SOUTHERN HARM: THE FIFTH CIRCUIT'S REFUSAL TO ADOPT THE STATE-CREATED DANGER DOCTRINE DISENFRANCHISES UNHOUSED PEOPLE OF A WAY TO COMBAT UNCONSTITUTIONAL ENCAMPMENT SWEEPS

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ABSTRACT

Homelessness is a premier crisis facing the United States. Municipal and state governments have widely failed to create long-term solutions to this complex social issue, and homeless encampments have proliferated across the nation. Encampments provide residents with community, protection, and storage, but can also negatively affect public health and facilitate intra-encampment crime. Governments have responded with short-term solutions: "sweeps," which eject encampment residents for site cleaning. They are expensive, detrimental to residents' health, and counterproductive in addressing homelessness. When done during extreme environmental conditions and while shelter space is unavailable, they become cruel and deadly.

Executive actions like sweeps are normally entitled to immunity. However, the state-created danger doctrine under the Fourteenth Amendment allows the piercing of this veil. Under the Ninth Circuit Court of Appeals' standard, when government officials conduct sweeps with deliberate indifference to foreseeable, harmful environmental conditions so as to throw unhoused people into a metaphorical snake pit, they commit actionable constitutional violations. Advocates have successfully used this doctrine in several circuits to obtain

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temporary restraining orders against sweeps. Yet the Fifth Circuit Court of Appeals stands alone as the only circuit to consistently refuse to accept the doctrine. This leaves unhoused people powerless against unconstitutional sweeps despite states in the Fifth Circuit's jurisdiction facing a growing homelessness crisis and worsening environmental conditions.

This Note argues that it is necessary for the Fifth Circuit to join its sister circuits and finally adopt the state-created danger doctrine. A claim based on an encampment sweep is the perfect vehicle for it to do so, as such a claim is not predicated on harm from a third party and has historical analogs predating the Fourteenth Amendment.

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INTRODUCTION

America has a problem: homelessness.[1] Record inflation,[2] drastic increases in rent prices that have far outpaced household income growth,[3] and decades of failed government policy preventing the building of enough housing are all to blame.[4] In 2023, the United States had a scarcity of more than seven million homes that were affordable and accessible to low-income renters.[5] While housing insecurity has been around for decades,[6] the COVID-19 pandemic disproportionately exacerbated the issue for Black and Latinx renters, worsening already present ethnic and racial economic inequality.[7] From 2017 to 2022, rates of homelessness increased nearly 6% from 550,996 to 582,462 people, with 2022 being a record-high year for unhoused individuals.[8] And demand is exceeding supply for

1. German Lopez, *Homeless in America*, N.Y. TIMES (July 15, 2022), https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html [https://perma.cc/9YC9-AGLV].

2. Christopher Rugaber, *U.S. Inflation at 9.1 Percent, a Record High*, PBS (July 13, 2022, 9:40 AM), https://www.pbs.org/newshour/economy/u-s-inflation-at-9-1-percent-a-record-high [https://perma.cc/RC79-5QFC].

3. *See* Anna Kodé, *The Typical American Renter Is Now Rent-Burdened, a Report Says*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/realestate/rent-burdened-american-households.html [https://perma.cc/4KW5-7LW5].

4. Lopez, *supra* note 1.

5. NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 1 (Matt Clarke ed., 2023).

6. Ashfaq Khan, Christian E. Weller, Lily Roberts & Michela Zonta, *The Rental Housing Crisis Is a Supply Problem that Needs Supply Solutions*, CTR. FOR AM. PROGRESS (Aug. 22, 2022), https://www.americanprogress.org/article/the-rental-housing-crisis-is-a-supply-problem-that-needs-supply-solutions/ [https://perma.cc/P7VV-KKRE].

7. Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CTR. FOR AM. PROGRESS (Oct. 3, 2020), https://www.americanprogress.org/article/pandemic-exacerbated-housing-instability-renters-color/ [https://perma.cc/8GMK-AU76] ("[N]onwhite renters face[] eviction rates that [are] 60[%] higher than those of white renters."). Further, due to "historic and current policies as well as systemic racism in housing, criminal justice, education, employment, and health care, people of color are more likely to experience homelessness across their lifespan." *Id.*

8. *See State of Homelessness: 2023 Edition*, NAT'L ALL. TO END HOMELESSNESS (2023), https://endhomelessness.org/wp-content/uploads/2024/08/StateOfHomelessness_2023.pdf. In 2022, the count of homeless individuals was 421,392 and of chronically homeless individuals was 127,768. *Id.* Native Hawaiian, Black, Native American, Multiracial, and Latinx people disproportionately make up the American unhoused population. *See id.*; *see also* U.S. DEP'T OF HOUS. & URB. DEV., 2017 ANNUAL HOMELESS ASSESSMENT REP. TO CONG. PART 2: ESTIMATES OF HOMELESSNESS IN

shelter beds, with shelter waitlists doubling or tripling as of summer 2022.[9] While focus on this crisis has been directed at expensive, liberal cities on the East and West Coasts like San Francisco and New York City,[10] a dearth of available shelter space is a ubiquitous phenomenon throughout the United States.[11]

As a result, some unhoused people have resorted to living in encampments, "places where a group of individuals experiencing homelessness reside that is not intended for long-term, continuous occupancy."[12] From 2007 to 2017, there was a "1,342[%] increase in the number of unique homeless encampments reported in the media, and encampments have been reported in every state."[13] There are several reasons for this. The majority of available beds are permanent housing for formerly unhoused people, not those currently experiencing homelessness.[14] Over three-quarters of beds available to those experiencing homelessness are dedicated to "emergency" or "very short-

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THE U.S. xxiii (2018), https://www.huduser.gov/portal/sites/default/files/pdf/2017-AHAR-Part-2.pdf ("[E]ven when compared to the U.S. poverty population, people of color account for a higher share of the one-year estimates of people in sheltered locations.").

9. Lopez, *supra* note 1.

10. *See id.*; *State of Homelessness: 2023 Edition*, *supra* note 8.

11. *See, e.g.*, *Waitlist for Shelter Space Is Long and Getting Longer*, SOC. TELEVISION NETWORK (Dec. 7, 2022) https://stntv.com/understand_the_issues/addressing-the-growing-wait-times-for-shelter-space/ [https://perma.cc/S8KJ-B8NG] (reporting that Phoenix, Arizona, had more than 200 families on waitlists for shelters in December 2022); Mark Robison, *Are 30 Families Homeless in Washoe County with No Shelter Space for Them?*, RENO GAZETTE J. (Sept. 15, 2023, 11:10 AM), https://www.rgj.com/story/news/2023/09/15/homeless-families-washoe-county-nevada-no-shelter/70836767007/ [https://perma.cc/6SR3-7DCC] (reporting that seventeen to thirty families around Reno, Nevada, were on shelter waitlists in September 2023); Emily Roberts, *Homeless Shelter Waitlists Grow as Temperatures Drop*, WBAY (Dec. 19, 2022, 5:18 PM), https://www.wbay.com/2022/12/19/homeless-shelter-waitlists-grow-temperatures-drop/ [https://perma.cc/FZ54-CMQZ] (reporting that 100 people, thirty-six of whom were children, were on a waitlist for shelter in Appleton, Wisconsin in December 2022); Mason Brighton, *Opinions Split on Tackling Homelessness in Kentucky*, SPECTRUM NEWS (Dec. 26, 2023, 5:00 AM), https://spectrumnews1.com/ky/louisville/news/2023/12/22/opinions-split-on-tackling-homelessness-in-kentucky [https://perma.cc/43KD-DHTS] (highlighting Louisville's inadequate supply of shelter beds).

12. NAT'L LEAGUE OF CITIES, AN OVERVIEW OF HOMELESS ENCAMPMENTS FOR CITY LEADERS 2 (2022), https://www.nlc.org/resource/an-overview-of-homeless-encampments/ [https://perma.cc/WS44-HK4V].

13. *Id.*

14. *Id.* at 3.

term" stays.[15] And many shelters have barriers to entry, making them unavailable or unattractive.[16] Religious shelters, for example, have proven to be acutely exclusive, especially those that require residents to practice a particular faith.[17] Concerns of overcrowding, disease, infestation, inadequate waste processing, theft, and attacks from co-inhabitants further make shelters undesirable.[18]

Conversely, critics note that encampments can be "unsafe, violent, and unhealthy places."[19] However, encampments vary widely in size, social structure, and standards of behavior.[20] Unlike shelters, they allow residents to build a community and stay together.[21] They can increase members' autonomy.[22] Notably, they can even protect inhabitants from "targeted aggression, assault, theft, or police harassment."[23] Altogether, encampments, just like shelters, vary in the benefits and detriments they provide residents.

In response to a rise in encampments, states and municipalities have essentially criminalized homelessness via the

15. *Id.*

16. *Id.* Shelter requirements can include "sobriety requirements, entry fees, gender requirements that separate partners and families, restrictions against having pets, set entry and exit times that may be incompatible with an individual's work hours, insufficient security, and lack of secure storage for personal belongings." *Id.*

17. *See* Mark Mulder, *Faith-Based Homeless Shelters and "Hyper-Institutionalization": A Case Study*, 18 MICH. SOCIO. REV. 137, 137–39 (2004) (asserting that faith-based shelters serve a prominent role in providing shelter with little accountability). LGBTQ people "comprise up to 40[%] of the total unaccompanied homeless youth population" and are often homeless because of their family's religious beliefs. Ariana Aboulafia, *The New John Lawrence: An Analysis of the Criminalization of LGBTQ Homelessness*, 19 CONN. PUB. INT. L.J. 199, 205–08 (2019). Many faith-based shelters, at times federally funded, discriminate against LGBTQ people up to and including forbidding entry. *See id.*

18. *See* NAT'L LEAGUE OF CITIES, *supra* note 12, at 3–4.

19. NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, IMPACT OF ENCAMPMENT SWEEPS ON PEOPLE EXPERIENCING HOMELESSNESS 1 (2022).

20. NAT'L LEAGUE OF CITIES, *supra* note 12, at 2.

21. *See id.*

22. *Id.* at 3.

23. *Id.* at 5.

prohibition of loitering, sleeping, or camping in public.[24] The breadth of anti-camping ordinances varies by jurisdiction.[25] Some narrower laws cover specific areas like non-campground state property, while others are breathtakingly broad, spanning an entire state.[26] Enforcement of these ordinances has dramatically increased in the wake of the Supreme Court's recent decision in *City of Grants Pass v. Johnson*, with California Governor Gavin Newsom, for example, issuing an executive order mandating that state agencies conduct sweeps.[27] Governments use these bans to justify "sweeping," or clearing, encampments.[28] Sweeps "can result in arrests and the destruction of a person's personal property, including IDs and personal documents, medicine and medical devices, and other crucial items."[29] More importantly, they "threaten unhoused people's health, wellbeing, and connections to care."[30] Over time, this disruption of

24. *See* Aboulafia, *supra* note 17, at 201 n.10. Forty-eight states have "at least one law restricting behaviors that prohibit or restrict conduct of people experiencing homelessness." NAT'L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 7 (2021).

25. NAT'L HOMELESSNESS L. CTR., *supra* note 24, at 7.

26. *Id.* at 8–9. In 2021, Texas passed a harsh statewide bill banning public camping and threatening municipalities with a loss of state funding if they contradicted the bill. *Id.*

27. 603 U.S. 520, 542–43, 557–58 (2024) (holding that laws regulating and restricting camping on public property were not in violation of the Eighth Amendment's "cruel and unusual punishment" prohibition); Marisa Kendall, *Gavin Newsom Orders State Agencies to Move Homeless People Out of Camps—but to Where?*, CALMATTERS (July 25, 2024), https://calmatters.org/housing/homelessness/2024/07/newsom-homeless-encampments-order/ [https://perma.cc/RDM5-R6X2]; *see also* Michael Corkery & Jill Cowan, *Clear Encampments? Mind Your Own Business, Los Angeles Tells Newsom*, N.Y. TIMES (July 28, 2024), https://www.nytimes.com/2024/07/26/us/homeless-encampments-newsom-los-angeles.html [https://perma.cc/3742-35SX] (reporting that San Francisco Mayor London Breed stated at a rally that police officers would be taking a "rigid approach" to clearing starting in August 2024, "mak[ing] [unhoused people] so uncomfortable on the streets of San Francisco that they have to take [her] offer").

28. NAT'L HOMELESSNESS L. CTR., *supra* note 24, at 8.

29. *Id.*; *see, e.g.*, Bridget Grumet, *'Not Acceptable': After Homeless Camp Was Abruptly Demolished, Austin Will Retrain Staff*, AUSTIN AM.-STATESMAN (Mar. 11, 2024, 6:02 AM), https://www.statesman.com/story/opinion/columns/2024/03/11/demolition-austin-homeless-encampment-city-protocol-opinion/72887024007/ [https://perma.cc/7SKD-9B6M] (profiling an encampment resident, Tammy Underwood, who lost her identification, just-bought groceries, and dog toys as the result of an unannounced encampment demolition).

30. Zane McNeill, *Homeless "Sweeps" Increase Mortality Rates of Unhoused People, Research Finds*, TRUTHOUT (Apr. 19, 2023), https://truthout.org/articles/homeless-sweeps-increase-mortality-rates-of-unhoused-people-research-finds/ [https://perma.cc/4GDW-8TE6].

care gradually contributes to an increased risk of mortality for unhoused people.[31] But sweeps pose a more immediate threat when occurring during extreme weather and disease outbreaks—they make the risk of injury or death an imminent threat.[32]

While shocking to the conscience, executive government actions such as these are entitled to sovereign immunity and beyond the reach of civil law claims, barring constitutional violations that trigger 42 U.S.C. § 1983 liability.[33] As such, even if government officials act callously indifferent to foreseeable harm, unhoused people have no way of stopping sweeps or seeking monetary damages unless they can prove a § 1983 claim.[34] However, the state-created danger doctrine, an equitable exception to governmental immunity stemming from the Fourteenth Amendment, allows relief under § 1983 in such extraordinary circumstances.[35] Under this doctrine derived from *DeShaney v. Winnebago County Department of Social Services*, states or municipalities may be held responsible where their officials create or escalate danger to a person.[36] Every Circuit Court of Appeals except for the Fifth has accepted the validity of the judicially-created doctrine in the wake of *DeShaney*,[37] with widely-varying standards due to the Supreme Court's silence

31. *Id.* One scientific medical study predicted that encampment sweeps would increase the deaths of unhoused people using drugs by 25% over a ten-year period. *Id.* The lead investigator stated, "[I]t means our states and our cities are literally killing people with this." *Id.*

32. *See* discussion *infra* Part III; Trân Nguyễn, *Federal Judge Says California's Capital City Can't Clear Homeless Camps During Extreme Heat*, ASSOCIATED PRESS, https://apnews.com/article/heat-wave-homeless-sweeps-judge-order-58173a538f07b113557bf89ed8017309 [https://perma.cc/B9YL-F82J] (Aug. 7, 2023, 6:18 PM); Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1191–93 (E.D. Cal. 2022); Janosko v. City of Oakland, No. 3:23-CV-00035-WHO, 2023 WL 187499, at *3–4 (N.D. Cal. Jan. 13, 2023).

33. *See* discussion *infra* Section II.A; DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

34. *See* discussion *infra* Section II.A.

35. *See* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006).

36. 489 U.S. 189; *see* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1165–68 (2005).

37. Oren, *supra* note 36, at 1173.

on the matter.[38] Importantly, several circuits have either recognized state-created danger claims against government actors for conducting sweeps or at least acknowledged such claims as possible.[39] Yet, the Fifth Circuit alone consistently and obstinately refuses to adopt the doctrine.[40] Despite the worsening homelessness crisis in Texas,[41] Louisiana,[42] and Mississippi,[43]

38. Zoe Levine, Note, *Holding Government Officials Accountable by Applying the State-Created Danger Doctrine to Cases of Suicide*, 113 J. CRIM. L. & CRIMINOLOGY 207, 210 (2023).

39. *See, e.g.*, Acoff v. City of Rochester, No. 22-CV-6450, 2022 WL 17335392, at *9–12 (W.D.N.Y. Nov. 30, 2022) (denying temporary restraining order against removing unhoused people from a building during a cold winter as the building was private property and there was available shelter space elsewhere); Murray v. City of Philadelphia, 481 F. Supp. 3d 461, 474–76 (E.D. Pa. 2020) (denying temporary restraining order where Philadelphia proved that it had sufficient available beds at hotels with which it had contracted); Phillips v. City of Cincinnati, 479 F. Supp. 3d 611, 648–49 (S.D. Ohio 2020) (denying motion to dismiss claim where complaint sufficiently pleaded that Cincinnati: (1) destroyed unhoused people's tents, blankets, and clothing; (2) forced the unhoused people into isolated, dangerous areas; and (3) failed to provide adequate shelter space); Berry v. Hennepin Cnty., No. 20-CV-2189, 2022 WL 3579747, at *9 (D. Minn. Aug. 19, 2022) (dismissing state-created danger claim where state actors had cleared shelter but had not created or increased risk of dangerous weather conditions or COVID-19); Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1190–93 (E.D. Cal. 2022) (granting preliminary injunction where Sacramento cleared protective encampments during hot summer); Denver Homeless Out Loud v. Denver, 514 F. Supp. 3d 1278, 1301–06 (D. Colo. 2021) (holding plaintiffs had stated cognizable claim where officials cleared encampment during COVID-19 pandemic but had presented insufficient evidence to grant injunction), *vacated and remanded due to prior agreement*, 32 F.4th 1259 (10th Cir. 2022).

