supporting [its] conclusion in this regard [were] fully expatiated in" its order denying the motion to dismiss. Pet.App. 15a n.2.

Respondent appealed that ruling to the Tenth Circuit, which held, without reaching the merits of the constitutional claim, that he was indeed entitled to qualified immunity because "the law was not clearly

established such that a reasonable 911 operator would have known his conduct violated Reat's constitutional rights." Pet.App. 2a.

Contending that the Tenth Circuit's decision is contrary to the majority of circuits that recognize state-created danger liability in circumstances such as these, Petitioners filed a petition for writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. The Circuit Split Alleged By Petitioners Is Ephemeral.

Petitioners assert that their alleged circuit split is "substantive," "significant," "radical," and "irreconcilable." Pet. at 4, 12. They imply that the Tenth Circuit deliberately rejected the majority position in other circuits, instead "sid[ing] with the Fourth and Fifth Circuits in holding that the state actor must 'limit[] in some way the liberty of a citizen to act on his own behalf' to bring a clearly established state created danger claim . . . ." Pet. at 3. But the Tenth Circuit did nothing of the kind. First, it expressly did not reach whether the conduct at issue in this case violated decedent's constitutional rights, instead determining that the particular factual circumstances at issue here did not violate the clearly-established state created danger theory it recognized as valid. Pet.App. 12a. Second, the Tenth Circuit does not reject, but actually embraces, state-created danger theory in non-custodial situations. Indeed, the Tenth Circuit opinion does not even cite, must less reject, any of the cases from circuits that follow what Petitioner claims is the majority rule. There is no circuit split here, but

rather a significantly different set of factual circumstances applied to a legal doctrine that the Tenth Circuit follows every bit as much as the other Circuits on the supposed opposing side of Petitioners' claimed "irreconcilable" split.

A. The Tenth Circuit Only Addressed Qualified Immunity, Not the Merits of Petitioners' Constitutional Claim.

The panel decision below makes clear at the outset that it was "not opin[ing] on whether [Respondent] Rodriquez violated [Petitioner[1]] Reat's constitutional rights." Pet.App. 2a. Rather, the panel merely addressed whether the rather unique factual circumstances at issue here "clearly established" liability under the state-created danger doctrine, a doctrine that the panel itself acknowledged was "clearly established in this circuit." Pet.App. 8a. Because "[t]he inquiries for qualified immunity and [the substantive constitutional claim are] distinct," *Saucier v. Katz*, 533 U.S. 194, 204 (2001), there is no basis for Petitioners' contention that the Tenth Circuit's decision is contrary to the weight of authority in other circuits on the merits of the constitutional claim.

Indeed, on the question relevant to the qualified immunity inquiry, namely, whether the constitutional violation was "clearly established" at the time, the very existence of the circuit split asserted by Petitioners (if it even existed) would have *required* the Tenth Circuit's recognition of qualified immunity. "If judges . . . disagree on a constitutional question, it is

---

[1] Petitioners are actually Reat's estate and family members, not Reat himself, who is deceased. For simplicity, we just reference "Petitioners" throughout.

unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). On that point—the only one actually decided by the Tenth Circuit in this case—there is clear Supreme Court precedent in support of the Tenth Circuit's decision. *See, e.g., Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) ("The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (in turn quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). And there is no question that the Tenth Circuit was on solid ground in first considering the "clearly established" issue. *Pearson*, 555 U.S. at 236. Certiorari is not warranted merely to reaffirm existing precedent of this Court that no one disputes.

B. The Tenth Circuit Applies the State-Created Danger Doctrine in Non-Custodial Circumstances, Just Like Other Circuits.

Even assuming that the Tenth Circuit had resolved the merits of the constitutional claim en route to its qualified immunity holding (which it did not), Petitioners' contention that the Tenth Circuit requires custody in order for a state-created danger claim to be viable is simply inaccurate. In *Radecki v. Barela,* for example—a case referenced with approval by the panel below, Pet.App.10a—the Tenth Circuit expressly acknowledged both theories of liability: special relationship (such as in a prison); and state-created danger. *Radecki v. Barela*, 146 F.3d 1227, 1230 (10th Cir. 1998). It analyzed the claim in the case under the state-created danger theory, rejecting it only

after determining that the claim failed under the "shocks the conscience" test set out by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), not because the individual was not in custody. 146 F.3d at 1232.

