

No. 18-1366

In The
Supreme Court of the United States

ESTATE OF ADRIANO ROMAN, JR.,

Petitioner,

vs.

CITY OF NEWARK, NEW JERSEY, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

**SUPPLEMENTAL BRIEF FOR PETITIONER
ESTATE OF ADRIANO ROMAN, JR.**

JUSTIN D. SANTAGATA, ESQ.
Counsel of Record
KAUFMAN SEMERARO & LEIBMAN LLP
Two Executive Drive, Suite 530
Fort Lee, New Jersey 07024
T: 201-947-8855
F: 201-947-2402
E: jsantagata@northjerseyattorneys.com

Counsel for Petitioner Estate of Adriano Roman, Jr.

INTRODUCTION

Pursuant to Supreme Court Rule 15(8), Petitioner Estate of Adriano Roman, Jr. (“**Estate**”) submits this short supplemental brief highlighting *Fazica v. Jordan*, No. 18-1457, 2019 WL 2417358 (6th Cir. June 10, 2019) [pending publication], a precedential Sixth Circuit opinion decided after the filing of the Estate’s petition and which is relevant to the split in the federal circuits on pleading group action under 42 U.S.C. § 1983.

ARGUMENT

As set forth in the Estate’s petition, the Estate’s question presented states that the Third Circuit opinion below is an outlier among the federal circuit courts in that it requires a plaintiff under 42 U.S.C. § 1983 to allege the action of each individual defendant even if the plaintiff plausibly alleges they acted collectively—both physically and temporally—to cause an indivisible constitutional harm. *Fazica* highlights the approach taken by a majority of the federal circuits and is in stark contrast to how the Third Circuit addressed this case and a similar case.

While *Fazica* does not discuss joint and several liability (or pleading), which is how the Estate framed its questions presented here, *Fazica* is couched in language that is directly comparable to joint and several liability. In *Fazica*, the plaintiff alleged that a group of sheriff’s officers put a mask on her so she could

not identify the officers as they transported her to a cell and engaged in excessive force. *Fazica*, 2019 WL 2417358 at *3. Eventually the sheriff’s officers moved for summary judgment on the argument that the plaintiff was not able to identify which individual officers did what during the transport. *Id.* at *4. The district court denied the motion. On appeal, the Sixth Circuit affirmed and reiterated the principle that is lacking in the Third Circuit opinion below and another similar case from the Third Circuit: “a reasonable jury could conclude that each of the named [d]efendants either violated her constitutional rights or observed his colleagues violating her constitutional rights and failed to intercede.” *Id.* at *7. A “[d]efendant may be liable if he observes his colleague’s unconstitutional act, has an opportunity to intervene, but fails to do so.” *Id.* at *8.

Here, the Third Circuit held the Estate to the burden of pleading the individual actions of a group of police officers that concededly acted as a group during an unconstitutional search. At a minimum, the Estate plausibly alleged that the group acted as a group and should not have been required to plead who among the group did what, which may be unknowable at the pleading stage and where the plaintiff here was handcuffed, face-down on the floor. If joint and several liability principles are properly applied, the burden of apportioning actions among the police officers should shift to each officer at trial. (Pet. at 18-19.)

In *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 289-292 (3d Cir. 2018), decided several months before

the Third Circuit opinion here, the Third Circuit reached the exact opposite conclusion of *Fazica* on nearly identical facts: an allegation of excessive force where the group was identifiable but individual actions were not.

The key principle in *Fazica* and lacking in the Third Circuit opinion here, and apparently in other opinions such as *Jutrowski*, is that a police officer who acts as part of a group to inflict a constitutional harm and knows that such a harm is occurring is subject to liability regardless of whether the plaintiff can allege or even prove precisely what that officer did. If the plaintiff plausibly alleges group action, especially with physical and temporal proximately as here, that should be sufficient to vault past the pleadings stage under 42 U.S.C. § 1983.

CONCLUSION

Fazica further highlights why the Estate's petition should be granted, even if the question presented is reframed to simply address whether group participation

in an unconstitutional search is sufficient to plausibly allege individual liability for each member of that group at the pleadings stage.

Respectfully submitted,

JUSTIN D. SANTAGATA, Esq.

Counsel of Record

KAUFMAN SEMERARO & LEIBMAN LLP

Two Executive Drive, Suite 530

Fort Lee, New Jersey 07024

T: 201-947-8855

E: jsantagata@northjerseyattorneys.com

Counsel for Petitioner

Estate of Adriano Roman, Jr.