40. Max Giuliano, Comment, *State-Created Danger: The Fifth Circuit's Refusal to Address the Problem and Its Devastating Effect on Domestic Violence Victims*, 127 PENN STATE L. REV. 929, 932 (2023).

41. *See* Katy McAfee & Ben Thompson, *Austin's Homeless Population Dispersing After 2 Years of Camping Ban Enforcement*, CMTY. IMPACT (May 25, 2023, 4:57 PM), https://communityimpact.com/austin/central-austin/city-county/2023/05/25/austins-homeless-population-dispersing-after-2-years-of-camping-ban-enforcement/ [https://perma.cc/RT6R-WB9V] (describing findings of a survey of unhoused people which determined "around 5,400 people are now experiencing sheltered or unsheltered homelessness in the Austin area").

42. *See* Roby Chavez, *'We're Barely Making It.' Why More New Orleans Families Are Without Stable Housing*, PBS (July 14, 2023, 2:03 PM), https://www.pbs.org/newshour/nation/were-barely-making-it-why-more-new-orleans-families-are-without-stable-housing [https://perma.cc/N338-F5DS] (describing increasing homelessness in New Orleans).

43. Morgan Harris, *Mississippi One of the Highest in the Nation of Homeless Not Living in Shelter*, WLBT (Apr. 28, 2023, 12:56 PM), https://www.wlbt.com/2023/04/28/mississippi-one-highest-nation-homeless-not-living-shelter/ [https://perma.cc/F23E-DBXE] ("Mississippi has over 1,100 people who are currently homeless.").

unhoused people in these states have no relief if state or municipal governments cause them injury via a sweep.[44]

The subsection of state-created danger claims relating to sweeps is critical because these claims differ from more standard ones where the ultimate harm is caused by private, third-party actors.[45] Examples of more standard claims include attempts to hold the government liable for failing to prevent neighbor-on-neighbor crime, domestic violence, and child abuse.[46] These claims are often critiqued as constitutionally suspect or creating a slippery slope of governmental liability.[47] While some claims by unhoused people have centered on harm from human third parties,[48] the majority have uniquely focused on environmental harms.[49] Recognizing state-created danger claims for this latter class of claims acknowledges that government actors, in tandem with environmental forces, are knowingly magnifying harm by leaving the plaintiffs worse off than they were before.[50] Beyond the constitutional justifications for these claims, equity also demands that the government be held liable since Mother Nature cannot be.[51]

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44. *See* discussion *supra* notes 33–35 and accompanying text (describing the lack of recourse available to unhoused people who experience sweeps and cannot prove a constitutional claim).

45. *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1–2 (2007) (remarking that liability generally stems from the government failing to intervene to prevent harm by third-party actors).

46. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989) (suing social workers for failing to prevent a father from killing his child); Irish v. Fowler, 979 F.3d 65, 67–68 (1st Cir. 2020) (suing police officers for causing a man to kidnap his former lover and murder her boyfriend); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1057–59 (9th Cir. 2006) (suing an officer for causing a violent child to shoot two of his neighbors).

47. *See* discussion *infra* Sections IV.B, IV.C.

48. *See, e.g.*, Phillips v. City of Cincinnati, 479 F. Supp. 3d 611, 648 (S.D. Ohio 2020) (characterizing the danger the unhoused plaintiffs faced as "violence and victimization by other members of the public").

49. *See, e.g.*, Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1193 (E.D. Cal. 2022) (granting preliminary injunction where plaintiffs showed police sweep exposed them to extreme heat); Janosko v. City of Oakland, No. 23-CV-00035, 2023 WL 187499, at *3–4 (N.D. Cal. Jan. 13, 2023) (granting temporary restraining order where plaintiffs showed sweep would expose them to "severe weather conditions" and "historic levels of rainfall").

50. *See Sacramento Homeless Union*, 617 F. Supp. 3d at 1193.

51. *See* discussion *infra* Section II.B.

This Note argues for the Fifth Circuit's official adoption of the state-created danger doctrine because doing so would allow plaintiffs to obtain temporary injunctions against sweeps that arbitrarily increase the risk of harm to unhoused individuals.[52] Part I will examine the homelessness crisis and ever-magnifying climate issues increasing the danger to unhoused people in the Fifth Circuit, which is comprised of Texas, Louisiana, and Mississippi. Part II will explore the origins and justifications for the state-created danger doctrine, as well as its varying framework among the circuits. Part III will examine the wealth of precedent applying the doctrine to unhoused individuals and encampment sweeps. Lastly, Part IV will explore the Fifth Circuit's refusal to adopt the doctrine and the arguments of those seeking to eradicate the doctrine. It will then examine why this opposition is legally indefensible and why pursuing a state-created danger claim in the context of an encampment sweep is the perfect vehicle for the Fifth Circuit to adopt the doctrine.

I. WHY THE STATE-CREATED DANGER DOCTRINE IS NEEDED IN THE FIFTH CIRCUIT

The adoption of the state-created danger doctrine in the Fifth Circuit is necessary for two reasons. First, the magnitude of the homelessness crisis is increasing in the states within the Fifth Circuit's jurisdiction. Second, so too are the environmental dangers unhoused people face on the street after encampment sweeps.

52. *See, e.g.*, *Sacramento Homeless Union*, 617 F. Supp. 3d at 1193 (showing the utility of applying the state-created danger doctrine to hold officials accountable for encampment sweeps). While the Supreme Court creating a uniform framework to apply across all circuits is the ideal solution, such analysis is beyond the scope of this Note. *See* Chemerinsky, *supra* note 45, at 26 (commenting on the large variation in the circuits and that due process is an area of law with a need for a "national, uniform set of rules"). *See generally* Oren, *supra* note 37, at 1215 (outlining the proposed elements of a generalized state-created danger doctrine).

A. The Growing Homelessness Crisis in the Fifth Circuit and the State and Municipal Response

The housing market and weather of the states in the Fifth Circuit's jurisdiction are in flux. Many of the factors contributing to the homelessness crisis in California and New York are becoming commonplace in southern cities, which will almost certainly lead to an increase in homelessness.[53] While Texas overall is affordable compared to other states,[54] many of its cities are becoming cost-prohibitive.[55] In 2018, the Texas Comptroller reported that "Texas housing prices have been rising faster than the state's personal income."[56] The population is growing "explosive[ly]" in response to a thriving economy and many new jobs,[57] resulting in Texas now containing four of the top ten largest cities in the United States.[58] Because of this population growth, homebuilders cannot keep up with the demand for affordable single-family homes.[59] This is compounded by the insufficient number of construction workers in the state, leading to increased wages for workers and higher overall costs to build homes.[60] To maintain profit margins, homebuilders are shifting from building "entry-level" housing to bigger, pricier homes.[61] These cost-of-living increases vary across the state but,

53. *See supra* note 11 and accompanying text.

54. *See* Kia Jackson, *Cost of Living in Texas 2023*, ONEMAIN FIN. (Aug. 22, 2023), https://www.onemainfinancial.com/resources/everyday-living/cost-of-living-in-texas [https://perma.cc/78JC-PU5L] (noting that Texas had the fifteenth-lowest cost of living in the United States in the first quarter of 2023). However, other statistics reveal that this lower cost of living overall is not aiding very low-income Texan households, who are still struggling to afford housing. *See infra* notes 70–71 and accompanying text.

55. *See* Courtney King, *Texas Housing Prices on the Rise*, COMPTROLLER.TEX.GOV (Mar. 2018), https://comptroller.texas.gov/economy/fiscal-notes/archive/2018/march/housing.php [https://perma.cc/4AN7-ESC2].

56. *Id.*

57. *Id.*

58. Alexa Ura, *Texas Cities Again Lead Population Growth, and Austin Is Now Country's 10th Largest*, TEX. TRIB. (May 18, 2023, 5:00 PM), https://www.texastribune.org/2023/05/18/texas-cities-census-growth/ [https://perma.cc/83EC-RVX2].

59. King, *supra* note 55.

60. *Id.*

61. *Id.*

unsurprisingly, are concentrated in the larger metropolitan areas such as Austin-Round Rock and Dallas-Fort Worth-Arlington.[62]

The same factors driving up housing prices are also affecting rent prices, posing a significant challenge for lower-income families.[63] For example, the average rent in Austin was over $1,700 as of 2022.[64] This phenomenon is not limited to metropolitan areas with high rent prices; Texas counties with a greater majority of low-income residents may be cost-burdened too.[65] According to 2021 Census Bureau data, less-populated counties such as Jeff Davis County and Red River County had median cost ratios indicating that citizens were spending 50% and 41.8% of their incomes on rent, respectively.[66]

For extremely low-income renters, Texas overall ranks as the sixth-worst state in terms of available and affordable rental housing.[67] This lack of rental housing is a significant factor pushing families and individuals "into housing instability and homelessness."[68] While Texas managed to lower its population of unhoused people through intensive work by nonprofit organizations and government agencies in the early 2000s, this trend reversed in 2018.[69] Additionally, a bulk of the "visibly"

62. *Id.*

63. *Id.*

64. HOUSINGWORKS AUSTIN, AUSTIN CITY COUNCIL DISTRICT-BY-DISTRICT ANALYSIS 3 (2023), https://housingworksaustin.org/wp-content/uploads/2023/06/ALLCombined_DistrictAnalysis2022_062923.pdf. As a result, 45% of renter households in Austin are cost-burdened, paying at least 30% of their income towards housing costs. *Id.* at 4. Nearly 25% are extremely cost-burdened, paying at least 50% of their income towards housing costs. *Id.*

65. *See* Molly Cromwell, *Housing Costs a Big Burden on Renters in Largest U.S. Counties*, U.S. CENSUS BUREAU (Dec. 8, 2022), https://www.census.gov/library/stories/2022/12/housing-costs-burden.html [https://perma.cc/E8QA-CJYN] (explaining that the proportion of cost-burdened renter households may be "especially high . . . in areas where incomes are low").

66. *Id.*

67. *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 5, at 17.

68. *See id.* at 22–23.

69. Jessica Donald & Spencer Grubbs, *Housing Affordability and Homelessness in Texas*, COMPTROLLER.TEX.GOV (Mar. 2021), https://comptroller.texas.gov/economy/fiscal-notes/archive/2021/mar/housing.php [https://perma.cc/5D2Q-25CG]; *see* Alan Greenblatt, *How Houston Cut Its Homeless Population by Nearly Two-Thirds*, GOVERNING (Aug. 30, 2023), https://www.governing.com/housing/how-houston-cut-its-homeless-population-by-nearly-two-thirds [https://perma.cc/7YX2-2L6P].

unhoused population in Texas is chronically unhoused.[70] It is apparent that despite some progress in the early aughts, the rate of homelessness is likely to rise and presents an issue of great public concern.[71]

While the population of unhoused people is lower in Louisiana and Mississippi, the homelessness problem has also worsened in recent years.[72] Homelessness in Louisiana increased by 7.9% from 2019 to 2020,[73] and a high number of the state's unhoused people were unsheltered or chronically homeless.[74] Many counties in Louisiana have a large proportion of residents who are burdened by housing costs because of the state's high poverty rate.[75] The New Orleans-Metairie-Hammond area has both the majority of cost-burdened renters in the state and less than two-thirds of the necessary affordable housing for extremely low-income households.[76] The period from 2021 to 2023 hit New Orleans particularly hard, with the "undertow of poverty" causing "growing homeless encampments" beneath

70. Donald & Grubbs, *supra* note 69. A chronically unhoused person is one who has "experienced homelessness for at least a year—or repeatedly—while struggling with a disabling condition such as a serious mental illness, substance use disorder, or physical disability." *Chronically Homeless*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/who-experiences-homelessness/chronically-homeless/ [https://perma.cc/JQ4S-MKPP] (Jan. 2025).

71. *See* discussion *supra* notes 53–70 and accompanying text.

72. *See* discussion *infra* notes 73–83 and accompanying text.

73. H.R. Res. 194, 117th Leg., Reg. Sess. (La. 2022).

74. *Id.* Of Louisiana's 3,173 unhoused residents, 36.3% were unsheltered and 405 were chronically homeless. TANYA DE SOUSA, ALYSSA ANDRICHIK, MARISSA CUELLAR, JHENELLE MARSON, ED PRESTERA & KATHERINE RUSH, U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 86 (2022). The United States Department of Housing and Urban Development defines "unsheltered" people as those who live in a place "not meant for human habitation, such as cars, parks, sidewalks, [and] abandoned buildings." JENNIFER TURNHAM, ERIN WILSON & MARTHA BURT, U.S. DEP'T OF HOUS. & URB. DEV., A GUIDE TO COUNTING UNSHELTERED HOMELESS PEOPLE 4 (2004).

75. DOUGLAS WHITE & MARY LOIS WHITE, RENTAL HOUSING AFFORDABILITY IN LOUISIANA 2021 2 (2021). In total, "there are 275,703 cost[-]burdened households or 47.4% of all rental households," and 53% of these cost-burdened households "are extremely cost[-]burdened." *Id.* Louisiana's poverty rate was 18.9% as of July 1, 2024. *Quickfacts: Louisiana*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/LA/PST045222 [https://perma.cc/F7WV-6LFY] (last visited Apr. 6, 2025).

76. WHITE & WHITE, *supra* note 75, at 2.

highways.[77] This downswing occurred even after the city permanently placed most unhoused people into shelters during the first year of the COVID-19 pandemic.[78] As those placed remain in permanent housing, this strongly suggests that there is a clear trend of people becoming newly homeless as a result of increased housing costs and housing insecurity.[79]

Mississippi is subject to some of the highest rent inflation in the nation.[80] This inflation is difficult for residents to handle due to a median household income that is less than 70% of the national average.[81] And while Mississippi officially ranks as the state with the lowest number of people experiencing homelessness, its rate of homelessness increased 8% from 2020 to 2022.[82] Given increasing rent prices and the number of cost-burdened households, this number is likely to continue to rise in the state.[83] In summary, a higher rate of homelessness and lack of shelter beds are leading to an increase in the number of unhoused people who are unsheltered and chronically unhoused in Texas, Louisiana, and Mississippi.

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77. Chavez, *supra* note 42. The number of unhoused people in that time rose from 1,042 to 1,390 and this was "likely an undercount" of the true figure. *Id.* Family homelessness also increased by 62% during this timeframe. *Id.*

78. *Id.*

79. *See id.*

80. *See State of Mississippi Sees Increase in Rent Price over the Year*, WXXV TV (Dec. 19, 2022), https://www.wxxv25.com/state-of-mississippi-sees-increase-in-rent-price-over-the-year/ [https://perma.cc/7XZQ-F2DN]. From 2020 to 2022, the average price of rent increased 24%. *Id.*

81. In 2021, Mississippi's median household income was $49,111, while the national average was $70,784. *See* Erica Sandberg, *Average Credit Score by State (2024)*, BADCREDIT.ORG, https://www.badcredit.org/studies/average-credit-score-by-state/ [https://perma.cc/F7YN-5NX8] (Nov. 5, 2024); Jessica Semega & Melissa Kollar, *Income in the United States: 2021*, U.S. CENSUS BUREAU (Sept. 13, 2022), https://www.census.gov/library/publications/2022/demo/p60-276.html [https://perma.cc/CNL8-XBH8]. Thirty-two percent of all renting households in Mississippi are extremely low-income, and 65.1% of extremely low-income households are severely cost-burdened. NAT'L LOW INCOME HOUS. COAL., 2024 MISSISSIPPI HOUSING PROFILE 1 (2024). "Extremely low-income" households are those whose incomes "are at or below the poverty guideline or 30% of their area median income." *Id.*

82. DE SOUSA ET AL., *supra* note 74, at 100. Mississippi is also the state with the eleventh-highest rate of unsheltered residents at 63.6%. Samuel Stebbins, *How the Homelessness Problem in Mississippi Compares to Other States*, THE CTR. SQUARE (Sept. 25, 2023), https://www.thecentersquare.com/mississippi/article_f971b729-803f-5fba-a7e9-201cf55bdd41.html [https://perma.cc/KXN4-96ZM].

83. *See* discussion *supra* notes 80–82 and accompanying text.

Consequently, encampments are proliferating in these states, and city and state governments have responded by sweeping them.[84] Sweeping is becoming increasingly common as cities dedicate more taxpayer dollars to the practice, for better or worse.[85] The practice is frequently justified by community complaints of drug use, drug sales, accumulating waste, open fires, and an increase in crime in the surrounding area.[86] For that reason, sweeps generally target encampments that are near residential or business areas.[87]

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84. For example, Dallas "cleaned" or "decommissioned" 213 sites in total from January 2022 to July 2022, and New Orleans cleared and fenced off an encampment as a first step toward a goal of eliminating all encampments by 2025. Michael Lozano, *'You Get Used to It': Homeless Encampment Cleaning in Dallas Displacing People Amid Triple-digit Temperatures*, SPECTRUM NEWS, https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2022/07/18/homeless-encampment-cleanings-underway-in-dallas- [https://perma.cc/QN8T-UMBZ] (July 19, 2022, 8:42 PM); Sophie Kasakove, *New Orleans Officials to Permanently Shut Down and Fence Off First Homeless Encampment*, NOLA (Nov. 14, 2023), https://www.nola.com/news/politics/new-orleans-to-clear-one-of-citys-largest-homeless-camps/article_11906b02-82fb-11ee-8bf6-f3a42198981d.html [https://perma.cc/6ZU2-3E7J].