So, too, with *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), also referenced with approval by the panel below, Pet.App. 10a. On facts similar but not quite identical to those in *DeShaney*, the Tenth Circuit applied the state-created danger doctrine to deny qualified immunity to a couple of social workers who had put children in danger by transferring custody of them from their mother to their abusive father. Significantly, the qualified immunity claim of one of the social workers was denied because she had directed the mother to quit making claims of abuse by the father and thereby "intensified" the "risk to the children." *Currier*, 242 F.3d at 921.

That factual circumstance is quite similar to the factual circumstances that led to liability in the Second Circuit's case of *Dwares v. City of New York,* 985 F.2d 94, 96-97 (2nd Cir. 1993), and the Eighth Circuit's case of *Freeman v. Ferguson*, 911 F.2d 52, 53-54 (8th Cir. 1990) (assailant was friend of the police chief, who allegedly directed his officers not to stop assailant's harassment of his ex-wife, whom he subsequently murdered), two of the cases Petitioners rely on for the supposed circuit split. *See* Pet. at 14. *See also Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (state-created danger claim allowed against sheriff who ordered civilian divers not to attempt a rescue of a drowning boy). Indeed, the Fifth Circuit cited the Tenth Circuit's *Currier* case as an example of a Circuit that recognizes the state-created

danger theory of liability. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003). And Petitioners' co-counsel in this case, Dean Erwin Chemerinsky, called the Tenth Circuit's decision in *Currier* "one of the best cases for plaintiffs" for holding government employees "liable for state-created danger." Erwin Chemerinsky, The State-Created Danger Doctrine, 23 Touro L. Rev. 1, 10 (2007).

Several other Tenth Circuit cases demonstrate that the Tenth Circuit accepts the state-created danger doctrine. *See, e.g.*, *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999) ("state officials may be liable for injuries caused by a private actor where those officials created the danger that led to the harm"); *Armijo v. Wagon Mound Pub. Sch.,* 159 F.3d 1253 (10th Cir. 1998) (denying qualified immunity from a state-created danger claim to school official who drove a suspended, special needs child home and left him there alone, knowing he was suicidal); *cf. Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995) (affirming grant of qualified immunity from state-created danger claim, not by rejecting the state-created danger theory but because Plaintiff had not met its elements); *Graham v. Indep. Sch. Dist. No. I-89,* 22 F.3d 991, 995 (10th Cir. 1994) (affirming dismissal of state-created danger claims because the state had not created the danger, not because the Court rejected the state-created danger theory of liability). Indeed, the Tenth Circuit's decision in *Seamons v. Snow* could not be more clear on this point: "In addition to the 'special relationship' doctrine [involving people in custody], we have held that state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the

harm." *Seamons*, 84 F.3d at 1236 (quoting *Uhlrig*, 64 F.3d at 572). It is an odd "split" when the courts supposedly on opposite sides of the split are in such agreement. Indeed, the First Circuit has even questioned whether the Tenth Circuit applies the state-created danger doctrine *too broadly*. *See Hasenfus v. LaJeunesse*, 175 F.3d 68, 74 (1st Cir. 1999) (expressing doubt as to whether school officials' conduct at issue in *Armijo* could be deemed conscience-shocking rather than seriously negligent and stating that "[i]f sound, the Tenth Circuit decision is at the outer limit" of what may be deemed conscience-shocking).

The other side of Petitioners' equation is equally flawed. Petitioners claim that "these Plaintiffs could clearly sue for the death of Jimma Reat" in "the Second, Sixth, Seventh, Eighth, and Ninth (and potentially Third and Eleventh) Circuits." Pet. at 21. Even accepting that those circuits utilize a broader state-created danger doctrine than the Tenth Circuit recognizes, *but see Hasenfus*, 175 F.3d at 74, the 911 operator's conduct at issue here would not give rise to liability in those circuits, either.

