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

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

REPLY BRIEF

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INTRODUCTION

There is great confusion in the law as to the scope of the state created danger doctrine. The Tenth Circuit's decision has added to that confusion and deepened the split among the Circuits as to whether such claims only cover conduct by a state actor that imposes actual limitations on a person's freedom to act on his own behalf. In opposing the petition for certiorari, Respondent downplays the confusion and conflicts.

Respondent mischaracterizes the factual findings accepted by the Tenth Circuit in an effort to turn the legal issue into a factual dispute. Despite Respondent's continued presentation of his own "sanitized" version[1] of the facts, Judge Blackburn made extensive findings in concluding that Rodriguez knowingly committed multiple conscience shocking and affirmative acts that increased the danger and caused Jimma Reat's death. There was no factual dispute before the Tenth Circuit nor is there one before this Court. Rather, the question presented concerns the important legal disagreement between the circuits about whether the facts, as found, constitute a state created danger claim.

Respondent also suggests that there is no legal dispute because the Tenth Circuit never addressed the merits of the underlying claim. Yet the Tenth Circuit did decide the state created danger legal issue as part of its qualified immunity analysis. Accordingly, it granted immunity on the basis that there was no

[1] App. 15a.

physical limitation placed on plaintiffs' freedom and therefore no clearly established constitutional violation.

In arguing against certiorari, Respondent minimizes the real split between the Circuits regarding the scope of state created danger claims. The Circuit split is both real and permanent, not "ephemeral" or made up by petitioner and liberal legal scholars as a tactic to overturn *DeShaney v. Winnebago*, 489 U.S. 189 (1989) as Respondent suggests. Respondent's Brief in Opposition [hereafter "Opposition Brief"], pp. 6, 19. Rather, it is federal appellate courts themselves that openly recognize this division and routinely call out for this Court's intervention. For example, the D.C. Circuit noted the "lack of clarity in the law of the circuits", which are "inconsistent in their elaborations" of danger creation claims. *Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir. 2001). The Eighth Circuit has expressed similar confusion, stating: "It is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect." *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990). *See also McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001) (noting the "variety of tests" in the circuits); *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 859, 871 (5th Cir. 2012) (Higginson, J., concurring) ("Dicta in *DeShaney* has contributed to twenty-three years of circuit (and intra-circuit) disharmony, and excited legions of law review articles, about whether the Constitution asserts positive or negative liberties, or regulates government action or inaction – all giving uncertain guidance to litigants and courts, as well as public officials, hence necessarily also giving uncertain guidance to citizens

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whom government persons cause to be subjected to injury.") (Internal citations omitted).

Respondent argues that the Tenth Circuit and others accept the state created danger doctrine. Of course they do, but that is not the point. The question in this case is not whether the doctrine exists, but where it applies. In particular, does the state created danger doctrine apply in situations where a state actor does not impose limitations on a person's freedom? It is precisely this Circuit split that requires resolution by this Court.

I. THIS CASE PRESENTS A SOUND VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

A. The Factual Findings Were Accepted by the Tenth Circuit and Must Be Accepted by This Court.

Notwithstanding Respondent's steadfast attempt to re-litigate its factual position below (falsely presenting this as barely a negligence case "without malicious intent"[2]), Judge Blackburn rejected this version in denying summary judgment, finding *inter alia* that:

- "Through his affirmative acts, Mr. Rodriguez sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before. Aware that the assailants had been headed northbound on Sheridan Boulevard after the

[2] Opposition Brief, p. i.

initial attack, Mr. Rodriguez instructed plaintiffs to stop their car at a major intersection less than 20 blocks north and make themselves even more conspicuous at a time of night when there was unlikely to be much other traffic on the road in any event. Most glaringly, knowing that the driver was injured and that the assailants had a gun, he failed to send help to the scene until after the tragedy was *fait accompli*. Although qualified immunity provides 'ample room for mistaken judgments', I cannot say that 'reasonable officials in the same situation as the defendant could disagree on the appropriate course of action to follow.'" App. 23a-24a.

- "Indeed, Mr. Rodriguez acknowledged during the call that the assailants might return." App. 33a.

- "In his disciplinary report, Mr. Rodriguez acknowledged that he knew plaintiffs did not need to return to Denver in order to file a police report. Nevertheless, he sent them from their location of relative safety in Lakewood back south along Sheridan into Denver, despite having been informed that the assailants were headed northbound on Sheridan immediately after the attack." App. 22a.