85. *See, e.g.*, Jason Beeferman, *Dallas Proposes $3.6 Million to Raze, Clean and Fence Homeless Encampments*, DALL. MORNING NEWS, https://www.dallasnews.com/news/2023/08/08/city-proposes-41-million-to-raze-clean-and-fence-homeless-encampments/ [https://perma.cc/ZN6A-DLHT] (Aug. 8, 2023, 4:31 PM) (noting Dallas's request of $3.6 million to clear, fence, and "clean" encampments in 2024, an increase from previous years); Megan Rodriguez, *San Antonio Is Clearing More Homeless Encampments Than Ever*, SAN ANTONIO EXPRESS NEWS, https://www.expressnews.com/news/article/san-antonio-ramps-up-homeless-encampment-sweeps-18433319.php [https://perma.cc/F2FZ-V7TS] (Oct. 22, 2023, 11:17 AM) (reporting that San Antonio swept twenty-four encampments with a $1.9 million budget in 2022 and planned to spend $2.9 million on the practice in 2023).

86. *See* Martin Kaste, *Homeless Camps Are Often Blamed for Crime but Experts Say It's Not So Simple*, NPR (Jan. 24, 2022, 4:17 PM), https://www.npr.org/2022/01/24/1074577305/homeless-crime-experts [https://perma.cc/E4UF-CHZC] (claiming the crime justification for encampment sweeps is tenuous); *cf.* Kasakove, *supra* note 84 (describing "pervasive drug activity" and thirty-one reported overdoses in an encampment in June and July 2023 and ten fires logged in a seven-month period); Rodriguez, *supra* note 85 (explaining that San Antonio prioritizes sweeping encampments that are believed to be the site of drug activity, have residents using fires to cook or keep warm, or are deemed hazardous because of trash or waste).

87. *See, e.g.*, Rodriguez, *supra* note 85 (detailing that an outpouring of 311 complaints from businesses and residents drove San Antonio's encampment targeting); Kasakove, *supra* note 84 (noting that a sweep coincidentally took place one month before the development of a large mixed-use construction project across the street from an encampment). It is difficult to escape the conclusion that some community members will use this complaint system for cruel, less justifiable purposes, such as removing those who are doing no harm simply because their presence is undesirable or they are unwelcome reminders of systemic inequality. *See* Nicole Wetsman, *Why Experts Say Some Unhoused People Are Unfairly Assumed to Be Dangerous*, ABC NEWS (Oct. 17, 2023, 5:17 AM), https://abcnews.go.com/Health/unhoused-people-perceived-

While it is true that the government must maintain public health and safety, it is not clear that sweeps conducted pursuant to the complaint-driven model always accomplish this goal. On the contrary, sweeps are often ineffective, expensive, and dangerous. Studies show that the presence of an encampment does not increase the amount of property crimes occurring in the surrounding area.[88] Likewise, sweeps have not been shown to decrease the rate of violent crime nearby,[89] with statistics suggesting unhoused people are not more likely to commit such offenses than other groups.[90] Rather, sweeps contribute to unhoused people becoming victims of violent crime themselves.[91]

Despite a lack of associated criminality, public pressure to address the "visible realities" of homelessness has caused many cities to nonetheless conduct sweeps, which are inherently punitive.[92] While cities frequently justify sweeps as beneficial outreach to encampment residents,[93] sweeps often worsen homelessness within municipalities.[94] For example, forced removal

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dangerous/story?id=103751928 [https://perma.cc/AEQ2-MB9N] (explaining that bias, social stigma, and unfamiliarity with unhoused people can lead to unjustified fear and anxiety). *See generally* Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCH. SCI. 847, 847 (2006) (finding that some people view unhoused people with more revulsion and as less human than other groups).

88. *See* Kaste, *supra* note 86.

89. *See* NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *supra* note 19, at 4.

90. *See, e.g.*, *In Our View: Homelessness, Crime Linked Only by Perception*, COLUMBIAN (Apr. 18, 2023, 6:03 AM), https://www.columbian.com/news/2023/apr/18/in-our-view-homelessness-crime-linked-only-by-perception/ [https://perma.cc/R2DN-5UP4] (noting that less than 2% of emergency calls in Vancouver concerned unhoused people).

91. *See* NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *supra* note 19, at 4 (observing that former residents of encampments suffered a 35% increase in the risk of being physically assaulted after sweeps); discussion *infra* Section I.B.

92. ALISA DEWALD, KATHERINE LEVINE EINSTEIN & CHARLEY E. WILLISON, INITIATIVE ON CITIES, POLICING AND THE PUNITIVE POLITICS OF LOCAL HOMELESSNESS POLICY 2 (2023); *see infra* notes 93–97 and accompanying text. Punitive policing tied to community complaints has a storied history in the United States associated with the rise of order maintenance policing, or policing minor offenses like panhandling and obstruction. *See* DEWALD ET AL., *supra*; David E. Thacher, *Order Maintenance Policing*, *in* THE OXFORD HANDBOOK OF POLICE AND POLICING 122, 122–23 (Michael D. Reisig & Robert J. Kane eds., 2014). This practice is increasingly associated with aggressive over-policing of groups such as unhoused people. *See* Thacher, *supra*, at 123.

93. *See, e.g.*, Rodriguez, *supra* note 85 (reporting that San Antonio has two workers who offer resources to encampment residents ahead of sweeps).

94. DEWALD ET AL., *supra* note 92, at 2.

has been linked to a decrease in residents' access to public benefits and connections to care, while simultaneously increasing their trauma and worsening their mental health conditions.[95] Sweeps also generally serve only to fragment and relocate residents, ironically sometimes forcing them closer to where other people live and work.[96]

Overall, sweeps are just a band-aid solution to a persistent and complex problem. They also possess many humanitarian shortcomings that make them inherently suspect. But when conducted during extreme environmental conditions, sweeps cross the line from suspect to shocking governmental action.[97]

B. Scorching Terrain and Disease

Several types of environmental harms are pertinent to valid state-created danger claims in the context of homelessness. These include dangerous climate conditions and exposure to disease.[98] Since the late 2010s, the risk of harm to unhoused people has increased in the Fifth Circuit in both categories.[99]

Climate change is increasing the frequency of extreme heat events in the United States.[100] The Centers for Disease Control

95. *See* NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *supra* note 19, at 3; DEWALD ET AL., *supra* note 92, at 2 (noting that police disrupt services to encampment residents by confiscating or destroying residents' documents and forcing them into different areas or cities).

96. *See* Wetsman, *supra* note 87; Rodriguez, *supra* note 85 (quoting a San Antonio city councilman as stating sweeps just fragment a larger group and result in residents seeking shelter in abandoned buildings, and quoting Donald Whitehead of the National Coalition for the Homeless as stating that sweeps only serve to relocate the unhoused to another location).

97. *See generally* Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1191 (E.D. Cal. 2022) (explaining that governmental sweeps during times of extreme heat cause unhoused people to experience stress, exhaustion, and fatigue due to the weather climate).

98. *See, e.g.*, *id.*

99. *See infra* notes 102–04, 130–36, and accompanying text.

100. U.S. ENV'T PROT. AGENCY & CTRS. FOR DISEASE CONTROL & PREVENTION, EPA 430-R-16-061, CLIMATE CHANGE AND EXTREME HEAT 2 (2016) [hereinafter EPA & CDC, CLIMATE CHANGE AND EXTREME HEAT]. Due to the hotter climates of Texas, Louisiana, and Mississippi, heat is the weather condition of focus in this Note. However, other extreme weather conditions such as intense rain or wind, winter storms, and natural disasters like floods and hurricanes are growing increasingly common due to climate change and disproportionately harm the unsheltered. *See* Caitlin Mello, *How Climate Change Impacts Homelessness*, NAT'L ALL. TO END HOMELESSNESS (Apr. 24, 2023), https://endhomelessness.org/blog/how-climate-change-impacts-homelessness/ [https://perma.cc/X88Y-3P69]; Mariya Bezgrebelna, Kwame McKenzie, Samantha Wells, Arun

and Prevention ("CDC") and the Environmental Protection Agency predict that such events will become more frequent, more serious, and longer-lasting in the coming years.[101] These changes are particularly affecting large cities in the southern portions of Louisiana and Mississippi and throughout Texas.[102] In August 2023, Dallas, Houston, and New Orleans suffered a heat wave with highs of 105 to 115 degrees Fahrenheit.[103] Southern Louisiana also saw record heat in July 2023 with a high of 105 degrees Fahrenheit, shattering the previous record by three degrees.[104]

Heat waves like these increase the risk of illness or death in economically-disadvantaged populations such as unhoused people.[105] This is especially true for the chronically unhoused, as harmful effects from heat are cumulative on the body.[106] Heat stresses organ function, and most people who die from heat exhaustion do so from cardiac arrest.[107] Unhoused people often do not have access to air-conditioned buildings, shade, temporary shelter, or other methods of cooling that are imperative for health.[108] Unsurprisingly, of the estimated 1,500 people who die

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Ravindran, Michael Kral, Julia Christensen, Vicky Stergiopoulos, Stephen Gaetz & Sean A. Kidd, *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, INT'L J. ENV'T RES. & PUB. HEALTH, May 28, 2021, at 1, 1–2. These weather conditions could potentially substitute for extreme heat in valid state-created danger claims against the government for conducting sweeps. *See* discussion *infra* Part III.

101. EPA & CDC, CLIMATE CHANGE AND EXTREME HEAT, *supra* note 100, at 6.

102. *See Heat Waves*, U.S. GLOB. CHANGE RSCH. PROGRAM, https://www.globalchange.gov/indicators/heat-waves [https://perma.cc/8TQX-JXXQ] (last visited Apr. 6, 2025).

103. Dan Stillman & Ian Livingston, *Unrelenting Heat Keeps Setting Records from Texas to Florida*, WASH. POST, https://www.washingtonpost.com/weather/2023/08/07/heat-wave-south-texas-louisiana/ [https://perma.cc/TPN5-CM34] (Aug. 8, 2023, 1:33 PM).

104. Delaney Nolan, *'The Heat Will Eat You Up': Homeless in New Orleans on the Hottest Days in Its History*, THE GUARDIAN (Aug. 31, 2023, 2:00 PM), https://www.theguardian.com/us-news/2023/aug/31/new-orleans-homeless-residents-extreme-heat [https://perma.cc/AS45-N4F9].

105. *Heat Waves*, *supra* note 102; Timothy English, Matthew Larkin, Alejandro Vasquez Hernandez, Jennie Hutton & Jane Currie, *Heat Illness Requiring Emergency Care for People Experiencing Homelessness: A Case Study Series*, INT'L J. ENV'T RES. & PUB. HEALTH, Dec. 9, 2022, at 1, 1–2.

106. *See* Nolan, *supra* note 104.

107. *Id.*; English et al., *supra* note 105, at 2.

108. Nolan, *supra* note 104; English et al., *supra* note 105, at 2 (detailing that many unhoused people live in urban areas and that the "built environment retains heat").

every year from heat exhaustion in the United States, advocates estimate that about half are unhoused people.[109] Besides creating temperature regulation issues, extensive sunlight exposure also leads to blistering and other serious skin conditions.[110]

For these reasons, unhoused people will often set up camp below highway overpasses, fences, and other structures.[111] Yet government officials in the Fifth Circuit regularly clear people from this potentially life-saving shade without consistently providing opportunities for shelter. For example, Mike Infinity, an unhoused New Orleans resident, reported that police wake him and others taking shelter by a fence at Jackson Square "[e]very morning" and "blindly push[]" them into direct sunlight.[112] Another disabled resident stated that the unshaded concrete was scorching hot and that police "don't want you in any shade."[113] Government officials justified these daily sweeps with a need to power wash the square.[114] This government activity was particularly concerning because the nearest cooling center from Jackson Square was half a mile away, only one cooling center was open overnight, and the city did not provide air-conditioned housing options—only water and ice in the morning.[115]

Other cities, such as Dallas, also conduct encampment sweeps during extreme heat, a "controversial practice."[116] One such sweep cleared people out from the shade of an underpass in midday during maximum sunlight.[117] While Dallas officials say that they refer residents to cooling centers or shelters, these

109. Anita Snow, *Extreme Heat Can Be Deadly for People Who Are Homeless*, PBS (June 20, 2022, 11:14 AM), https://www.pbs.org/newshour/nation/extreme-heat-can-be-deadly-for-people-who-are-homeless [https://perma.cc/3D7J-KYF4].

110. *See* Nolan, *supra* note 104.

111. *See id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Erin Douglas, Joshua Fechter & Lucy Tompkins, *Homeless Texans Left with Few Places to Cool Off During Record Heat*, TEX. TRIB. (July 27, 2022, 5:00 AM), https://www.texastribune.org/2022/07/27/texas-heat-homeless-health/ [https://perma.cc/2CRV-NTS6].

117. *See id.*

resources are not consistently available.[118] Furthermore, these cooling centers are lightly staffed, distant, and not open on weekends or evenings.[119] Many encampment residents also justifiably fear that their property will be taken or discarded if they travel to centers.[120] And for some residents with physical disabilities, traveling to centers is infeasible—if they cannot stay at a shelter, reliable shade like that of an overpass is a necessity.[121] Due to government sweeps, residents are left to shelter in sunlight: as a resident said, "there's nowhere else for [them] to go."[122] These examples of callous, arbitrary government action are present in cities throughout the Fifth Circuit.[123]

Besides weather conditions, sweeps may also unnecessarily expose unhoused people to disease. During the COVID-19 pandemic, the CDC issued guidance recommending that encampments not be closed unless alternative, individual housing was available.[124] Advocates "lauded" this change in policy, as encampment sweeps increase the risk of breaking residents' connections to care, spreading disease to new communities, and exposing residents to illness in crowded homeless shelters.[125] Despite being past the peak of the COVID-19 pandemic, the disease remains and has been responsible for over 1.2 million

118. *See id.*

119. *See id.*

120. *See id.*; *e.g.*, Grumet, *supra* note 29 (profiling how police destroyed a resident's property without warning).

121. *See* Douglas et al., *supra* note 116.

122. *See id.*

123. *See, e.g.*, Sue Calberg, *Beating the Heat Is Hard for Those Living on the Streets*, KENS5, https://www.kens5.com/article/news/community/beating-heat-is-hard-for-those-living-on-the-streets/273-f951751d-6bd8-4d9e-99ce-80d84cc90943 [https://perma.cc/XQB3-4KER] (June 14, 2023, 7:14 PM) (reporting on advocates' calls to stop sweeps in excessive heat in San Antonio).

124. *CDC Advises Against Clearing Homeless Encampments if Alternate Housing Is Not Available During Coronavirus Outbreak*, NAT'L LOW INCOME HOUS. COAL. (Mar. 30, 2020) [hereinafter *CDC Advises Against Clearing Encampments*], https://nlihc.org/resource/cdc-advises-against-clearing-homeless-encampments-if-alternate-housing-not-available [https://perma.cc/YL7M-WQLE]; DENNIS CULHANE, DAN TREGLIA & KEN STEIF, ESTIMATED EMERGENCY AND OBSERVATIONAL/QUARANTINE CAPACITY NEED FOR THE US HOMELESS POPULATION RELATED TO COVID-19 EXPOSURE BY COUNTY; PROJECTED HOSPITALIZATIONS, INTENSIVE CARE UNITS AND MORTALITY 10 (2020).

125. *Id.*; NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, PREVENTION & RESPONSE TO INFECTIOUS DISEASES WITHIN THE HOMELESS POPULATION 1 (2016).

deaths in the United States since its inception in 2020.[126] There is "probably no end in sight . . . for the near future" of domestic COVID-19 waves.[127] As of the Biden Administration, CDC guidance still recognized COVID-19 as a threat to unhoused people, noting that unhoused people are especially vulnerable to infectious disease and that when hospitalizations are high, sweeps should only be done in tandem with state health departments and when alternative housing is available.[128] Outbreaks of diseases other than COVID-19 are also growing, likely due to climate change and modern social policy and infrastructure.[129]

The COVID-19 pandemic disproportionately affected most of the American South and likely would again should another outbreak occur. This disproportionate impact was largely because of a lack of mitigation efforts in the region, such as vaccination.[130] As of May 2023, Texas, Louisiana, and Mississippi

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126. *WHO COVID-19 Dashboard*, WORLD HEALTH ORG., https://data.who.int/dashboards/covid19/deaths [https://perma.cc/45ZL-E8SU] (last visited Apr. 6, 2025).

127. Catherine Caruso, *COVID-19's Lessons for Future Pandemics*, HARV. MED. SCH. (Nov. 17, 2022), https://hms.harvard.edu/news/covid-19s-lessons-future-pandemics [https://perma.cc/WG9A-DKY6].

128. *See Guidance on Management of COVID-19 in Homeless Sevice Sites and in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (May 11, 2023). *See generally CDC Advises Against Clearing Encampments*, *supra* note 124; CULHANE ET AL., *supra* note 124, at 10.