In *Pena v. DePrisco*, for example, the Second Circuit held that "'state created danger' liability arises from the relationship between the state and the private assailant." *Pena v. DePrisco*, 432 F.3d 98, 109 (2nd Cir. 2005). Similarly, the Eighth Circuit has recognized that a state-created danger claim might be viable where it was alleged that the police chief had directed his officers not to attempt to prevent harassment of the deceased by her estranged husband (against whom a restraining order had been issued) because the Chief "had such a close personal relationship with" him. *Freeman*, 911 F.2d at 54. *See also*

Phillips v. Cty. of Allegheny, 515 F.3d 224, 243 (3rd Cir. 2008) (allowing state created danger claim against two 911 operators who provided confidential personal information to fellow former call operator, who then used it to locate and murder plaintiff); *Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998) (allowing state-created danger claim against police deputy chief who let a tape of a call by an informant alerting police to criminal activity be released to the person informed against, who used it to identify the informant and kill him). There is no claim of any such special relationship here, or indeed of any connection between Respondent and the assailants at all, so contrary to Petitioners' assertion, Pet. at 21, they could not "clearly sue for the death of Jimma Reat" in those circuits.

Moreover, the Eighth Circuit has denied liability even when there was a relationship between the government official and the assailant, when the government official was, as here (at most), merely negligent. *Wells v. Walker*, 852 F.2d 368, 371 (8th Cir. 1988); *Davis v. Fulton Cty., Ark.*, 90 F.3d 1346, 1352 (8th Cir. 1996); *see also Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("Even if a state-created danger theory were acknowledged in this circuit," the 911 operator was merely negligent and therefore did not have the "deliberate indifference" necessary for Plaintiff's "due process claim . . . to fall within the narrow exceptions to *DeShaney*'s holding that state actors may not be held responsible for private violence") (citing *DeShaney*, 489 U.S. at 197).

Petitioners' claim that the outcome would be different in the Sixth Circuit is even more of a stretch. In *Jones v. Reynolds*, 488 F.3d 685 (6th Cir. 2006)—a

case on which Petitioners expressly rely, Pet. at 13—the Sixth Circuit *rejected* a state-created danger claim where the defendant officers were much more responsible for the risk creation than the 911 operator was here. On the alleged facts of that case, the officers arrived on scene before a drag race was about to occur, and told the racers to go ahead. One of the racers lost control of his car and killed one of the bystanders watching the race. The Court rejected the state-created danger claim because the officers were even less responsible for creation of the danger than were the social workers in *Deshaney*: "[T]he government was merely returning a person to a situation with a preexisting danger," the court noted. 438 F.3d at 693 (quoting *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir.2003), and citing *DeShaney*, 489 U.S. at 201).

Similarly, the First Circuit in *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 81 (1st Cir. 2005), assumed that state-created danger liability exists, but rejected a state-created danger claim by an undercover FBI informant who was murdered by a gang member with whom he was meeting while wired to assist the FBI in its criminal investigation into gang-related drug trafficking involving the use of firearms. Although it acknowledged that "[t]here are risks inherent in being a cooperating witness," the Court rejected the claim because "the state does not create those dangers, others do, and the witness voluntarily assumes those risks." The "risk" that Petitioners claim Respondent created here is not even close to the risk that arises when the FBI puts a cooperating witness into a drug sting, yet the First Circuit found even that risk insufficient to prevail on a state-created danger theory.

The fact that the outcome *in this case* would be the same even under the supposedly different standard applied by those circuits makes this case a poor vehicle for resolving whatever circuit split might exist. *See* Stephen M. Shapiro, *et al.*, Supreme Court Practice, Ch. 4.4(f), p. 249 (10th ed. 2013) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied") (citing *Sommerville v. United States,* 376 U.S. 909 (1964)).

C. The Fourth Circuit Also *Accepts* State-Created Danger Liability, and the Issue Is Still in Flux in the Fifth Circuit.

