No. 18-1372

IN THE

Supreme Court of the United States

CITY OF NEWARK,

Petitioner

v.

THE ESTATE OF ADRIANO ROMAN, JR.,

Respondent

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Supreme Court Should Grant Certiorari as to the First Issue Presented

Petitioner City of Newark (the "City") petitions for writ of certiorari on the issue of whether a *Monell* claim is barred by the dismissal of employees alleged to have violated Constitutional rights. Respondent the Estate of Adriano Roman, Jr. ("Plaintiff") submits two arguments in opposition to certiorari of this issue. Those arguments are meritless as they improperly attempt to shift the scope of the presented issue.

A. Mandatory Joinder Is a Subsidiary Issue But Not the Main Presented Issue

Plaintiff first contends that the City "confuses *Heller*'s requirement of an underlying constitutional violation with a non-existent requirement that an individual municipal officer be a party to the complaint and must be adjudicated individually liable in order to establish municipal liability." Opp. at 5. Plaintiff argues that there has never been a rule establishing mandatory joinder of party. Opp. at 5.

Contrary to Plaintiff's contentions, it is well-established that a claim may be dismissed if an indispensable party is not joined to the action. *See generally*, Fed. R. Civ. P 12(b)(7), 19. Plaintiff's statement to the contrary is incorrect. More pertinently, even the rules of the Supreme Court recognize that a presented issue may include subsidiary issues, which the Supreme Court may consider. *See* Supreme Court Rule 14(1)(a) ("The statement of any question presented is deemed to

comprise every subsidiary question fairly included therein."). The issue identified by Plaintiff is one such subsidiary issue and may be analyzed by the Supreme Court if the petition is granted.

However, mandatory joinder of the police officers is not the main issue. Plaintiff did not fail to name any officers. (App. 83-86). To the contrary, Plaintiff named six actual officers and 20 additional fictitious officers as having allegedly violated his constitutional rights. (App. 83-86). All of these officers were dismissed from the case, as affirmed by the Third Circuit. (App. 27 n.10, 69-70). Just as important, the officers' actions, in allegedly violating the Constitution, were alleged to be the sole underlying basis for making the City's training and supervision regimen actionable under *Monell*. (App. 99 at ¶ 94.). The main issue presented is whether the dismissal of the underlying constitutional claim bars the claim against the City.

B. The Implications for Qualified Immunity Analysis May Be a Subsidiary Issue But It Is Not the Main Presented Issue

As stated above, the main issue presented is whether the City should remain a party, where its liability is partially, but necessarily, premised on the actions of officers that have been dismissed from this matter. Plaintiff argues that the City's liability for an officer's allegedly unconstitutional conduct will never depend on whether the officer is liable for violating the constitution because a *Monell* claim requires additional conduct (in the form of a pattern of abuses) and a different mental state for that additional conduct (deliberate indifference). Opp. at 8 ("In

different terms, this is what the Third Circuit said in *Fagan*: '[t]hese claims are based on different theories and require proof of different actions and mental states.'"). Plaintiff contends that this analysis has been employed by all of the Circuit courts, such that there is no split among them. Opp. at 5-6. Plaintiff attempts to support this proposition by citing to cases where a *Monell* claim is allowed to proceed where all involved officers have been deemed entitled to protection from liability under qualified immunity's violation-of-clearly-established-rights prong.

As preliminary matter, Plaintiff has again improperly reformulated the main issue as a potential subsidiary issue. *See* Supreme Court Rule 14(1)(a). Plaintiff's analysis relies entirely on the analysis of qualified immunity claims, but the defendant officers did not present that defense on the motion to dismiss and neither of the lower courts issued a ruling on qualified immunity. (App. 1-34, 48-76). While it would be proper for the Supreme Court to revisit whether a finding of qualified immunity constitutes a defense to the merits of the constitutional claims, or simply to damages and suit, that is not the main issue presented.

Likewise, the cases that Plaintiff relies on are inapposite because they deal with qualified immunity. Assuming, for the purposes of this petition only, that Plaintiff has correctly concluded that qualified immunity is only a defense to damages and suit, but not liability, the analysis employed in qualified immunity claims is not the same analysis asseverated by Plaintiff in his opposition. The qualified immunity cases cited by Plaintiff are based on the fact that the

second prong of the qualified immunity analysis is not reached until there is an **affirmative finding** of a constitutional violation. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) ("Respondent urged, and the Court of Appeals apparently agreed, that 'the jury could have believed that Bushey, . . . was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury' . . . . The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer." (citations omitted)); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993) ("This court upheld Officer Hymon's dismissal from the case not because he committed no constitutional violation, but because he was protected by the doctrine of qualified immunity."); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[T]his Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (*see* Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right." (citation omitted)).

The reasoning of cases involving qualified immunity and *Monell* claims is that qualified immunity cannot be applied until there is a finding that an officer committed a constitutional violation. It follows that the municipality can be liable for the damages because qualified immunity protects the individuals from damages, but not public entities.

Conversely, the rationale that Plaintiff espouses is only set forth in *Fagan*. As the First

Circuit noted, while the second prong of a *Monell* claim requires deliberate indifference as to an improper policy or custom, the second equally indispensable prong requires an underlying constitutional violation, which will often be the employee's commission of a constitutional violation with a separate culpable mental state. *See* Pet. at 18 (citing *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996)).

Given the necessary overlap between a *Monell* claim against a public entity and a constitutional claim against that entity's employee(s), there can be no *Monell* claim, where the employee has not been plausibly alleged to have violated the Constitution. *Schor v. City Of Chicago*, 576 F.3d 775, 779 (7th Cir. 2009) ("[T]he plaintiff must begin by showing an underlying constitutional violation, in order to move forward with her claim against the municipality. Because we have concluded that these plaintiffs have not alleged any plausible constitutional violation committed by Mayor Daley or the officers, it follows that there is no wrongful conduct that might become the basis for holding the City liable.").