129. *See, e.g.*, Karen Weintraub, *The Next Pandemic Could Spring from the US Meat Supply, New Report Finds*, USA TODAY (July 23, 2023, 11:38 AM), https://www.usatoday.com/story/news/health/2023/07/22/deadly-covid-style-pandemic-could-easily-start-in-us-report-finds/70442786007/ [https://perma.cc/Z93F-L3VC] (summarizing a report finding that globalization and loose regulations in the U.S. livestock and poultry industries are exposing the nation to a great risk of a new zoonotic disease); Will Stone, *After Delay, CDC Releases Data Signaling Bird Flu Spread Undetected in Cows and People*, NPR (Feb. 13, 2025, 1:00 PM), https://www.npr.org/sections/shots-health-news/2025/02/13/nx-s1-5296672/cdc-bird-flu-study-mmwr-veterinarians [https://perma.cc/M2QZ-HK6K] (discussing the spread of a new H5N1 variant spreading from poultry to cows and data suggesting "spillovers from dairy cattle into humans have gone undetected"); Priya Joi, *New Study Suggests Risk of Extreme Pandemics Like COVID-19 Could Increase Threefold in Coming Decades*, GAVI (Sept. 5, 2022), https://www.gavi.org/vaccineswork/new-study-suggests-risk-extreme-pandemics-covid-19-could-increase-threefold-coming [https://perma.cc/3FT6-VXBF] (summarizing a study finding climate change has aggravated the spread of disease and that "the annual probability of extreme epidemics occurring could also increase threefold in the coming decades").

130. *See* Luma Akil, Yalanda M. Barner, Anamika Bisht, Ebele Okoye & Hafiz Anwar Ahmad, *COVID-19 Incidence and Death Rates in the Southern Region of the United States: A Racial and*

trailed behind both the national average and the northern states' rates of vaccination.[131] Mississippi's vaccination rate is the fourth-worst in the nation, behind Wyoming, North Dakota, and Oklahoma.[132] COVID-19 also ravaged the South because of its lower socioeconomic status, worse access to health care, and higher percentage of racial minorities compared to the nation.[133] Black and Hispanic populations suffered higher rates of hospitalization and death, affected by physical comorbidities such as cardiovascular disease, diabetes, and hypertension.[134] As unhoused people disproportionately possess the aforementioned comorbidities or experience worse complications from them, they are most at risk of suffering serious illness or perishing from disease.[135] Unhoused people in the American South will be particularly at risk during future disease epidemics due to the region's higher rate of poverty and probable lackluster response in combatting infectious diseases.[136] Encampment sweeps during these epidemics in Texas, Louisiana, and

Ethnic Association, INT'L J. ENV'T RES. & PUB. HEALTH, Oct. 27, 2022, at 1, 1–2, 13–14. The U.S. South, including Louisiana and Mississippi, had comparably higher rates of death from COVID-19 than the nation generally. *Id.* at 2, 9–10, 13. Responses to the pandemic were influenced by religious and political beliefs, and many Republican-led states used preventative measures such as vaccination, masking, social distancing, and stay-at-home orders with less frequency and shorter duration. *See id.* at 13–14.

131. As of July 2024, 80.7% of U.S. citizens had received at least one dose of a COVID-19 vaccine. *COVID-19 Vaccination Coverage and Vaccine Confidence Among Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/covidvaxview/interactive/adults.html [https://perma.cc/RLH3-VEMT] (last visited Apr. 6, 2025). By that point, Texas, Louisiana, and Mississippi still trailed behind, with rates standing at 76.8%, 74.3%, and 68.9% respectively. *Id.* In contrast, Pennsylvania and New York's rates were 78% and 88.7%, respectively. *Id.*

132. *Id.*

133. Akil et al., *supra* note 130, at 2, 14–15.

134. *Id.* at 2. COVID-19 risk in these populations may be influenced by lack of insurance, working front-line or high-exposure jobs, and living in dense, multi-generational homes. *Id.* at 15–16.

135. *See supra* notes 7–8, 105–10, and accompanying text; Ruchi Sharan, Kathryn Wiens, Paul E. Ronksley, Stephen W. Hwang, Gillian L. Booth, Peter C. Austin, Eldon Spackman, Li Bai & David J.T. Campbell, *The Association of Homelessness with Rates of Diabetes Complications: A Population-Based Cohort Study*, 46 DIABETES CARE 1469, 1472–74 (2023); Nader James Al-Shakarchi, Hannah Evans, Serena A Luchenski, Alistair Story & Amitava Banerjee, *Cardiovascular Disease in Homeless Versus Housed Individuals: A Systematic Review of Observational and Interventional Studies*, 106 HEART 1483, 1487 (2020).

136. *See* discussion *supra* Section I.B; Akil et al., *supra* note 130, at 2.

Mississippi will thus pose a greater risk of harming or killing unsheltered people.

For all these reasons, unhoused people in states within the Fifth Circuit's jurisdiction are at great risk of harm from encampment sweeps. Government agents conducting sweeps during dangerous environmental conditions, like those occurring in Dallas and New Orleans, are callously indifferent to known harm.[137] The state-created danger doctrine provides a limited exception to state immunity for such government conduct that violates unhoused people's fundamental constitutional rights.[138] This doctrine is necessary in the Fifth Circuit to curb arbitrary and capricious sweeps of encampments and promote policymaking that is humane and constitutional.[139]

II. THE STATE OF THE STATE-CREATED DANGER DOCTRINE

The state-created danger doctrine is a modern doctrine with pre-colonial underpinnings.[140] A judicial creation, its varying framework and application across the circuit courts provides many models upon which to base a potential Fifth Circuit adoption of the principle.

A. The Doctrine's Medieval and Modern Origins

State-created danger claims against government actors are based in the language of 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . *subjects, or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

137. *See* Douglas et al., *supra* note 116; Nolan, *supra* note 104; discussion *infra* Part III.

138. *See* discussion *infra* Part II.

139. *See* discussion *infra* Part IV.

140. *See* discussion *infra* notes 153–60 and accompanying text.

> in an action at law, suit in equity, or other proper proceeding for redress . . . .[141]

Thus, police officers or government officials acting in the capacity of their official role may be held liable for tortious conduct when violating one's constitutional rights.[142] When the government actor is a state official, the Due Process Clause of the Fourteenth Amendment allows liability against the actor.[143] The Fourteenth Amendment, in pertinent, part reads: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[144] Thus, absent any state law allowing tort liability against government actors,[145] tort victims may only hold state officials liable by showing deprivation of due process.[146]

The state-created danger doctrine requires "invasion of a 'liberty interest,'" so it is important to examine the historical context of the word "liberty" to understand what the doctrine protects.[147] The "life, liberty, or property" language originated over 800 years ago in the Magna Carta, drafted in 1215.[148] This document "was written by a group of [thirteenth]-century barons to protect their rights and property against a tyrannical king."[149] It inspired colonists during the American Revolution, who subsequently incorporated it into the Constitution.[150] In instilling the words with meaning, the drafters of the Constitution and the Bill of Rights were immensely influenced by

141. 42 U.S.C. § 1983 (emphasis added).

142. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 193–94 (1989).

143. *See* Oren, *supra* note 36, at 1167–68.

144. U.S. CONST. amend. XIV, § 1.

145. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) ("[This decision] does not mean States are powerless to provide victims with personally enforceable remedies.").

146. *See DeShaney*, 489 U.S. at 200.

147. *See* Oren, *supra* note 36, at 1174.

148. *See Magna Carta*, NAT'L ARCHIVES (Apr. 26, 2019), https://www.archives.gov/exhibits/featured-documents/magna-carta [https://perma.cc/D9SF-XPQT].

149. *Id.*

150. *See id.*

eighteenth-century interpretations of the Magna Carta.[151] Judge Sir Edward Coke, whose impact on understanding the document's language "cannot be overestimated," asserted that the Magna Carta reiterated individual rights that "people held since antiquity" and that it stood "against arbitrary action by the king."[152]

These eighteenth-century interpretations permeate mid-twentieth-century case law examining the liberty protections afforded by the Due Process Clause and condemning unjustifiable, arbitrary government action.[153] In 1952, the Supreme Court stated that the rights afforded by the Due Process Clause "are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"[154] and "are 'implicit in the concept of ordered liberty.'"[155] As such, arbitrary and capricious governmental actions, or actions which offend a "sense of justice," are untenable.[156] In so holding, the Court found a constitutional violation where state law enforcement violated a defendant's personal integrity, "shock[ing] the conscience."[157]

Related to integrity, the liberty interest often implicated in substantive due process claims is the fundamental "right to personal security."[158] Security or integrity violations take a variety

151. *See Magna Carta and the U.S. Constitution*, LIBR. OF CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/magna-carta-and-the-us-constitution.html [https://perma.cc/VNS2-WTZT] (last visited Apr. 6, 2025).

152. *Interpreting the Rule of Law*, LIBR. OF CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/interpreting-the-rule-of-law.html [https://perma.cc/F25U-XLTN] (last visited Apr. 6, 2025).

153. *See infra* notes 159–70 and accompanying text.

154. Rochin v. California, 342 U.S. 165, 169 (1952) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

155. *Id.* at 169 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

156. *Id.* at 173; *see also* Bowers v. City of Flint, 325 F.3d 758, 763 (6th Cir. 2003) (quoting Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992)) (explaining substantive due process as the recognition that sometimes no amount of process is sufficient for the government to deprive one's "life, liberty or property").

157. *Rochin*, 342 U.S. at 172. The conduct in question concerned agents "[i]llegally breaking into the privacy of the petitioner, . . . struggl[ing] to open his mouth and remove what was there," and extracting his stomach contents during an investigation. *Id.*

158. Wood v. Ostrander, 879 F.2d 583, 591 n.8 (9th Cir. 1989).

of forms, including excessive force during arrest,[159] withholding medical treatment from an incarcerated person,[160] and forcibly cutting a student's hair.[161] In 1972, the Seventh Circuit further qualified the scope of the Due Process Clause's protections, holding that the clause does not require an invasion of physical integrity.[162] They reaffirmed that finding seven years later in *White v. Rochford*, which involved police arresting a man for drag racing and leaving his three nephews and nieces unattended and stranded in a car on the side of a highway.[163] The court held that the prepubescent plaintiffs had an actionable claim against the officers for their grossly negligent conduct which arbitrarily intruded on the plaintiffs' "physical and emotional well-being."[164]

This precedential landscape set the stage for the modern state-created danger doctrine, which arose from the seminal 1989 case, *DeShaney v. Winnebago County Department of Social Services*.[165] *DeShaney* involved a father horrifically beating his child, Joshua, causing permanent brain damage.[166] The father's second wife and a local emergency room previously notified the Winnebago County Department of Social Services ("DSS") several times that the father was abusing Joshua over the course of eleven months.[167] An assigned DSS caseworker also documented that she believed Joshua was a victim of child abuse yet did nothing to intervene.[168] Joshua's mother levied a § 1983

159. *See, e.g.*, Bellows v. Dainack, 555 F.2d 1105, 1106 (2d Cir. 1977) (discussing a case in which the plaintiff brought a § 1983 claim against officers after an arresting officer twisted the plaintiff's arm, pulled the plaintiff by the neck, and struck the plaintiff in the ribs).

160. *See, e.g.*, Green v. Cauthen, 379 F. Supp. 361, 369 (D.S.C. 1974) (finding incarcerated plaintiffs have standing to bring a § 1983 claim when medical treatment is denied).

161. *See, e.g.*, Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir. 1974) (holding violation of a school rule limiting hair length is not a valid reason to invade a student's freedom).

162. *See* Duncan v. Nelson, 466 F.2d 939, 944–45 (7th Cir. 1972) (finding involuntary confession without physical contact was an actionable claim under § 1983).

163. White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979).

164. *Id.* at 384–85.

165. 489 U.S. 189 (1989).

166. *Id.* at 191–93.

167. *Id.* at 192–93.

168. *Id.*

claim against the DSS, stating it had failed to properly respond to child abuse complaints, negligently causing the brain damage and depriving Joshua of his substantive due process rights.[169] Specifically, she alleged the DSS violated Joshua's "liberty interest in 'free[dom] from . . . unjustified intrusions on personal security.'"[170] The Supreme Court found against Joshua, holding that the government did not have a duty to protect him from harms inflicted by his father.[171] The Court noted that the Constitution generally does not impose affirmative action upon the government to prevent harm from private parties and that said principle was true in the case at hand.[172] It also held that relevant state law mandates requiring government officials to act could induce tort liability but would not change the government's constitutional duties, as government action is inherently discretionary.[173]

However, the *DeShaney* opinion's language carved out two exceptions to this rule.[174] First, when the state acts affirmatively to create a "special relationship" with the individual that "restrain[s] the individual's freedom to act on his own behalf—through incarceration, institutionalization, or some other similar restraint of personal liberty . . . [it] trigger[s] the protections of the Due Process Clause . . . ."[175] This first exception is termed the "special relationship" exception.[176] Federal courts found the second exception, "the genesis of . . . the state-created danger doctrine," implicit in the opinion's language.[177] The Court wrote:

169. *Id.* at 189.

170. *Id.* at 195 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1972)).

171. *Id.* at 202.

172. *Id.* at 200.

173. *See id.* at 200–02; *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (noting that states can allow civil suits against their agents for less than a constitutional violation).

174. Oren, *supra* note 36, at 1166.

175. *DeShaney*, 489 U.S. at 200, 202.

176. Oren, *supra* note 36, at 1166.

177. *Id.* at 1166–67.

> While the State may have been aware of the dangers [to] Joshua . . ., it *played no part in their creation*, nor did it do anything to *render him any more vulnerable to them*. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it *placed him in no worse position than that in which he would have been had it not acted at all*.[178]

While ruling against Joshua, the Court's inclusion of this language gave the lower circuits a general framework to hold state actors liable for the actions of third parties.[179]

B. A Patchwork of Rights: What Framework Makes the Most Sense?

In the decades following *DeShaney*, eleven Circuit Courts of Appeals adopted the state-created danger doctrine based off of the opinion's language—but the doctrine varies immensely among the circuits.[180] In all of the circuits, there are three basic elements of a state-created danger claim: (1) the government actor invaded a victim's liberty interest, (2) the actor "created or caused the danger that inflicted the loss," and (3) the actor acted with the requisite mens rea or culpability.[181] The varying circuit tests developed over time in an attempt to satisfy the doctrine's constitutional prerequisites while also reconciling it with *DeShaney* and other Supreme Court cases.[182]

To be constitutionally sound, any satisfactory state-created danger doctrine framework must require that (1) the government agent was acting under state-granted authority, (2) the action put the victim in a worse position than she was previous to the action, and (3) the agent acted with, at minimum, a

178. *DeShaney*, 489 U.S. at 201 (emphasis added).

179. *See* discussion *infra* Section II.B.

180. *See* discussion *infra* Section II.B; Oren, *supra* note 36, at 1184–87 (discussing the varying tests employed among several circuits).

181. Oren, *supra* note 36, at 1174.

182. *See id.* at 1176, 1178, 1184, 1188, 1194, 1199.

deliberate indifference to the risk of harm.[183] The Tenth Circuit also implemented a fourth factor, which may be combined with the state of mind factor in other circuits.[184] The first two elements serve to clearly demarcate where the government crosses the line between inaction and action.[185] At that point, the state cannot "say that its role was merely passive; it is as much an active tortfeasor as if it had thrown [the victim] into a snake pit."[186] The third element serves to increase the difficulty in holding an official liable under § 1983, preventing a flood of litigation and turning the Due Process Clause into a wellspring of tort law.[187] The fourth element appears to originate from Eighth Amendment case law holding that the seriousness of harm must rise to a certain level before a constitutional violation occurs.[188] In that context, seriousness is an objective determination based on societal standards: in other words, under the totality of the circumstances, was the punishment administered proportional or decent?[189] For this element to be equitably applied to the state-created danger framework, however, there should be a proportional balancing between the seriousness of the risk and the level of government control over the circumstances.[190] Where government actions are truly shocking, such balancing would afford plaintiffs relief without requiring them to demonstrate an imminent risk of death or serious bodily injury.[191]

183. *Id.* at 1187–88.

184. *Id.* at 1189. This fourth factor requires that the government agent's actions put the victim at a "substantial risk of serious, immediate, and proximate harm." Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).

185. *See* Oren, *supra* note 36, at 1187.

186. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

187. *See* Oren, *supra* note 36, at 1192–94.

188. *Id.* at 1189–91.

189. *Id.* at 1191.

190. *Id.* at 1192.

191. *Id.* Requiring a showing of imminent risk of death or bodily injury would have precluded recovery for the three- and five-year-old plaintiffs left on the side of a road by police officers in *White v. Rochford*, an unconscionable result. 592 F.2d 381, 383–84 (7th Cir. 1979). Incorporating proportionality into the standard thus allows claims for harms to emotional well-being. *See id.*; Oren, *supra* note 36, at 1192.

However, some circuits have gone even further with stricter requirements or additional exceptions.[192] The Fourth and Fifth Circuits have confusingly looped the "special relationship" exception—stated explicitly in *DeShaney* as requiring a custodial relationship between the plaintiff and the government[193]—into the second implicit exception that is the basis for the state-created danger doctrine.[194] This chimera of an exception is odd, given that the two exceptions derive from language in separate paragraphs of the *DeShaney* opinion and rely on different legal reasoning.[195] Furthermore, it is counter to the majority of the circuits implementing the state-created danger doctrine.[196] Relatedly, the D.C. Circuit has expanded the "shocks the conscience" standard discussed in *County of Sacramento v. Lewis* to hold that a mens rea of deliberate indifference is insufficient to hold government officials liable, even outside of high-pressure situations like prison riots or high-speed chases.[197] This is a near-impossible standard for plaintiffs to prove.

These further restrictions to bar recovery are unnecessary given the already-stringent standards under the doctrine. There is no danger of turning the Due Process Clause into a flood of successful tort litigation.[198] The possibility that agents may still escape liability via immunity even if the elements of the state-created danger doctrine are met further lessens plaintiffs'

192. *See infra* notes 193–97 and accompanying text.

193. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

194. Chemerinsky, *supra* note 45, at 3–4.

195. *See* discussion *supra* notes 174–78 and accompanying text.

196. *See, e.g.*, Pena v. Deprisco, 432 F.3d 98, 109 (2d Cir. 2005) (treating the two categories of exceptions as "separate and distinct theories of liability"); Murguia v. Langdon, 61 F.4th 1096, 1109–11 (9th Cir. 2023) (same), *cert. denied sub nom.* Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024).

197. *See* Est. of Phillips v. District of Columbia, 455 F.3d 397, 405 (D.C. Cir. 2006) (quoting Fraternal Ord. of Police Dep't of Corr. Lab. Comm. v. Williams, 375 F.3d 1141, 1145–46 (D.C. Cir. 2004)) (characterizing deliberate indifference as requiring a "lower threshold" of culpability than that required when the government acts affirmatively).

198. *See* Chemerinsky, *supra* note 45, at 1 ("A suit is brought against the government . . . . Yet, the government almost always prevails.").

likelihood of success.[199] Moreover, circuits that have recognized the doctrine still often find factual ways to not apply it, chiefly with the elements of affirmative action and state of mind.[200]

For instance, in *S.S. v. McMullen*, a split en banc Eighth Circuit held that social services workers were not liable after they returned a child, S.S., to the care of her father despite knowledge of S.S.'s previous molestation by an unknown person while in her father's care and her father's continued association with a pedophile who called the agency to "complain that it was unfair to try to limit his contact with S.S."[201] The majority held that the state had not committed an affirmative act because it had not "expos[ed] [S.S.] to a dangerous environment" but instead had "return[ed] her to an equally dangerous one."[202] The court acknowledged that the distinction it drew could be considered "gratuitous."[203] The dissent found this distinction "arbitrary," as the state had already "rescued [S.S.] from danger" two and a half years prior, her "fate [was] in the state's hands," and the workers "affirmatively placed S.S. into [the pedophile's] path."[204]

For the state of mind element, the majority acknowledged that deliberate indifference could suffice for a constitutional violation but held that the workers' actions amounted to only negligence considering their knowledge of the risk in returning

199. *See e.g.*, *Pena*, 432 F.3d at 111–15 (finding police officers immune where, through "deliberate silence" and "explicit permission," they facilitated the drinking binge of a fellow officer who killed three people while driving, but they had not violated any clearly established law).

200. Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 DICK. L. REV. 893, 913 & n.183 (2016) ("Often conduct is found in a conclusory manner not to have arisen to deliberate indifference or a similar standard but was one of mere negligence."); *see* Chemerinsky, *supra* note 45, at 24 ("[T]here are very few [cases] where the plaintiffs have been able to succeed . . . . [T]he plaintiff really must show that the official was deliberately indifferent.").

201. 225 F.3d 960, 962, 965 (8th Cir. 2000).

202. *Id.* at 963.

203. *Id.* ("The line between action and inaction has been important in the law for centuries, but it has proven to be an elusive and thin one; so, it is perhaps not surprising that cases on either side of that line will be so close factually that drawing a legal distinction between them will often seem hard to justify. But we see the distinction nevertheless.").

204. *Id.* at 967–68 (Gibson, J., dissenting).

S.S. to her father.[205] Without citing precedent, the majority justified its finding that the workers' conduct was not egregious or conscience-shocking because of "the state's obligation to reunite children with their parents if possible."[206] Because there was "no similarity between [S.S.'s] case and the Supreme Court cases in which a complaint was held to state a claim for the deprivation of substantive due process rights," the majority would not hold that S.S.'s constitutional rights were violated.[207]

The dissent countered that the allegations in the complaint clearly established deliberate indifference, as the workers "knew many facts indicating that S.S. was at risk," such as the father's own history of committing sexual abuse and one of the workers writing "that she and her supervisor decided 'that if something happens to [S.S.] because . . . [the father] knows what [the pedophile] has done in the past[,] he will be solely responsible.'"[208] The dissent noted that Chief Judge Posner of the Seventh Circuit had hypothesized this situation of returning a child to the care of a child molester "as a clear case of liability."[209] Furthermore, the deliberate indifference displayed by the workers here shocked the judicial conscience because the workers "reflect[ed] upon the risk to which they willfully subjected S.S."[210]

Looking at *S.S.* and other case law, it appears that that there is a judicial hesitance to enforce the doctrine.[211] The well-developed complaint established the social service workers' deliberation and knowledge of the clear risk of sending S.S. back home with her abusive father and his associate, satisfying the

205. *Id.* at 963–64.

206. *Id.*

207. *Id.* at 964.

208. *Id.* at 969 (Gibson, J., dissenting).

209. *Id.* (Gibson, J., dissenting) (citing Kitzman-Kelley v. Warner, 203 F.3d 454, 461 (7th Cir. 2000) (Posner, C.J., dissenting)).

210. *Id.* (Gibson, J., dissenting) (comparing S.S.'s case to Supreme Court precedent examining substantive due process claims).

211. *See* discussion *supra* Section II.B.

requirements of the doctrine.[212] But the majority declined to allow liability in the absence of clear authorization from the Supreme Court in a factually-similar case and created a gratuitous distinction, essentially foreclosing any future claims arising from social services agencies placing children with their birth parents.[213] Because "[f]actual distinctions clearly can make all the difference in the world of state-created danger claims,"[214] judges who are uneasy with the doctrine can easily weigh certain facts in the totality of the circumstances to deny relief.[215]

Even in the Ninth Circuit, with a liberal, more plaintiff-friendly standard that does not require proof of a "shocks the conscience" element,[216] it is nonetheless quite difficult to succeed on a claim.[217] Given these high burdens for plaintiffs, the ease by which judges can circumvent applying the doctrine, and the serious violations of rights underlying these claims, the test promulgated by the Ninth Circuit is the most equitable of the circuits and the one that should be adopted by the Fifth Circuit. Federal courts in several circuits have applied these frameworks to the issue of encampment sweeps to varying levels of

212. *See* discussion *supra* notes 201, 204, 208, and accompanying text for description of *S.S.*'s well-developed complaint; Oren, *supra* note 36, at 1187–88 (explaining the requirements needed to fulfill the state-created danger doctrine).

213. *See S.S.*, 225 F.3d at 963 (citing K.H. *ex. rel.* Murphy v. Morgan, 914 F.2d 846, 848–49 (7th Cir. 1990)).

214. Oren, *supra* note 36, at 1180.

215. *See id.* at 1180–83 (examining cases with very similar factual scenarios but different outcomes).

216. *See* Chemerinsky, *supra* note 45, at 19 & n.50. The Ninth Circuit requires that a government agent affirmatively act with deliberate indifference in placing victims in a worse situation considering an actual, particularized danger, *not* in a way that shocks the conscience. Murguia v. Langdon, 61 F.4th 1096, 1111 (9th Cir. 2023). The particular type of injury must also be foreseeable given the circumstances. *Id.*

217. *See, e.g.*, Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito, No. 21-CV-01143, 2021 WL 2141323, at *2–5, *10 (N.D. Cal. May 26, 2021) (dissolving injunction where plaintiffs could not meet their burden of demonstrating that air pollution in the park was high enough); Wills v. City of Monterey, 617 F. Supp. 3d 1107, 1123 (N.D. Cal. 2022) (dismissing claims where plaintiff could not sustain burden to show causality between officer's actions and her victimization); Cobine v. City of Eureka, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017) (dismissing claim where the danger plaintiff was exposed to, generalized crime on the street, already existed prior to plaintiff's shelter being removed).

success for unhoused people.[218] Examining these cases demonstrates the variety of factual scenarios that can rise to the level of unconstitutional government conduct.

III. INJUNCTION JUNCTION: WHEN THE GOVERNMENT SHOULD HAVE COMPUNCTION

Courts applying the state-created danger doctrine have been able to address arbitrary government action. In many of the state-created danger cases involving environmental conditions, a lack of available shelter takes center stage in the analysis.[219] In *Sacramento Homeless Union v. County of Sacramento*, unhoused plaintiffs sought a preliminary injunction against the City and County of Sacramento to prevent sweeps during an extremely hot California summer.[220] The plaintiffs alleged that the encampments provided protection from the heat and that the defendants removing the plaintiffs' shelter made them suffer stress, exhaustion, collapse, and increased mortality.[221] The court granted the injunction, finding the plaintiffs were likely to succeed on a state-created danger claim.[222] It found that the state acted with deliberate indifference to the extreme heat and that the irreparable harm to the plaintiffs "far outweighed" any interest in the general public welfare gained by sweeping the encampment.[223] This was particularly so, as "there is a strong 'public interest in maintaining the protection afforded by the

218. *See supra* note 39.

219. *See, e.g.*, Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1184–85 (E.D. Cal. 2022) (examining a state-created danger case involving unbearable heat conditions that resulted from state removal of shelters); Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1084–85 (9th Cir. 2000) (analyzing a state-created danger case in which police officers left an intoxicated man in the freezing cold without shelter, causing him to die of hypothermia); Janosko v. City of Oakland, No. 3:23-CV-00035, 2023 WL 187499, at *1–2 (N.D. Cal. Jan. 13, 2023) (discussing a state-created danger case involving a failure to provide shelter beds after the removal of an encampment by the state during a period of historic storms).

220. 617 F. Supp. 3d at 1184–85.

221. *Id.* at 1191–93.

222. *Id.* at 1193.

223. *Id.* at 1193, 1199.

[C]onstitution to those most in need of such protections.'"[224] Unhoused people are clearly in such need.[225] The court took judicial notice of historical weather data and granted the preliminary injunction for twenty-eight days, when the presiding judge estimated maximum temperatures would be lower.[226]

It is critical to note what the court did not hold—that the state had an affirmative, constitutional duty to provide sufficient cooling centers to the plaintiffs.[227] That would be counter to *DeShaney*,[228] and it could turn the Constitution into a "font of tort law."[229] Without affirmative action by the state, the heat would have been the sole cause of the plaintiffs' injuries.[230] But by displacing the plaintiffs in extreme heat without anywhere else for them to stay, the state took a "significant role in creating the dangerous situation."[231] It thus took on the constitutional burden of providing a situation that was equivalent or better for the plaintiffs.[232]

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224. *Id.* at 1199 (quoting Cobine v. City of Eureka, No. C 16-02239, 2016 WL 1730084, at *7 (N.D. Cal. May 2, 2016)).

225. *Id.*

226. *Id.* at 1200. The court held that the plaintiffs could seek reinstatement of the injunction after its expiration by providing "greater detail about the weather forecast for the remainder of the summer months." *Id.*

227. *Id.* at 1190.

228. The "Due Process Clause generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." Patel v. Kent Sch. Dist., 648 F.3d 965, 971 (9th Cir. 2011) (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989)).

229. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)). "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, 474 U.S. at 332.

230. *Sacramento Homeless Union*, 617 F. Supp. 3d at 1189.

231. *Id.* at 1190, 1193 (citing Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1088 (9th Cir. 2000)).

232. Signed declarations in *Sacramento Homeless Union* averred that the state endangered unhoused people by simultaneously destroying or confiscating shelter, not providing accessible cooling centers, and disrupting access to charitable resources including water. *See* 617 F. Supp. 3d at 1191–92. However, the state presumably could have escaped liability by either providing shade or allowing the plaintiffs to congregate again in the shaded areas from which they were evicted. *See id.* at 1191–93. Similarly, in *Janosko*, the city could have simply waited a few weeks to sweep the encampment until new shelter beds were available at the "cabin community" that

Again, the limited state-created danger doctrine does not put the onus on the government to shelter every unhoused person. It is, unfortunately, well-settled that housing is not a fundamental right in the United States.[233] However, when the executive branch takes the action of ejecting unhoused people from encampments or destroying their property, it affirmatively involves itself in the well-being of those people.[234]

Similar reasoning underlies injunctions because of disease. In *Sausalito/Marin County Chapter of the California Homeless Union v. City of Sausalito*, the court enjoined the city from enforcing a resolution that would ban day camping and move a group of encampment residents from one park to another during the COVID-19 pandemic.[235] The court found the city acted with deliberate indifference to the danger of the campers contracting COVID-19 by banning day camping.[236] Such a ban contradicted CDC guidance urging governments to combat disease spread by allowing encampment residents to "remain where they are" absent the availability of individual housing.[237] The government justified the resolution in the name of the hygienic health of the residents.[238] But the fact that the old park had permanent bathrooms with running water and the new park only had uncleaned, unstocked portable toilets belied this justification.[239] Importantly, the court noted that the resolution not only

it was already building. Janosko v. City of Oakland, No. 3:23-CV-00035, 2023 WL 187499, at *3–4 (N.D. Cal. Jan. 13, 2023).

233. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972); Ann Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 211 (2003). It is unsurprising that housing has not been extended fundamental right status given the low social and legal status of the poor in Colonial and Revolutionary America. *Id.* at 211–14. About 40% of the world's constitutions make housing a fundamental right. *Id.* at 214 n.19.

234. *See Sacramento Homeless Union*, 617 F. Supp. 3d at 1193; *Janosko*, 2023 WL 187499, at *3–4.

235. Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito, 522 F. Supp. 3d 648, 658–59 (N.D. Cal. 2021).

236. *Id.* at 659.

237. *Id.* at 654. The court noted the ban would require shelter to be broken down and set up twice a day. *Id.* at 654–55. This, combined with the fact that many campers had physical disabilities, would require repeated group effort and render social distancing impossible. *Id.*

238. *Id.* at 659.

239. *Id.*

endangered the campers through disease spread, but the general public as well.[240] This case is a prime example of how a fact-sensitive inquiry under the state-created danger doctrine can not only determine that plaintiffs are left in a more dangerous situation—it can also sniff out an arbitrary or invidious intent.[241] Preventing harmful actions with such intent is the entire purpose of the Due Process Clause.[242]

The lack of hygiene products in *City of Sausalito* also highlights that inadequate resources can be relevant when determining if the state has arbitrarily placed unhoused people in a more dangerous situation.[243] Another example of inadequate resources is *Mary's Kitchen v. City of Orange*, which concerned the eviction of a city's sole homeless service provider for childless, unhoused individuals.[244] The proposed eviction occurred during both the COVID-19 pandemic and the rainy winter season.[245] The court enjoined the eviction, finding that the city acted with deliberate indifference to "substantial" health risks to the unhoused population.[246] The city clearly knew about the "critical services" that the shelter provided the population from its thirty-year collaborative relationship with the shelter.[247] The

240. *Id.*

241. Whether they openly admit it or not, a motivating factor for municipalities outside the public health and safety is often that encampments are eyesores or unwelcome reminders of poverty to more fortunate citizens. *See, e.g.*, Kasakove, *supra* note 84 (reporting that a businessman stated a motivating factor for sweeping an encampment was the nearby development of the "new River District neighborhood, which [was anticipated to] include millions of square feet of apartments, offices, and stores").

242. *See* discussion *supra* notes 152–55, 158–59, and accompanying text.

243. *See Sausalito*, 522 F. Supp. 3d at 659.

244. Mary's Kitchen v. City of Orange, No. 21-CV-01483, 2021 WL 6103368, at *1 (C.D. Cal. Nov. 2, 2021).

245. *Id.* at *11.

246. *Id.* at *8, *11–12.

247. *Id.* at *11. These services included hot food, "clothing distribution, laundry facilities, showers, mobile health services, and mail." *Id.* at *2. To clarify, this Note does not advocate for viable state-created danger claims in situations where sweeps merely disrupt social services from non-governmental organizations for unhoused people. Resulting harms would most likely be too attenuated and indirect to be actionable. *See* discussion *supra* Parts II, III. Further, if services are provided by the government, holding the government accountable for withdrawing them would be contrary to the general rule that the government is under no obligation to provide affirmative aid to its citizens. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,

city's transition plan provided inadequate resources and housing to substitute for this loss and, in light of the foreseeable harm from environmental conditions, was not justifiable by any legitimate reason.[248] Due to the "gravely concern[ing]" and arbitrary actions of the city, the court granted a six-month injunction to allow the shelter to move to a new location.[249]

A spiritual companion underlying these cases was the momentous holding of *Martin v. City of Boise* in 2018.[250] There, the Ninth Circuit held that criminal anti-camping ordinances were unconstitutional unless there were sufficient shelter beds available for the population of unhoused people.[251] Otherwise, the court reasoned, such ordinances essentially criminalize the status of being homeless and violate the Eighth Amendment.[252] The essence of this holding was that the government cannot arbitrarily punish unhoused people for sleeping outside when there are insufficient resources of which they can avail themselves.

Unfortunately, the Supreme Court abrogated *Martin* and its progeny with the Court's 2024 holding in *City of Grants Pass v.*

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489 U.S. 189, 200 (1989). *But see generally* Where Do We Go Berkeley v. Cal. Dep't of Transp., 32 F.4th 852, 860–61 (9th Cir. 2022) (holding that the government's encampment sweep qualified as a "program" under Title II of the Americans with Disabilities Act and was actionable). *Mary's Kitchen* correctly factors the disruption of housing services, as this was coupled with exposing unhoused people to dangerous environmental conditions. 2021 WL 6103368, at *11–12.