The fact that the Tenth Circuit recognizes state-created danger liability in non-custodial contexts places that circuit in line with, rather than at odds with, what Petitioners call the "majority" position. That alone is enough to deny the petition here because, once it is acknowledged that the Tenth Circuit already agrees with the *legal* position Petitioners advance, all that is left is, at most, a fact-bound, non-certworthy disagreement about the doctrine's application. *See* Shapiro, *et al.*, Supreme Court Practice, Ch. 4.14, at p. 272; *id.* at Ch. 4.3, p. 242 ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases *with very similar facts*") (emphasis added); *see also* S.Ct. Rule 10 ("A petition is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"); *see also White v. Pauly*, 137 S.Ct. 548, 552 (2017) ("the clearly established law must be

'particularized' to the facts of the case," citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Petitioners claim in addition that the Fourth and Fifth Circuits also reject state-created danger liability. If true, then perhaps review of a decision from one of those circuits would be warranted at some point. But it is not true with respect to the Fourth Circuit, and the issues appears to be still under ongoing consideration in the Fifth.

The Fourth Circuit actually recognizes state-created danger liability in non-custodial situations, Petitioners' claim to the contrary notwithstanding, Pet. at 21-22. In *Pindar v. Johnson*, for example—the case relied on by Petitioners for proof of the circuit split—a majority of the thirteen judges of the Fourth Circuit, while sitting en banc, recognized the existence of state-created danger liability in the non-custodial context. *Pindar v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995) (Wilkinson, J., for majority in relevant part, recognizing state-created danger liability though finding a police officer's promise that an abusive ex-husband would be jailed overnight not to be a clearly established application of it); *id.* at 1179 (Widener, J., concurring in part, rejecting only language that suggested state-created danger theory was a "wholly different paradigm"); *id.* (Russell, J., dissenting) (accepting state-created danger doctrine and finding it clearly established on the facts presented). Petitioners' claim that the Fourth Circuit held in *Pindar* that there is no duty to protect outside the custodial context is based on the court's discussion of the "special relationship" exception to *DeShaney* (where a custodial relationship is required), not on its discussion of the state-created danger exception. *Compare*

id. at 1176 ("The salient issue … has been whether the notion of the special relationship is limited to the penal/institutional context"), *with id.* at 1176-77 ("It is true, as the district court noted, that some cases found an 'affirmative duty' arising outside the traditional custodial context…. All involved some circumstance wherein the state took a much larger and more direct role in 'creating' the danger itself."); *and id.* at 1177 (Wilkinson, J., for a plurality) ("When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive").

A panel of the Fourth Circuit reaffirmed *Pindar*'s holding on that score in *Waybright v. Frederick Cty., MD*, 528 F.3d 199, 207 (4th Cir. 2008), though the panel likewise found the particular conduct at issue in the case did not qualify for state-created danger liability. "As we stated in *Pindar*," the court noted, "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive.'" *Id.* (quoting *Pindar*, 54 F.3d at 1177); *see also Robinson v. Lioi*, 536 F. App'x 340, 343-44 (4th Cir. 2013) (unpublished) (acknowledging that "this Court has recognized the state-created danger doctrine," and adding, without any suggestion of a custodial requirement, "that for the doctrine to apply, there must be affirmative action, not inaction, on the part of the State which creates or increases the risk that the plaintiff will be harmed by a private actor").

That leaves the Fifth Circuit—the third player in the trilogy of circuits that Petitioners claim take the "minority" position in rejecting state-created danger liability in non-custodial circumstances. But the

Fifth Circuit has had an on-again, off-again embrace of the doctrine. In a series of cases decided in the immediate aftermath of *DeShaney*, the Fifth Circuit first recognized the existence of, then adopted, the state-created danger theory of liability. *See Johnson v. Dallas Indep. Sch. District.*, 38 F.3d 198, 200 (5th Cir.1994) ("When state actors knowingly place a person in danger, the due process clause of the constitution has been held [by other courts] to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody'"); *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001) (identifying the elements of state-created danger liability and holding that, even if theory was available in this circuit, plaintiff had not met its elements); *McClendon v. City of Columbia*, 258 F.3d 432, 435 (5th Cir. 2001) ("We have not heretofore explicitly adopted and enforced this theory. We do so now"). But the panel opinion in *McClendon*, which expressly adopted the theory, was vacated by the en banc court. *McClendon v. City of Columbia*, 285 F.3d 1078 (5th Cir. 2002). The en banc court then held that even if the state-created danger theory of liability was available, it was not met in the case. *McClendon v. City of Columbia*, 305 F.3d 314, 325-27 (5th Cir. 2002).