- "The facts also plausibly suggest that Mr. Rodriguez consciously disregarded this risk. After directing plaintiffs to park in a

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conspicuous location on a major road on which he knew the attackers had been traveling just minutes before, Mr. Rodriguez then instructed plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning. He then learned that the attackers had brandished a gun during the initial altercation. Despite this knowledge, Mr. Rodriguez did not suggest that plaintiffs find a more discrete location, even within the city of Denver, or otherwise make their whereabouts less obvious." App. 22a.

- "Most egregiously, Mr. Rodriguez did not dispatch a police officer to plaintiffs' location at any time until after Jimma Pal had been fatally shot." App. 22a.

- The facts were "sufficiently shocking to the conscience" to state a claim under the state created danger doctrine. App. 19a.

These were the facts accepted by the Tenth Circuit, as required on an interlocutory appeal, not the sanitized version presented in Respondent's Opposition Brief. See App. 9a (accepting the District Court's factual finding that "these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory"); *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995).

B. The Tenth Circuit Decided The State Created Danger Issue As Part of its Qualified Immunity Analysis.

The decision to grant immunity was not factual, but rather based on the Tenth Circuit's dispositive legal ruling that the facts failed to establish any limitation of freedom as required to state a clearly established claim. This holding reflects the fundamental split between the circuits in terms of the scope of these claims.

Judge Blackburn rejected the minority approach to *DeShaney* advanced by Respondent, reasoning: "As seen in *Currier* and *Briggs*[3], instructions need not amount to commands in order to qualify as affirmative conduct . . . "even if Ran Pal was not theoretically required to follow Mr. Rodriguez's instructions to drive to Denver, park, and turn on his hazard lights", "Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver. . .moved the Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants", thereby increasing the danger. App. 57a-58a (internal citations omitted).

In reversing, the Tenth Circuit aligned itself with the minority interpretation of *DeShaney*, holding that liability does require conduct that imposes limitations on a person's freedom to act:

as the Supreme Court noted in the case that is

[3] *Currier v. Doran*, 242 F.3d 905, 922 (10th Cir. 2001); *Cf. Briggs v. Johnson*, 274 F. App'x 730 (10th Cir. 2008).

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> widely understood to be the progenitor of the state-created danger doctrine, '[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Deshaney v. Winnebago Cty. Dept of Soc. Servs.*, 489 U.S. 189, 200 (1989). . . App. 10a-11a.
>
> As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.' *Graham v. Indep. Sch. Dist., 22 F.3d 991, 995* (10th Cir. 1994).
>
> Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers, Reat and his companions were not incapable of acting in their own interest at the time of the shooting. App. 11a.

The Tenth Circuit decided this legal issue as part of its qualified immunity analysis, reversing based on its ruling that no limitation of freedom occurred as is required to state a claim.

II. RESPONDENT'S BRIEF UNDERSCORES THAT THE LOWER COURTS ARE IN DISARRAY OVER WHETHER FREEDOM LIMITATION IS A COMPONENT OF STATE CREATED DANGER CLAIMS.

Respondent's review of cases shows the great confusion in the law and the need for Supreme Court review. Respondent's brief highlights the point that the circuits, including the Tenth, are at times divided against themselves over the question presented, but this only amplifies the importance of granting certiorari. Current law is unpredictable, not only across the circuits, but sometimes within them.

As Petitioner pointed out in the petition for rehearing *en banc*, until now, the Tenth Circuit has never expressly imposed any requirement that a state actor limit a person's freedom to act as part of the danger creation test, as shown by the District Court's interpretation of prior cases including *Currier*, 242 F.3d 905. In direct contrast to their argument before this Court, Respondent maintained in the lower courts that the Tenth Circuit has always required a state actor limit the liberty of a citizen in some way in the context of state created danger claims.

And of course, while the District Court rejected the freedom limitation requirement urged by Respondent, the Tenth Circuit accepted it, aligning itself with the minority view of *DeShaney*. To be sure, there seems to be some intra circuit disharmony in the

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Tenth Circuit as here, four Judges (Judges Lucero, Hartz, Phillips and Moritz) voted to grant *en banc* rehearing. App. 78a. Internal divisions do not change the fact that decisions are also divided across the circuits. They just make the current confusion worse, defeating predictability even within a given circuit.