248. *Mary's Kitchen*, 2021 WL 6103368, at *6–8. *Mary's Kitchen* demonstrates a concerningly-common phenomenon with municipalities in cases concerning the unhoused: (1) overpromising or lying and (2) weak justifications implying an invidious intent. *See, e.g.*, Chosen 300 Ministries, Inc. v. City of Philadelphia, No. 12-3159, 2012 WL 3235317, at *22 (E.D. Pa. Aug. 9, 2012) ("I am at a loss to understand how taking choice away from the homeless [and forcing them to eat in a crowded indoor facility] advances their dignity."). For one example of several in *Mary's Kitchen*, the opinion notes that the county informed the court that the city's claimed expansion of medical services for the unhoused was untrue. 2021 WL 6103368, at *7. Furthermore, the city's proffered explanation of increased crime near the shelter "had little basis" and was not compelling. *Id.* at *11.

249. *Mary's Kitchen*, 2021 WL 6103368, at *12.

250. 902 F.3d 1031, 1032 (9th Cir. 2018), *and opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019).

251. *Id.* at 1048–49.

252. *Id.* While controversial, this holding was upheld in 2022. *See* Johnson v. City of Grants Pass, 72 F.4th 868, 877–78 (9th Cir. 2023), *cert. granted*, 144 S. Ct. 679 (2024).

Johnson.[253] The Court held that the Eighth Amendment and its own precedent narrowly forbid the criminalization of "mere status" and that homelessness that was characterized as "involuntary" did not qualify as status.[254] The Court stated that the calculus to determine the number of shelter beds prior to enforcing a criminal statute as required under *Martin* was nebulous and unworkable for cities and that the Eighth Amendment "provide[d] no guidance to 'confine' judges in deciding what conduct a State or city may or may not proscribe."[255] Overall, the Court took umbrage with using the Eighth Amendment, which circumscribes the limits of criminal punishment by the states, as a means of applying a "judicially preferred approach 'into a rigid constitutional mold'" to solve a complex social problem.[256] *Martin* had instructed judges to take away determining criminal liability from "elected representatives," presenting issues with federalism, and was "unmoored from any secure guidance in the Constitution."[257]

While *Grants Pass* was a blow to homelessness activists who are advocating against the unnecessary jailing of unhoused people, it is not a death knell to the state-created danger doctrine in the context of homelessness.[258] The Court explicitly stated that "many substantive . . . provisions of the Constitution may have important roles to play when [s]tates and cities seek to enforce their laws against the homeless," including the Due Process Clause.[259] And, the state-created danger doctrine as applied does not wholly deprive the states of their law enforcement powers, but instead provides a limited and temporary

253. City of Grants Pass v. Johnson, 603 U.S. 520, 546–56 (2024).

254. *Id.* at 546, 549 (citing Robinson v. California, 370 U.S. 660, 666 (1962)).

255. *Id.* at 552–56 (quoting Powell v. Texas, 392 U.S. 514, 534 (1968)).

256. *Id.* at 551 (quoting *Powell*, 392 U.S. at 537).

257. *Id.* at 552.

258. *See* Corkery & Cowan, *supra* note 27 (in response to Governor Newsom's order to sweep encampments and jail those that resist, Los Angeles County supervisors stated that "the county's jails will not serve as makeshift shelters for homeless people").

259. *Grants Pass*, 603 U.S. at 557.

check on arbitrary executive action.[260] Furthermore, unlike the application of the Eighth Amendment in *Martin*, the state-created danger doctrine in this context is "moored" in the precolonial tradition of a right to personal security.[261]

Lastly, while the Court critiqued that the Eighth Amendment provided little guidance to courts in what executive action they may proscribe and that it was difficult for cities to accurately ascertain resources prior to conducting sweeps, these counterpoints are less persuasive in the context of the state-created danger doctrine for several reasons.[262] First, unlike the inherent difficulty in determining whether one's homelessness is involuntary and thus a status, for purposes of the doctrine, an officer must simply assess the circumstances based on the officer's personal knowledge—is it apparent from environmental conditions, the unhoused person's current shelter and/or property, and available resources that conducting a sweep would pose an obvious and foreseeable risk to that person? This standard is necessarily flexible, as it is only from the totality of the circumstances that it can be determined if government action is arbitrary and in violation of the Due Process Clause.[263] Availability of shelter space and other resources that prevent harm are necessary considerations for such a common-sense analysis.[264] And, when reducing the analysis to a local scale, it is entirely possible for police departments to maintain partnerships with

260. *See* discussion *supra* Part III. Hypothetically, if a city wanted to enforce an anti-camping ordinance during a very hot summer, it would still be authorized to conduct a sweep if doing so would not arbitrarily cause harm to encampment residents. For instance, the city could jail residents for violations presuming the jails were air-conditioned and sanitary. Sweeps could be constitutionally sound if conducted at night when temperatures were lower, presuming that the city did not destroy resident's shelter without notice. Further, and most humanely, the city could simply deign to enforce its ordinances after seasonal temperatures went down or in conjunction with providing shelter.

261. *See* discussion *infra* Section IV.C.

262. *See Grants Pass*, 603 U.S. at 552–55.

263. *See* discussion *supra* Section II.B.

264. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) (emphasizing multiple factors taken into consideration and ultimately holding that while the State was aware of the "dangers," it "played no part in their creation, nor did it do anything to render [the child] any more vulnerable to them").

nearby shelters to know if space is available.[265] Lastly, the *Martin* Court's palpable fear of creating a fundamental right of housing in certain contexts is unfounded in the context of the state-created danger doctrine, as the relief granted is only a temporary restraining order against sweeps, not a semi-permanent injunction against enforcement of criminal laws.[266] Thus, *Martin* does not destroy the viability of the state-created danger doctrine, and many of the concerns expressed in the Court's opinion do not apply to it.

Overall, the line of cases implementing the state-created danger doctrine in the context of homelessness demonstrates that the state-created danger doctrine can be a powerful, impactful tool. When the government takes affirmative action by sweeping encampments, it has affirmatively acted and played a significant role in what happens to the people it displaced.[267] Government actions that expose displaced people to known or obvious dangers without legitimate justifications are arbitrary, tyrannical, and shocking.[268] Such unconstitutional conduct is worthy of piercing the general veil of governmental immunity. This is particularly so when the injured parties are the most vulnerable among us and the "third party" also causing the harm is an intangible thing, such as the environment.[269] While extreme heat or disease is the main culprit, unhoused people also cannot drag COVID-19 into court. Thus, the state-created danger doctrine is a necessary check on arbitrary government sweeps that serves a dual purpose: (1) threat of suit encourages

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265. *See* Bonnie Sultan, *Sharing the Solutions: Police Partnerships, Homelessness, and Public Health*, DISPATCH (Cmty. Oriented Policing Servs., D.C.), Dec. 2020, https://cops.usdoj.gov/html/dispatch/12-2020/sharing_the_solutions.html [https://perma.cc/3VG4-TSXU] ("By implementing a whole community approach to public health and homelessness, police and their partners offer connections to emergency shelter, comprehensive case management, and medical care to those in need.").

266. *See* discussion *infra* Section IV.C; *Grants Pass*, 603 U.S. at 555 ("But might a colder climate trigger a right to permanent tent encampments and fires for warmth?").

267. *See* discussion *supra* Part III.

268. *See* discussion *supra* Part III.

269. *See generally* Douglas et al., *supra* note 116 (covering summer encampment sweeps in Dallas, Texas, where unhoused people suffered from heat exposure).

governments to relocate or close encampments in a planned, humane way, and only for legitimate purposes, and (2) litigation allows courts to prevent further irreparable harm where governments have already acted unconstitutionally.

IV. ADOPTING THE STATE-CREATED DANGER DOCTRINE IS NECESSARY TO PRESERVE THE CONSTITUTIONAL RIGHTS OF UNHOUSED PEOPLE

Considering the necessity for the state-created danger doctrine, its constitutional justifications, and its acceptance in the vast majority of jurisdictions, the Fifth Circuit's obstinate refusal to accept the doctrine is indefensible.

A. The Fifth Circuit's Refusal to Truly Evaluate the Doctrine Leaves Plaintiffs Unsure of Their Constitutional Rights

The Fifth Circuit has a tumultuous history with the state-created danger doctrine. In the wake of *DeShaney* and through the early 2000s, the Fifth Circuit acknowledged the emerging viability of the doctrine in other circuits[270] and recognized a legal framework for the doctrine that complied with constitutional requirements.[271] It recognized that qualifying abuses of executive power would have to be constitutionally arbitrary and "shock[] the conscience."[272] Therefore, executives would have to act with deliberate indifference toward a victim's plight at a minimum.[273] The deliberate indifference standard would require that a state actor knew of and disregarded "an excessive risk to [the victim's] health or safety."[274] Precedent clarified that

270. *See, e.g.*, Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 530–31 (5th Cir. 1994) (profiling cases considering the doctrine in various circuits); McClendon v. City of Columbia, 305 F.3d 314, 326 (5th Cir. 2002).

271. *See generally* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); *McClendon*, 305 F.3d at 325–26.

272. *McClendon*, 305 F.3d at 325–26 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

273. *Id.* at 326 (citing Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001)).

274. *Id.* at 326 n.8 (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 513 (6th Cir. 2002)). The disregard must be of "an immediate danger facing a known victim," not issues resulting

deliberate indifference was a "lesser form of intent," not a "heightened degree of negligence."[275] Lastly, state actors would have to use their authority to create the dangerous situation.[276] Despite establishing this framework, Fifth Circuit panels refrained from ruling on the validity of the doctrine by holding that each case's complaint alleged gross negligence at best.[277]

In 2003, all of that seemed to change with *Scanlan v. Texas A&M University*.[278] *Scanlan* involved the collapse of the Texas A&M bonfire stack, which students created yearly as a tradition.[279] In 1999, the stack collapsed, killing twelve students and injuring twenty-seven more.[280] The plaintiffs alleged that university officials were aware that the stack-building environment was dangerous and used their authority to create the opportunity for the tragedy to happen.[281] A circuit panel held that the pleaded allegations met the elements of a state-created danger claim and that the district court erred in dismissing the § 1983 claim.[282] The panel remanded the case to the district court for discovery and consideration consistent with the opinion.[283] By holding as such, this opinion impliedly and necessarily adopted the doctrine.[284] This conclusion appeared cemented in 2007 by *Breen v. Texas A&M University*, a case involving the same bonfire stack collapse as *Scanlan*, where the panel

from a policy generally affecting many. Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865–66 (5th Cir. 2012) (quoting Saenz v. Heldenfels Bros., 183 F.3d 389, 392 (5th Cir. 1999)).

275. *Leffall*, 28 F.3d at 531 (quoting Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 n.7 (5th Cir. 1994)).

276. Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537 (5th Cir. 2003) (citing Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)).

277. *See, e.g.*, *Leffall*, 28 F.3d at 531–32 (finding that since a school had hired two security guards, it proved it was not deliberately indifferent to danger).

278. *See* 343 F.3d 533 (5th Cir. 2003).

279. *See id.* at 535.

280. *Id.*

281. *Id.* at 538.

282. *Id.* at 539–40.

283. *Id.* at 540.

284. *See id.* at 538–40; *see also* Davis v. Southerland, No. CIV.A. G-01-720, 2004 WL 1230278, at *5 (S.D. Tex. May 21, 2004) (noting that the panel in *Scanlan* officially recognized the doctrine).

expressly adopted the doctrine and held that *Scanlan* had already impliedly done so.[285]

However, the Fifth Circuit decided to rehear *Breen*, beginning its current era of state-created danger doctrine jurisprudence.[286] The panel withdrew the section of its opinion adopting the doctrine.[287] In 2012, the Fifth Circuit acknowledged this precedential whiplash in *Doe ex rel. Magee v. Covington County School District*.[288] It held that *Scanlan* did not expressly adopt the theory, but rather only stated that the trial court should have recognized that the plaintiffs stated a claim under the theory.[289] Importantly, it explicitly declined to use the en banc opportunity to adopt the theory "because the [specific case's] allegations would not support such a theory."[290] That statement's message appeared to signal hope for the eventual adoption of the doctrine when the right case came along.[291] Yet the Fifth Circuit refused to do exactly that a little more than a decade later.[292]

In 2023, the "ideal vehicle" to incorporate the doctrine came along: *Fisher v. Moore*.[293] The plaintiff in *Fisher* was a disabled high school student who was previously sexually assaulted by a fellow student with notorious violent tendencies.[294] The plaintiff's teachers knew of the previous assault and still allowed the two to roam the school unsupervised.[295] Horrifically and

285. Breen v. Tex. A&M Univ., 485 F.3d 325, 332–40 (5th Cir.), *opinion withdrawn in part on reh'g*, 494 F.3d 516 (5th Cir. 2007).

286. *Breen*, 494 F.3d at 518.

287. *Id.*

288. 675 F.3d 849, 865 (5th Cir. 2012).

289. *Id.* at 864–65. This roundabout logic does not necessarily follow, as there is no real reason the panel in *Scanlan* would have remanded for fact-finding under a state-created danger claim if it was not recognizing the doctrine. *See Scanlan*, 343 F.3d at 539–40. It would appear that the Fifth Circuit used this en banc opportunity to undercut the panel's decision in *Scanlan* without explicitly overruling it. *See generally* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, FED. CTS. L. REV., April 2008, at 1, 1–2 (detailing how federal courts of appeals navigate disagreements with previous panel decisions).

290. *Doe*, 675 F.3d at 865.

291. *See id.*

292. *See* Fisher v. Moore, 73 F.4th 367, 369 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024).

293. *Id.* at 375 (Wiener, J., concurring).

294. *Id.* at 368.

295. *Id.*

predictably, the defendant once again assaulted the plaintiff.[296] The plaintiff's mother sued the school officials under § 1983.[297] She explicitly stated that this was the case the Fifth Circuit had been waiting for to finally adopt the doctrine.[298]

Without applying the facts of the case to the elements of the doctrine, the panel swiftly denied the mother's plea and dismissed her claim.[299] The opinion admitted both the widespread acceptance of the doctrine in the federal circuits and the mother's argument that "sometimes a 'robust "consensus of persuasive authority"' may suffice to clearly establish a constitutional right."[300] But the panel discounted the national vigor of the doctrine by noting that circuits accepting it are "not unanimous in [the doctrine's] 'contours' or its application."[301] Further, despite the plaintiff's assertion that this was the case the circuit had been waiting for, the panel held that the plaintiff had not briefed the issue or explained the doctrine's application to the case.[302] The panel thus held it would be "especially unwise" to adopt the doctrine "without the benefit of rigorous briefing."[303] Secondarily, the panel highlighted the Supreme Court's landmark opinion in *Dobbs v. Jackson Women's Health Organization*, which held that "rights protected by substantive due process 'must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."'"[304] Any

296. *See id.*

297. *Id.*

298. *Id.* at 373.

299. *Id.* at 369, 372.

300. *Id.* at 372–73 (quoting Morgan v. Swanson, 659 F.3d 359, 371–72 (5th Cir. 2011)).

301. *Id.* at 373 (quoting Morrow v. Meachum, 917 F.3d 870, 879 (5th Cir. 2019)).

302. *Id.*

303. *Id.* (quoting Lookingbill v. Cockrell, 293 F.3d 256, 263 (5th Cir. 2002)). It is notable however that the *Lookingbill* panel explicitly noted that the plaintiff was given "several opportunities for supplemental briefing." 293 F.3d at 262–63. Nowhere in the *Fisher* decision is it indicated that plaintiff M.F. was given this same opportunity, indicating this reason is another excuse to "refus[e] to take on the mantle." *Fisher*, 73 F.4th at 376 (Higginson & Douglas, JJ., dissenting from denial of rehearing en banc).

304. *Fisher*, 73 F.4th at 374 (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022)).

briefing on the state-created danger doctrine would thus need to meet the newly "reinvigorated test" established by *Dobbs*.[305]

Though concurring in the judgment, Senior Judge Jacques L. Wiener strongly disagreed with the Fifth Circuit's decision not to rehear the case en banc.[306] Cogently, he wrote that it was "well past time for this circuit to be dragged screaming into the 21st century" and join the ten other circuits recognizing the doctrine.[307] Granting rehearing would have allowed extensive briefing on the issue, one of the main reasons for the panel not ruling on the doctrine's validity.[308] Seven of the sixteen judges sitting on the circuit voted in favor of rehearing and six of them joined a dissent in the denial for rehearing.[309] The dissenters excoriated the majority for declining to disagree with the other circuits and blocking "percolation," the process by which the lower courts experiment and the Supreme Court eventually settles conflicting precedent.[310] The dissenters called on litigants to continue bringing state-created danger claims in the circuit so that a future panel could fulfill its purpose and finally rule on the doctrine.[311]

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305. *Id.*

306. *See id.* at 375 (Wiener, J., concurring).

307. *Id.* (Wiener, J., concurring).

308. *Id.* at 373, 375 (Wiener, J., concurring).

309. *Id.* at 368, 375 (Higginson & Douglas, JJ., dissenting from denial of rehearing en banc). Of the six judges in the dissent, four were notably the only non-senior judges in the circuit appointed by Democratic presidents. *United States Court of Appeals for the Fifth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fifth_Circuit [https://perma.cc/QAA9-Q9UA] (last visited Apr. 6, 2025).

310. *Fisher*, 73 F.4th at 376 (Higginson & Douglas, JJ., dissenting from denial of rehearing en banc) (quoting California v. Carney, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (omission in original)). Despite inter-circuit conflict on the contours of the doctrine, by not definitively ruling that the doctrine is invalid, the Fifth Circuit did not establish a traditional conflicting circuit split. *See id.* at 375; *see also* Murguia v. Langdon, 73 F.4th 1103, 1104 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc) (expounding that *Fisher* only "questioned the legitimacy" of the doctrine).