The following year, the Fifth Circuit again acknowledged that it had "never explicitly adopted the state-created danger theory," but it noted that it had previously "set out the elements of a state-created danger cause of action" and then reversed the district court's dismissal of the claim because "even a cursory review of the complaints shows that plaintiffs pleaded facts to establish deliberate indifference," the element

of state-created danger liability that the district court found to have been lacking, thereby effectively adopting the theory. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 537 (5th Cir. 2003). In *Beltran v. City of El Paso*, however, the Fifth Circuit noted that it had "consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented." 367 F.3d at 307. The Court then found it unnecessary to settle the issue at the time because "[e]ven if a state-created danger theory were acknowledged in this circuit," the 911 operator defendant had not acted with the deliberate indifference necessary to state a claim. *Id.*

A few years later, another panel of the Fifth Circuit held that *Scanlan* "necessarily recognized that the state-created danger theory is a valid legal theory." *Breen v. Texas A&M Univ.*, 485 F.3d 325, 335 (5th Cir. 2007). But that opinion was then withdrawn in part on rehearing, with the sections of the opinion discussing state-created danger liability deleted. *Breen v. Texas A&M Univ.*, 494 F.3d 516, 518 (5th Cir. 2007). Subsequently, the Court reiterated that, "[d]espite the potential confusion created by *Scanlan* and *Breen*, recent decisions have consistently confirmed that '[t]he Fifth Circuit has not adopted the 'state-created danger' theory of liability.'" *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010); *see also Bustos v. Martini Club, Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) ("[T]his circuit has not adopted the state-created danger theory"). Nevertheless, some uncertainly lingers because most of the Fifth Circuit's cases have dealt with factual circumstances that would not give rise to state-created danger liability even if the

Circuit recognized the cause of action. Statements by the Court that it has not adopted the theory, in the context of factual circumstances that would not give rise to liability under the theory in any event, are not the same as a holding rejecting the theory altogether.

Given that the Fifth Circuit may itself still be grappling with the issue, its failure yet to definitively embrace state-created danger liability is hardly the "irreconcilabl[e]" conflict that Petitioners claim. Pet. at 2. Indeed, quite the opposite is true. A little more percolation in the Fifth Circuit might well eliminate the supposed split entirely.

II. This Case Is Simply Another Attempt At An End-Run Around *DeShaney*.

The lack of any real circuit split suggests that the actual purpose for seeking certiorari here is not resolution of a circuit split but lingering disagreement with this Court's decision in *DeShaney* itself. The law school dean serving as co-counsel on the case, for example, is a long-standing critic of *DeShaney*. *See* Chemerinsky, *The State-Created Danger Doctrine*, 23 TUORO L. REV. at 1, 26 ("There is no series of cases that are more consistently depressing than the state-created danger decisions." In suits against the government and its officials for failing to intervene and prevent a tragedy, "the government almost always prevails."); Erwin Chemerinsky, *Government Duty to Protect: Post-DeShaney Developments*, 19 TUORO L. REV. 679 (2003) (discussing *DeShaney* and explaining how to navigate its exceptions in showing liability on the part of the government for failure to protect); *see also* Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 533-534 (1992-1993) (suggesting

that *DeShaney* is unsound because it embodies the view that "the Constitution does not create affirmative entitlements, but is a restriction on government conduct."); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 53–57 (1989-1990) (citing *DeShaney* as an example of the "obvious consequence . . . that the government generally wins constitutional cases" because of the "Court's inability to develop . . . a theory for when it should accept constitutional claims and hold against the government."); Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L. J. 2676, 2678 (2012-2013) (arguing that among cases like *DeShaney*, which stand for the idea that the "Constitution [is] often described as being a charter of negative liberties, restrictions on government power, and not affirmative rights," cases like *Gideon v. Wainwright*, 372 U.S. 336 (1963), which promote affirmative Constitutional entitlements, should be celebrated.). Indeed, Dean Chemerinsky has intimated that the state-created danger theory would have required *DeShaney* to come out differently. Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. at 10 ("one can argue that in all of these cases [including *DeShaney*], the act of the government official is the 'but for' cause" that lead to a holding of liability under the "but for" causation standard adopted by the Tenth Circuit in *Currier*).