There is no question that this case would have been decided differently in the Second, Sixth, Seventh, Eighth, and Ninth Circuits, which evaluate whether or not the state actor created or increased danger - the same analysis the District Court used here. *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Freeman*, 911 F.2d 52; *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). As the Second Circuit reasoned in rejecting the Fifth Circuit's approach: "[s]ome courts have, indeed, incorporated the 'special relationship' criterion as a prerequisite to liability.[4] We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability." *Pena*, 432 F.3d at 109 (Sack. J.). *See also Grubbs*, 974 F.2d at 121 ("custody is not a prerequisite to the 'danger creation' basis" under *DeShaney*, and while "some cases have blended the two exceptions together . . . the distinction is important.").

Respondent's attempt to distinguish these cases relies once again on reciting his own factual interpretation as opposed to legal distinctions. *See e.g.* Opposition Brief, p. 12 (arguing the Eighth Circuit denies liability where "the government official was, as

[4] Citing *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004).

here (at most), merely negligent."); (arguing the outcome would be the same in the Sixth Circuit because claims have been rejected "where the defendant officers were much more responsible for the risk creation than the 911 operator was here.").[5] No matter how many times Respondent minimizes the facts, their version was rejected by the Tenth Circuit which instead concluded that it was the lack of a freedom limitation that was fatal to the claim.

There is similarly no question that this case would have been decided the same way in the Fourth and Fifth Circuits. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), the Fourth Circuit's seminal state created danger case, made clear that absent a custodial relationship, the government actor must "itself directly cause harm to the injured party" for any liability to attach under the Fourteenth Amendment. *Id.* at 1177. Indeed, Fourth Circuit Judge Russell argued against the minority's custodial approach, citing to the Seventh, Eighth, and Ninth Circuit cases for the proposition that

[5] Had Judge Blackburn accepted Respondent's interpretation of the events, he would have dismissed this claim. Since Judge Blackburn was appointed in 2002, he has consistently dismissed state created danger claims that fail to meet the Tenth Circuit's stringent elements of the doctrine. *See Estate of Barela v. City and County of Denver*, 2016 WL 1039908, at *3 (D. Colo. 2016) (Blackburn, J) (dismissing state created danger claim where 911 caller was killed by her boyfriend, where operator did not send the police despite repeated assurances because operator did not increase the already existing danger the girlfriend faced); *Baker v. Elbert Bd. of County Com'rs*, 2005 WL 2671072, at *2 (D. Colo.) (Blackburn, J.) (dismissing claim where state actor did not create or increase the danger); *Brasche v. City of Walsenburg*, 2006 WL 197335 (D. Colo.) (same).

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DeShaney "did not reject the state's clearly established duty to protect an individual where the state, through its affirmative action, has created a dangerous situation or rendered the individual more vulnerable to danger." *Pinder*, 54 F.3d at 1180 (Russell, J. dissenting).

Respondent's argument that the Fifth Circuit is still in flux about the doctrine is simply untrue. There is no "on again, off again" relationship[6] -- the Fifth Circuit has consistently refused to accept the doctrine outside of a custodial relationship. Thus, in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), *rev'd en banc*, 305 F.3d 314 (5th Cir. 2002), after acknowledging that "many of our sister circuits" "have adopted a variety of tests in expounding the [state created danger] theory", the Fifth Circuit reversed the panel's decision adopting the theory, concluding that it only "recognized the validity of the "special relationship" exception to *DeShaney*. *McClendon*, 305 F.3d at 324–25. *See also Beltran*, 367 F.3d at 307 ("This court has 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."); *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) ("Absent this "special relationship," the state has no duty to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence."). *Kovacic v. Villarreal*, 628 F.3d 209, 213-14 (5th Cir. 2010) ("The Fifth Circuit has not adopted the "state-created danger" theory of liability.").

[6] Opposition Brief, p. 17. To the extent that any intra-circuit divisions do exist within the Fifth Circuit, this would once again only underscore the need for this Court's review.

Despite Respondent's suggestion that the Fifth Circuit needs more time to mull it over, dissenting Fifth Circuit judges acknowledge the split, criticizing the majority's stalwart refusal to officially rule on the doctrine one way or the other as simply an "attempt[] to create the illusion that no Circuit split exists in hopes of avoiding Supreme Court scrutiny." *McClendon*, 305 F.3d at 338, Parker, J, joined by Wiener and DeMoss, dissenting).

Respondent likewise pretends "that no Circuit split exists in hopes of avoiding Supreme Court scrutiny." *Id.* The many cases cited by both sides in this matter reveal the great need for clarification from this Court. This case presents an ideal vehicle to provide much needed guidance on this important issue that has repeatedly arisen since *DeShaney*, which has divided and is continuing to divide the circuits.

CONCLUSION

For all these reasons, and for the reasons stated in the Petition for Certiorari, this Court should grant review in this case.

Respectfully submitted,

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