311. *Fisher*, 73 F.4th at 376 (Higginson & Douglas, JJ., dissenting from denial of rehearing en banc) (quoting California v. Carney, 471 U.S. 386, 400 n.11 (Stevens, J., dissenting)) ("Litigants should continue asking this court to decide the state-created danger issue, confident that we will act as a 'responsible agent[] in the process of development of national law.'") (alteration in original).

These actions of the deciding panel and Fifth Circuit majority signal the circuit's complete retreat from the doctrine over the past twenty years—from acceptance, to trepidatious consideration of a limited form of the doctrine, to outright refusal of it. This retreat was largely spurred by conservative appointees, and in particular, Trump appointees.[312] The majority's citation to *Dobbs* and its "history and traditions" test cuts to the palpable spirit of the opinion: strict originalism.[313] In this scheme, modern values and the consequences of a court's decision are irrelevant to interpreting the meaning of a statute or constitutional provision.[314] Judges in the Fifth Circuit and elsewhere have increasingly relied upon originalism to demand that historical analogs be almost identical and traditions be ever-older in order to find a constitutional right—and the jurists are unafraid to challenge decades of precedent in doing so.[315] Indeed, many originalists question the validity of Substantive Due Process

312. *See* Arthur D. Hellman, *The "Law of the Circuit" Revisited: What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 631–32 (2008) (observing the large number of conservative appointees in the Fifth Circuit in the 2000s and their empirical voting habits); David Smith, *How Trump Reshaped the Fifth Circuit to Become the 'Most Extreme' US Court*, THE GUARDIAN (Nov. 15, 2021), https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us [https://perma.cc/9USF-FUDX] (noting the circuit's shift to becoming the "place for the most extreme rulings" and that six of the judges on the circuit are Trump appointees). The prime indicators of this retreat are the panel's refusal to apply the facts of the case to the elements of the doctrine, unlike prior precedent, and the refusal of a majority of the circuit to allow briefing on the doctrine. *See* discussion *supra* Section IV.A.

313. *See* Lawrence B. Solum & Randy E. Barnett, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. L. REV. 433, 435–40 (2023) (discussing the Supreme Court's heavy reliance on history and tradition in interpreting constitutional rights).

314. *See id.* at 438; Avalon Zoppo, *5th Circuit Judge James Ho Criticizes 'Fair-Weather Originalism' in Speech*, LAW.COM (June 7, 2022), https://www.law.com/nationallawjournal/2022/06/07/5th-circuit-judge-james-ho-criticizes-fair-weather-originalism-in-speech/?slreturn=20240312150441 [https://perma.cc/MJC6-NWTF] (quoting Judge Ho's speech to a Federalist Society chapter where he stated that true originalists should not care if an outcome is unpopular with general society).

315. *See, e.g.*, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 286 (5th Cir. 2019) (Ho, J., concurring) ("[F]ederal courts, without any basis in constitutional text or original meaning, restrict the ability of states to regulate in the area of abortion."), *rev'd and remanded*, 597 U.S. 215 (2022); Cole v. Carson, 935 F.3d 444, 477 (5th Cir.) (Ho, J., dissenting), *as revised* (Aug. 21, 2019) ("[S]ome have criticized the doctrine of qualified immunity as ahistorical and contrary to the Founders' Constitution . . . . As originalists, we welcome the discussion."); *see also* Solum & Barnett, *supra* note 313, at 444 ("[A] constitutional tradition is strongest . . . when it has existed . . . more than a century . . . . [I]f a practice is relatively new . . . it would not be a tradition at all.").

under the Due Process Clause entirely.[316] This spirit, the motivating factor behind the *Fisher* court's reasoning, is palpable in a dissent by Judge Bumatay, another Trump-appointed jurist. Judge Bumatay favorably cited *Fisher* and its reasoning to argue for the diminution or abrogation of the doctrine in *Murguia v. Langdon*, a state-created danger doctrine case from the Ninth Circuit.[317]

B. Conservative Objections to the Doctrine Are Unavailing

The underlying facts of *Murguia v. Langdon* represent a clear example of state-created danger liability.[318] According to the case's complaint, Heather Langdon had a history of child abuse and related criminal charges known to the County of Tulare's Child Welfare Services ("CWS").[319] She eventually lost custody of her children to her children's father, Jose Murguia.[320] Murguia and Langdon rekindled their relationship and conceived twins.[321] In late November and early December 2018, Langdon started exhibiting disturbing behavior—making a false report about her son threatening to "shoot up an elementary school," holding one of her infant twins up to a ceiling fan while shouting "haneeshewa," and telling Murguia that Jesus told her to drink bleach.[322] Murguia called 911, and police responded to the home.[323] Despite Murguia's pleas, the responding officers separated Murguia from Langdon and his infant children.[324] Through a series of interactions with police and the staff of a

316. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (calling on the Court to consider overturning substantive due process decisions resulting in the rights to gay marriage, contraception, and same-sex intimate association).

317. Murguia v. Langdon, 73 F.4th 1103, 1103–04 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc).

318. *See* Murguia v. Langdon, 61 F.4th 1096, 1100–06 (9th Cir. 2023), *cert. denied sub nom.*, Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024).

319. *Id.* at 1100.

320. *Id.*

321. *Id.*

322. *Id.* at 1101.

323. *Id.* at 1102.

324. *Id.* at 1102–03.

local church, Langdon and the children were eventually taken to a women's shelter, where Langdon continued to demonstrate obvious signs of psychosis with the children still in her custody.[325] Sergeant Garcia, a crisis intervention police officer, reported to the shelter and called a social worker at CWS, Roxanna Torres.[326] Torres misrepresented to Garcia that Langdon had no criminal or child abuse history and found that she posed no immediate danger to her children.[327] Garcia, despite being told about Langdon's behavior and witnessing it himself at the shelter, dropped Langdon and the twins off unsupervised at a motel.[328] Langdon tragically drowned the twins overnight.[329]

Murguia sued the police department, CWS, and other parties individually and on behalf of his deceased children under the state-created danger doctrine.[330] The district court dismissed all federal claims with prejudice, and Murguia appealed.[331] The Ninth Circuit panel held Murguia adequately pleaded that Garcia was liable for being aware of Langdon's psychosis and removing her from the shelter staff's supervision.[332] The court also held Torres liable for her misrepresentations to Garcia.[333] Both parties were deliberately indifferent to the risk that Langdon would harm the twins and acted affirmatively to increase that risk.[334] Judge Ikuta dissented, finding that the defendants' conduct amounted only to negligence and that they did not abuse their authority to create a more dangerous situation.[335]

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325. *Id.* at 1103–04.

326. *Id.* at 1104–05.

327. *Id.* at 1105.

328. *Id.*

329. *Id.*

330. *Id.* at 1105–06.

331. *Id.* at 1106.

332. *Id.* at 1113.

333. *Id.* at 1115.

334. *Id.* at 1114–16.

335. *Id.* at 1120 (Ikuta, J., dissenting) (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)). Judge Ikuta implies that *Lewis* held that only executive acts *intended to cause harm* sufficiently "shock the conscience." *See id.* at 1121. This is ill-founded. *See Lewis*, 523 U.S. at 849–50. *Lewis* instead acknowledges that executive action must be, at minimum, *deliberately indifferent*

Judge Bumatay of the Ninth Circuit subsequently authored a fervent dissent from the denial of rehearing the case en banc.[336] He advocated for the abrogation of the state-created danger doctrine entirely, which would leave only the "special relationship" exception noted in *DeShaney*.[337] First, he wrote that the expansion of due process to allow liability for harm done by third parties lacked "textual and historical mooring."[338] Second, he noted the negligent actions of the state officials in the underlying case were not abusive exercises of authority but mistakes.[339] Third, as the Fourteenth Amendment did not alter the scheme of federalism regarding police powers, he wrote that it should be up to the states to determine when to relinquish tort immunity for state officials.[340] To course correct, Judge Bumatay would require the government to affirmatively act in creating a "deprivation of liberty" as a necessary predicate for any protection of due process.[341] This reasoning is flawed in numerous ways.

First, Judge Bumatay's apparent call for the Supreme Court to eliminate the state-created danger doctrine in the name of originalism is unsupported.[342] A full critique of originalism is an immense topic that is beyond the scope of this Note. It

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to risk and conscience-shocking when considered in the circumstances. *See id.* at 850. ("Rules of due process are not, however, subject to mechanical application . . . . [O]ur 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.").

336. Murguia v. Langdon, 73 F.4th 1103 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc).

337. *Id.* at 1108, 1118 (Bumatay, J., dissenting from denial of rehearing en banc).

338. *Id.* at 1109–10 (Bumatay, J., dissenting from denial of rehearing en banc). "So for over a century after the ratification of the Fourteenth Amendment, no court had recognized a substantive due process right against injury from private actors . . . ." *Id.* at 1107–08.

339. *Id.* at 1112 (Bumatay, J., dissenting from denial of rehearing en banc).

340. *Id.* at 1108 (Bumatay, J., dissenting from denial of rehearing en banc) (citing Paul v. Davis, 424 U.S. 693, 700 (1976)).

341. *Id.* at 1116, 1118 (Bumatay, J., dissenting from denial of rehearing en banc). This would inextricably tie personal security with a general liberty interest. *See id.* at 1116. Deprivation would require "incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 1115.

342. *See id.* at 1104 (Bumatay, J., dissenting from denial of rehearing en banc) ("Even if the state-created danger doctrine is properly considered a substantive due process right (which may be doubtful), we should reject its undue expansion and align it with the text of the Due Process Clause and Supreme Court precedent to the extent possible.").

suffices to say, however, that the Constitution is not so rigid or threadbare so as to afford the paltriest of individual liberties that can be divined from reading its plain text.[343] Both gay marriage and the right to possess and use contraception have no direct historical analog from the Nineteenth Century nor explicit protections in the Constitution's text, yet the Supreme Court afforded these rights to the people based on fundamental values inherent in American society and the Constitution itself.[344] The majority in *Dobbs* itself later affirmed these landmark decisions.[345]

In the context of the state-created danger doctrine, the right to be free from third-party harm caused by the government is not so much a new *right* cobbled together by a court, but rather an application of an ever-present right to newly-considered *facts*.[346] Just as an officer of the law locking a man in jail and starving him is arbitrary, tyrannical, and against the very spirit of our society, so too are the officer's actions in the following hypotheticals: stranding the man in a hot desert; leaving the man on a roadside next to a known psychopathic killer; or throwing the man into a snake pit.[347] In all of these examples, the outcome is the same—the man is dead because of the officer's deliberate indifference to a risk the officer created. Lastly, while the modern state-created danger doctrine was indeed implemented in full force after the *DeShaney* opinion, the doctrine is not solely predicated on that decision; courts recognized

343. *See* BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 7 (2018) (citing PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 37–38 (1982)) ("In other words, establishing textual meaning may not be straightforward, and a more flexible approach that does not bind the Court and policymakers to words written 300 years ago may, in the view of those who argue against textualism, be necessary to ensure preservation of fundamental constitutional rights or guarantees.").

344. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

345. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022) ("Nothing in this opinion should be understood to cast doubt on [substantive due process] precedents that do not concern abortion.").

346. *See* discussion *supra* Parts II, III.

347. *See* discussion *supra* Part II.

constitutional claims under 42 U.S.C. § 1983 for harms from third parties prior.[348]

Second, the state-created danger doctrine's state of mind requirement prevents the Constitution from being converted into a "font of tort law."[349] Simple negligence is a pillar of tort law and "categorically beneath" a due process violation.[350] At a minimum, deliberate indifference is sufficient to establish a constitutional violation.[351] Actual intent to harm has only been recognized by the Supreme Court as a predicate for a due process violation in the context of high-speed chases.[352] Misapplying these principles, Judge Bumatay, like Judge Ikuta before him, characterized Garcia's actions as a mistake, falsely equivocating a lack of intent to harm with negligence.[353] But as even the Fifth Circuit has acknowledged in cases considering the state-created danger doctrine, deliberate indifference is itself a form of intent.[354] Under the facts as pleaded in Murguia's complaint, Garcia, as the police officer charged with responding to crisis

348. *See* Murguia v. Langdon, 73 F.4th 1103, 1109 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc) ("[W]e should be wary of recognizing a new constitutional right from such an uncertain source."); *e.g.*, White v. Rochford, 592 F.2d 381, 384–85 (7th Cir. 1979) ("[T]he complaint sufficiently alleged a deprivation of rights secured by the Constitution sufficient to state a claim under § 1983."); Wood v. Ostrander, 851 F.2d 1212, 1215 (9th Cir. 1988) (plaintiff was raped after police officer stranded her in a high-crime area), *on reh'g*, 879 F.2d 583 (9th Cir. 1989).

349. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)).

350. *Id.* at 849.

351. *Id.* at 849–50 (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)) (highlighting *City of Revere*'s holding which applied the deliberate indifference standard in the context of pretrial detention); *see also* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1526–27 (1999) (noting that *Lewis* stands for adopting the "shocks the conscious [sic] standard" for claims arising under emergency conditions, so it implicitly adopts the deliberate indifference standard when government officials have time for reflection and deliberation before acting).

352. *Lewis*, 523 U.S. at 851. This is because chases require split-second decisions, not serious deliberation. *Id.*

353. Murguia v. Langdon, 73 F.4th 1103, 1111–12 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc) (equating a lack of any intent to harm with negligence); *see supra* note 335 and accompanying text (discussing Judge Ikuta's dissent in Murguia v. Langdon, 61 F.4th 1096 (9th Cir. 2023)).

354. *See* discussion *supra* Section II.B; Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994) (quoting Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 n.7 (5th Cir. 1994)).

events, clearly knew that Langdon was mentally unwell and posed a serious and foreseeable risk to her children.[355] This intentional disregard of a serious risk rises to the level of a constitutional violation beyond mere negligence.

Judge Bumatay's federalism argument is also unavailing.[356] The entire purpose of the Fourteenth Amendment was to change federalism so that state action was under the control of the Constitution.[357] When a state actor commits a constitutional violation under color of law, the federal government has enforcement power over the state.[358] This enforcement power extends to violations of rights both enumerated and unenumerated but implicit in the Constitution.[359] The right to personal security implicit in an ordered society is such an unenumerated constitutional right.[360] Furthermore, excessive force claims, which are essentially torts committed by police on pre-trial detainees, are widely accepted as enforceable against state actors.[361] As such, the Fourteenth Amendment clearly limits state officials' actions in their ability to cause harm.[362]

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355. Murguia v. Langdon, 61 F.4th 1096, 1116 (9th Cir. 2023).

356. *See Murguia*, 73 F.4th at 1108 (Bumatay, J., dissenting from denial of rehearing en banc).

357. McDonald v. City of Chicago, 561 U.S. 742, 837 (2010) (Thomas, J., concurring in part) ("[T]he [F]ourteenth [A]mendment changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States . . . ." (first alteration in original) (quoting Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872))).

358. *See* Paul v. Davis, 424 U.S. 693, 700 (1976) (citing Screws v. United States, 325 U.S. 91, 109 (1945)).

359. *See id.* at 700 (citing Screws v. United States, 325 U.S. 91, 109 (1945)) (any right "secured by the Constitution" is protected); U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.").

360. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1765) (declaring that at common law, there is an absolute right of personal security, meaning a person is "entitled . . . to security from the corporal insults of menaces, assaults, beating, and wounding").

361. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 396 (2015) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)) (explaining that "if the use of force is deliberate . . . the pretrial detainee's [excessive force] claim may proceed" because the "guarantee of due process has been applied to *deliberate* decisions of government officials").

362. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 119–21 (1992) ("[T]he Fourteenth Amendment . . . afford[s] protection to employees who serve the government as well as to those who are served by them . . . .").

Thankfully, Judge Bumatay's call to the Supreme Court to grant certiorari in *Murguia v. Langdon* and undo the state-created danger doctrine was unheeded.[363] Despite the judge's opposition and the Fifth Circuit's hesitance, the doctrine applied to harms from third parties is viable and constitutionally sound.[364] As such, the Fifth Circuit was wrong to not rehear *Fisher v. Moore* en banc and adopt the theory.[365] However, the factual circumstances of homeless encampment sweeps during extreme environmental conditions provide a unique opportunity to bypass or address many of the aforementioned protestations.[366]

C. Applying the State-Created Danger Doctrine to Encampment Sweeps Is Just, Necessary, and Historically Supported

State-created danger claims for unconstitutional encampment sweeps provide the "ideal vehicle" for the Fifth Circuit to adopt the doctrine.[367] This is because the harms inflicted by third-party environmental conditions are less constitutionally objectionable than those caused by human third parties. Furthermore, there are historical analogs from eighteenth-century England supporting the proposition that these actions are against fundamental values implicit in ordered liberty.[368]

Encampment sweep claims usually cut out the factor to which conservative judges most adamantly object, that the harm is actually caused by a human third party who intended to cause the harm, not the government official who displayed culpability closer to negligence.[369] An official using their

363. Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024).

364. *See* discussion *supra* Sections II.B, IV.B.

365. *See* discussion *supra* Sections IV.A, IV.B.

366. *See* discussion *supra* Sections IV.A, IV.B; *infra* Section IV.C.

367. Fisher v. Moore, 73 F.4th 367, 375 (5th Cir. 2023) (Wiener, J., concurring), *cert. denied*, 144 S. Ct. 569 (2024); *see* discussion *infra* Section IV.C.