The other scholars cited in the Petition are equally hostile to *DeShaney* itself. *See, e.g.,* Atinuke O. Awoyomi, *The State-Created Danger Doctrine in Domestic Violence Cases: Do We Have a Solution in* Okin v. Village of Cornwall-on-Hudson Police Department*?*, 20 COLUM. J. GENDER & L. 3, 3 (2011) ("*DeShaney* had a

devastating effect on claims that could be brought under the Due Process Clause of the Fourteenth Amendment"); Jeff Sanford, *The Constitutional Hall Pass: Rethinking the Gap in §1983 Liability That Schools Have Enjoyed Since* DeShaney, 91 WASH. U. L. REV. 1633, 1634 (2014) (arguing "that the current prevailing application of *DeShaney* to § 1983 claims against public schools is insufficient to address the egregious misconduct committed by public schools and their officials that result in constitutional violations to its students"); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine:* DeShaney *is Still Wrong and Castle Rock is More of the Same*, 16 TEMPLE POL. & CIV. RTS. L. REV. 47, 63 (2006) ("Any small individual gains from the exception should not come at the expense of conceding the validity of the 'no affirmative duty' rule"); Laura Oren, *Safari Into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1216 n. 369 (2005) ("However, I still maintain that *DeShaney*, the case that started the lower courts along the state-created danger route, did involve an abuse of government power and was wrongly decided by the Supreme Court").

A feigned circuit split is not grounds for certiorari. *See* Shapiro, et al., Supreme Court Practice, Ch. 4.3, at p. 241 ("[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized"). If *DeShaney* itself is the real target, then Petitioners should at least have asked in their Questions Presented whether *DeShaney* should be overruled. Having failed to raise *that* issue, there is nothing left of this case that warrants this Court's attention. *See* S.Ct. Rule 14.1(a) ("Only the questions set out in the

petition, or fairly included therein, will be considered by the Court"). This is particularly true in light of the fact that no member of this Court has called *DeShaney* into question. *See, e.g., Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 773 (2005) (Stevens, J., joined by Ginsburg, J., dissenting) (citing *DeShaney* for the "perfectly clear" rule "that neither the Federal Constitution itself, nor any federal statute, granted respondent or her children any individual entitlement to police protection"); *cf. Beltran*, 367 F.3d at 304 ("This Court has cautioned that the Equal Protection Clause should not be used to make an end-run around the *DeShaney* principle that there is no constitutional right to state protection for acts carried out by a private actor") (citing *McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir.1989)).

CONCLUSION

The Tenth Circuit is not at odds with the "majority" of circuit courts that recognize state-created danger liability in non-custodial situations, for it, too recognizes such claims. So does the Fourth Circuit, which Petitioners erroneously place in the "minority" camp with the Tenth Circuit as rejecting such claims entirely. And the Fifth Circuit's lingering uncertainty about the availability of state-created danger liability hardly qualifies as the "irreconcilable" conflict Petitioners claim. What we have, then, is nothing more than different outcomes (if even that) based on the application, in dramatically difference factual situations, of a fact-bound doctrine that nearly all of the Circuits recognize. The petition should therefore be denied.

Respectfully submitted,

Thomas S. Rice
Eric Ziporin
SENTER GOLDFARB & RICE, LLC
3900 E. Mexico Ave., Suite 700
Denver, CO 80210
(303) 320-0509

JOHN C. EASTMAN
Counsel of Record
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330 x2
jeastman@chapman.edu

Counsel for Respondent

Dated: February 27, 2017.