368. *See* discussion *infra* Section IV.C; Rochin v. California, 342 U.S. 165, 169 (1952) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

369. *See* discussion *supra* Section IV.B; Murguia v. Langdon, 61 F.4th 1096, 1123 (9th Cir. 2023) (Ikuta, J., dissenting) ("At the furthest reach of this doctrine, we have extended liability to state officials who abused their state authority by intentionally acting in a way they knew would

authority to intentionally put someone in a harmful environment, however, is more likely to be considered an abuse of executive power within the scope of due process protections as opposed to mere negligence.[370] In other words, knowingly exposing a person to the elements or to disease is closer to the metaphorical snake pit than increasing the risk that an unknown bad actor will appear in the night and cause harm.[371] And, thus far, all state-created danger claims tried before the Fifth Circuit have concerned harms from human third parties.[372] Therefore, bringing a claim in the context of an encampment is ideal for two reasons: (1) these claims are generally less expansive and constitutionally objectionable, and (2) it is likelier that the Fifth Circuit will rule on the doctrine's validity instead of disposing of the case on its facts.[373]

Relatedly, claims in the context of encampment sweeps also circumvent the various heightened causation burdens incorporated into constitutional tort claims.[374] The only human parties in an encampment sweep claim are the plaintiffs and state actors.[375] If the state actor forces the plaintiff out into the scorching sun and the sun harms the plaintiff, the state is a cause-in-fact of the harm and the sole party that can be held liable.[376] If the same harm would not have happened to the plaintiff had they

provoke a third party to injure the plaintiff."), *cert. denied sub nom.* Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024).

370. *See Murguia*, 61 F.4th at 1122–23 (Ikuta, J., dissenting) (citing Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1084 (9th Cir. 2000)) (characterizing police leaving a drunk man outside to freeze to death and instructing him not to go back inside a bar as an abuse of power).

371. *See* discussion *supra* Parts I, III; Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

372. *See* discussion *supra* Section IV.A.

373. *See* discussion *supra* Section IV.A. *See generally* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 452–75 (1982) (emphasizing the necessary inquiries related to causation issues in constitutional tort litigation ranging from but-for and proximate causation to unforeseeable consequences and intervening causes).

374. *See* Eaton, *supra* note 373, at 452–75; *supra* notes 365–71 and accompanying text.

375. *See* discussion *supra* Part III.

376. *See, e.g.*, Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1190–93 (E.D. Cal. 2022).

remained sheltered, the state actor should be held liable.[377] And if the plaintiff is harmed within sufficient temporal proximity and without intervening causes, the state actor's conduct is sufficiently proximate to be held liable.[378] These heightened burdens are a compromise between the strong need to combat unconstitutional conduct and the desire to respect federalism by making it more difficult to hold state defendants liable for official actions.[379] As such, adding these burdens to the Fifth Circuit's version of the doctrine would address federalism concerns.[380] Doing so would also help to address concerns of slippery slope constitutional liability.[381] The Fifth Circuit has all the tools at its disposal to create a more restrictive version of the doctrine like other circuits already have.[382] But even if it does, encampment sweeps are more likely to clear these evidentiary hurdles than third-party harm claims.

Critically, encampment sweep claims also have bases in American history and tradition to support finding a constitutional right under an originalist interpretation of substantive

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377. *See id.* at 1189–90 (finding harm resulted because plaintiffs were forced out of shaded areas); Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980) (denying liability where defendant established that the plaintiff would have been injured anyway).

378. *See* Martinez v. California, 444 U.S. 277, 284–85 (1980) (holding defendant was not liable under a § 1983 claim where the plaintiff's death was too far removed from the defendant's actions).

379. *See* Eaton, *supra* note 373, at 444–46.

380. *See generally* Bradford C. Mank, *State Standing in* United States v. Texas: *Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 211–14 (2018) (highlighting the Fifth Circuit's focus on federalism in creating state standing to challenge federal directives).

381. *See supra* note 260 and accompanying text; *e.g.*, Mary's Kitchen v. City of Orange, No. 21-CV-01483, 2021 WL 6103368, at *11 (C.D. Cal. Nov. 2, 2021) (factoring the loss of "critical services" provided by a shelter that was closing into a state-created danger claim analysis where the city proposed to evict the shelter from its building); Murguia v. Langdon, 61 F.4th 1096, 1123–24 (9th Cir. 2023) (Ikuta, J., dissenting) (questioning the legitimacy of claims where state actors intentionally use their power in a way that provokes a third party to harm the plaintiff), *cert. denied sub nom.*, Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024). The Fifth Circuit could also limit the doctrine to include only physical harms as opposed to emotional ones. *See supra* notes 167–69 and accompanying text.

382. *See, e.g.*, Est. of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014) (incorporating proximate cause). It is unnecessary to make claims under the doctrine any harder to succeed on than they already are given that plaintiffs already almost always lose. *See* Chemerinsky, *supra* note 45, at 1. However, a more restrictive doctrine is better than no doctrine at all.

due process.[383] These bases appropriately address the concerns of the *Fisher* majority regarding "today's reinvigorated test" under *Dobbs*.[384] These historical values stand for opposing a tyrannical, punitive government.[385] For example, laws and customs as far back as the Magna Carta prohibit fining someone beyond what they are able to pay, even when lawfully ordered as punishment.[386] Similarly, those found guilty of committing a nuisance could be punished at the King's discretion, but could only be fined to the extent that they would not lose their position in society.[387] All of this is to show that pre-colonial British society believed that the "livelihood of the individual, his capacity to support himself, is a matter of particular sensitivity, demanding special protection."[388] In other words, the government was not obligated to provide aid—but it still could not punish those already suffering in a way that would deliberately place them in danger.[389]

Historical analogs also support applying the absolute right to personal security to include harm from environmental causes.[390] This right clearly extended to freedom from physical harm directly inflicted by the government, particularly in the context of torture.[391] Legal philosophers understood the Magna

383. *See generally* Tim Donaldson, *Federal Substantive Due Process Rights of Homeless Persons*, 58 U.S.F. L. REV. 39, 67–69 (2023) (collecting relevant examples from English law and custom from the sixteenth and seventeenth centuries).

384. Fisher v. Moore, 73 F.4th 367, 374 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024).

385. *See infra* notes 386–401 and accompanying text.

386. *See* MAGNA CARTA, cl. 20 (1215) (stating that an offender should be fined proportionally to the severity of his offense "saving his contenement"). *See generally* Tim Donaldson, *More than Lip Service Is Required: Excessive Fines Clause Limitations upon Fining the Homeless*, 54 ST. MARY'S L.J. 629, 632–41 (2023) (discussing how the Magna Carta codified the principle that offenders could not be excessively fined based on their economic status and circumstances).

387. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL, 114 (G.D.G. Hall ed. & trans., 1965) (1554) [hereinafter GLANVILL].

388. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L & POL'Y REV. 541, 562 (2017).

389. *See* Willowes' Case (1608) 77 Eng. Rep. 1413, 1415; GLANVILL, *supra* note 387, at 114.

390. *See infra* notes 391–405 and accompanying text; BLACKSTONE, *supra* note 360, at 134.

391. *See* W. Va. Coal. Against Domestic Violence, Inc. v. Morrisey, 689 F. Supp. 3d 272, 304–05 (S.D. W. Va. 2023) (citing JAMES PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON 188 (1877)).

Carta to impliedly forbid torture and considered England separate from other countries that allowed it as a custom.[392] Philosophers understood the infliction of pain and death to be particularly abhorrent to societal ideals when used prior to criminal sentencing.[393] Pre-colonial methods of torture include exposure to harm from wild animals,[394] water,[395] cold,[396] and the sun.[397] These forms of torture correlate to the exposure of unhoused people to the elements.[398] Similarly, a common pre-colonial method of punishment, often performed by cruel pirates, was the act of marooning: "abandoning someone on a deserted island or sand bar and leaving them for dead."[399] Marooning a man and leaving him to the elements is "slow," "painful," and can "drive [him] mad."[400] As such, British society viewed this

392. *See* JAMES PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON 187 n.1 (1877).

393. *See id.* at 186–88 (explaining that torture was used to extract information and confessions prior to guilty verdicts).

394. *See, e.g.*, LEONARD A. PARRY, THE HISTORY OF TORTURE IN ENGLAND 47 (1975) (describing English torture by which prisoners were put in a dungeon with rats that would eat their flesh); Miranda Leer, *Rat Torture: One of History's Most Barbaric Torture Methods?*, HISTORY DEFINED, https://www.historydefined.net/rat-torture [http://perma.cc/34N7-3H85] (last visited Apr. 6, 2025) (describing torture method where rats would be placed on a victim in a heated cage so that they would claw and bite into the person); Marco Margaritoff, *The Horrifying History of Scaphism, the Excruciating Execution Method of Ancient Persia*, ALL THAT'S INTERESTING (Feb. 26, 2024), https://allthatsinteresting.com/scaphism [https://perma.cc/5LES-824E] (describing torture method involving vermin eating prisoners covered in honey).

395. PARRY, *supra* note 394, at 163 (noting that "ducking" was a punishment, where offenders were dunked underwater repeatedly).

396. *See* MARY DE YOUNG, ENCYCLOPEDIA OF ASYLUM THERAPEUTICS, 1750-1950S 176–77 (2015) (describing the "dripping machine": cold water dripped onto a person's head for psychological torture as early as the fifteenth century).

397. *See* PARRY, *supra* note 394, at 173 (describing a man put in stocks for an entire day outside); Aganippe, *Means of Torture in the Ancient and Medieval World*, LEGIO I LYNX FULMINATA (Dec. 12, 2018, 11:36 PM), https://legioilynx.com/2018/12/12/means-of-torture-in-the-ancient-and-medieval-world/ [https://perma.cc/VRM5-MMDQ] (describing how one would be "exposed to whatever Mother Nature had to offer" while confined in stocks).

398. *See* discussion *supra* Part III.

399. Grant Piper, *The Historically Accurate Pirate Punishment Worse than Walking the Plank*, MEDIUM (Feb. 13, 2023), https://medium.com/exploring-history/the-historically-accurate-pirate-punishment-worse-than-walking-the-plank-20e48161263e [https://perma.cc/2V2E-8PYY].

400. *Id.*

form of punishment without a trial as reprehensible, not part of ordered society, and worthy of sanction.[401]

In all of these examples, the ultimate harm comes from Mother Nature, but humans are a clear cause-in-fact. And while these historical acts of torture or punishment were intended to cause harm, the deliberate indifference standard employed to find a constitutional violation is its own form of intent.[402] While pre-colonial torture was cruel, deadly, and obviously more severe in nature than the abuses committed by modern government officials, what matters for purposes of a constitutional hook is that there was a history and tradition to be free from intrusive bodily harm caused by the government.[403] This history and tradition is fundamentally established, and the torture analogies merely bolster the assertion that the government causing animals or the environment to harm a prisoner is still, in effect, the government causing harm to the prisoner.[404] As such, it is no great logical leap to conclude that the right to personal security prevents the government from arbitrarily causing encampment residents to be harmed by environmental conditions.[405]

Outside of historical and textual justifications, encampment sweep claims are more likely to be accepted by judges for practical reasons. First, recognizing this limited constitutional right does not broadly impact governments' abilities to implement policy or exercise their police powers—a major criticism of

401. For example, Warwick Lake, a British noble, was court-martialed for marooning a seaman who had stolen alcohol in 1807. *See* Ann Marie Ackermann, *Marooning in the Royal Navy: The Strange Case of Robert Jeffrey*, ANN MARIE ACKERMANN (Oct. 10, 2015), https://www.annmarieackermann.com/marooning-in-the-royal-navy-the-strange-case-of-robert-jeffrey/ [https://perma.cc/J93P-DXQ8x]; RICHARD WOODMAN, THE SEA WARRIORS: THE FIGHTING CAPTAINS AND THEIR SHIPS IN THE AGE OF NELSON 183–85 (2001).

402. *See* discussion *supra* Section II.B; Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994) (quoting Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 n.7 (5th Cir. 1994)).

403. *See supra* notes 390–401 and accompanying text.

404. *See supra* notes 390–401 and accompanying text; PARRY, *supra* note 394, at 2 ("No freeman shall be . . . injured, banished, or hurt . . . save by the lawful judgment of his peers or the law of the land.").

405. *See* discussion *supra* Parts II, III; Section IV.C.

other decisions establishing constitutional rights.[406] Homeless advocates have primarily used the doctrine to obtain temporary restraining orders or preliminary injunctions, granting only short-lived relief.[407] Cities may continue sweeps by either providing temporary shelter or waiting out the period of extreme conditions.[408] Further, advocates using the doctrine have generally not sought monetary damages.[409] As such, concerns about unhoused people substituting the government's purse for the funds of third parties causing harm are unfounded.[410] State-created danger claims simply give unhoused people a singular legal weapon against state actors abusing their power through sweeps. And giving them this tool is especially necessary given the unequal political and financial power between them and the government.[411]

Lastly, from a humanistic perspective, these sweeps are shocking and fundamentally unfair.[412] Such actions amount to punishment and are even more reprehensible when committed against extremely vulnerable people.[413] Executive action that so

406. *See, e.g.*, David Greenwald, *Supreme Court Will Take Up* 'Grants Pass' *Homeless Case and Determine Whether Local Governments Can Perform Homeless Sweeps*, DAVIS VANGUARD (Jan. 13, 2024), https://www.davisvanguard.org/2024/01/supreme-court-will-take-up-grants-pass-homeless-case-and-determine-whether-local-governments-can-perform-homeless-sweeps/ [https://perma.cc/4AWR-6PW3] (noting that California requested the Supreme Court review Ninth Circuit precedent establishing an Eighth Amendment right against anti-camping ordinances as it had tied the government's ability to respond to the homelessness crisis); Carpenter v. United States, 585 U.S. 296, 331–32 (2018) (Kennedy, J., dissenting) (criticizing the new rule that obtaining cell-site location information is a Fourth Amendment search as infringing upon federal, state, and local police powers).

407. *See* discussion *supra* Part III.

408. *See, e.g.*, Sacramento Homeless Union v. Cnty. of Sacramento, 617 F. Supp. 3d 1179, 1190–93 (E.D. Cal. 2022); Janosko v. City of Oakland, No. 23-CV-00035, 2023 WL 187499, at *3–4 (N.D. Cal. Jan. 13, 2023).

409. *See* discussion *supra* Introduction, Part III.

410. *See generally* discussion *supra* Part III (highlighting the government's culpability in creating a cognizable harm when unhoused people are removed from encampments and are subsequently exposed to severe weather elements).

411. *See* Tasneem Owadally & Quinn Grundy, *From a Criminal to a Human-Rights Issue: Re-Imagining Policy Solutions to Homelessness*, 24 POL'Y, POL. & NURSING PRAC. 178, 179 (2023).

412. *See* discussion *supra* Part I.

413. *See generally* discussion *supra* Section IV.C; *Sacramento Homeless Union*, 617 F. Supp. 3d at 1199 (quoting Cobine v. City of Eureka, No. C 16-02239, 2016 WL 1730084, at *7 (N.D. Cal.

clearly upsets the senses imposes a duty upon courts to evaluate whether the action was justified or offends the societal decency inherent in our nation.[414] The Constitution demands it.[415]

In sum, state-created danger claims arising out of encampment sweeps during extreme environmental conditions are uniquely in the same spiritual vein as the oppressive abuses of power by the government from which our Forefathers wanted to shield us. These claims are thus constitutionally valid under the Due Process Clause and squarely address judicial concerns regarding the government actor's necessary state of mind. Any remaining federalism or slippery slope liability concerns can be assuaged by the Fifth Circuit adopting a more stringent standard for the doctrine. Therefore, while there are no convincing justifications for the Fifth Circuit not to recognize the doctrine, there are compelling reasons for the contrary. The doctrine is a necessary tool to halt unconstitutional sweeps through temporary restraining orders and deter governments from committing such violations in the future.

CONCLUSION

America's ever-growing problem with homelessness is not going away any time soon. While a long-term solution will only come from legislation and policy, the judicial branch is not without capacity to contribute to the process. The judiciary serves a vital role in curbing arbitrary, shocking executive actions committed against unhoused people via encampment sweeps. Through the state-created danger doctrine, advocates can litigate to obtain injunctions and discourage unconstitutional solutions to societal problems.

May 2, 2016) ("[C]ourts have found there is a strong 'public interest in maintaining the protection afforded by the constitution to those most in need of such protections.'").

414. White v. Rochford, 592 F.2d 381, 386 (7th Cir. 1979) (citing Malinski v. New York, 324 U.S. 401, 416–17 (1945) (Frankfurter, J., concurring)) ("It seems difficult to understand how conduct so clearly deserving of universal reprobation can be said to fall outside of the protections of the Due Process Clause . . . .").

415. *See* discussion *supra* Part IV.

Despite its issues with homelessness and the unconstitutional executive action taking place within its borders, the Fifth Circuit has thus far refused to adopt the state-created danger doctrine. This is despite the doctrine being constitutionally sound and in accordance with Supreme Court precedent. But all cases tried before the Fifth Circuit thus far have concerned harm from human third parties. Pursuing a claim for encampment sweeps in extreme environmental conditions will provide the ideal vehicle for the Fifth Circuit to finally adopt the doctrine, as these claims best address conservative judicial concerns with the doctrine. Doing so will establish baseline substantive due process rights for unhoused people and grant them much-needed recourse against unconstitutional government action.