As Plaintiff has incorrectly assumed that qualified immunity cases must employ the same analysis as *Fagan* because they reached a similar result, it should be clear that Plaintiff has also incorrectly concluded that there is no split among the Circuit courts. Indeed, contrary to Plaintiff's averments, this first issue is the source of a split between the Circuits. Pet. at 18; *Fagan v. City of Vineland*, 22 F.3d 1283, 1293 (3d Cir. 1994) ("We decline to follow four other courts of appeals, which

have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution.").

Similarly, Plaintiff's analysis is misguided because here, there was no affirmative finding that Plaintiff had alleged a constitutional violation by an officer, and Plaintiff points to no such citation in the record. To the contrary, the lower courts held that Plaintiff had not alleged a plausible claim as to any officer. (App. 27 n.10, 69-70). In light of this holding, it was error for the Third Circuit to find that the allegations were somehow plausible as to the City. *See Heller*, 475 U.S. at 798-99 ("Respondent appealed to the Court of Appeals for the Ninth Circuit, and that court reversed the judgment of the District Court dismissing respondent's case against petitioners even though it did not disturb the verdict for the defendant police officer. . . . [Petitioners] were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent.").

In particular, the inconsistent finding, by the Third Circuit, frustrates the delicate balancing of interests identified by the Supreme Court in *Rizzo* and *Iqbal*. In *Iqbal*, the Supreme Court underscored the importance of pleading a plausible, not merely a possible, complaint in civil rights cases because of the necessity of minimizing litigation's unnecessary detraction from vital governmental public duties. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). The Supreme Court noted that "'[i]t is no answer to say that a claim just shy of a plausible entitlement to

relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.'" *Id.* (citation omitted). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Id.* (internal quotation marks and citations omitted)).

In *Rizzo*, as clarified by the Circuit courts, allegations of personal involvement have been required in furtherance of the principle that the "essential element of . . . any [] tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *See Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 289–90 (3d Cir. 2018); *see also Argueta v. U.S. Immigration & Customs Enf't*, 643 F.3d 60, 76 (3d Cir. 2011) (noting that complaint must allege personal involvement to withstand a motion to dismiss); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) ("These observations apply here with even more force, for the individual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures.").

Stated differently, a plaintiff's failure to identify any officer that allegedly violated the

Constitution, inhibits a public entity from being able to meet the complaint, gather discovery, and oppose allegations that its training and supervision regimen influenced/caused the unnamed officer to violate a plaintiff's constitutional rights. Such a failure to identify even one officer also reflects a failure to point to any well-pleaded fact from which causation can be inferred because no officer of the public entity is alleged to be the culprit. The dismissal of all claims against all officers in this matter, after providing Plaintiff with a transcript of the criminal proceedings (which contained specific information on the allegedly unlawful search) and a subsequent opportunity to amend, should have applied with equal force to the City, as the City's liability was premised on the actions of these officers.

To the extent Plaintiff attempts on appeal to rely on his suppression transcripts to enhance the Complaint, the suppression opinion did not establish that any officer was involved in the allegedly unlawful search, other than Officer Mendes. (*See* App. 36, 124, 128, 131). However, even as to Officer Mendes, in the courts below, Plaintiff did not cite to the transcript of the suppression opinion as providing the necessary details of personal participation. *See, e.g.*, *Roman v. City of Newark*, 2017 WL 4005235, at *36-37 (Appellant's Br.) ("While Mr. Roman could have pled more details about the unconstitutional search itself - which were nevertheless incorporated into his pleadings via the transcript of the suppression hearing - it would make no difference as a matter of pleading. Or, as the New Jersey court held in the suppression hearing: Mendes' testimony 'wasn't clear on how many officers came in and what the sequence'

was.").

Even if Plaintiff had, those facts would only be cognizable if he could establish them through one or more estoppel principles. *See Jacobs v. Bayha*, 616 F. App'x 507, 510 n.3, 513-14 (3d Cir. 2015) (implicitly approving of district court's rationale that "the evidence that was considered ([criminal] trial transcripts) constituted official court records of which the court could take judicial notice even on a motion to dismiss."); *Adams v. Gould Inc.*, 739 F.2d 858, 870 n.14 (3d Cir. 1984) ("The rule in this circuit is that affirmative defenses, such as the statute of limitations and *res judicata*, can be asserted on a motion to dismiss."). In this respect and contrary to Plaintiff's assertions, because neither the City nor its officers were parties to Plaintiff's criminal proceedings, (App 5-6, 116, 119, 121); (App. 90 at ¶ 35), estoppel would not have been available against the defendants. *See Del. River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 573 (3d Cir. 2002) (discussing collateral estoppel); *Duhaney v. AG of the United States*, 621 F.3d 340, 347 (3d Cir. 2010) (discussing *res judicata*).

Likewise, the standard under Fed. R. Civ. P. 12(b)(6) prohibits Plaintiff from now arguing that specific parts of the transcripts -- separate and apart from estoppel principles -- established personal participation for any officers. *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426, 427 n.7 (3d Cir. 1999) ("Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein . . . . We have held that a court that examines a transcript of a prior proceeding to find

facts converts a motion to dismiss into a motion for summary judgment."); *Brody v. Hankin*, 145 F. App'x 768, 772-73 (3d Cir. 2005) (holding that a court cannot take judicial notice of facts adjudicated in a court proceeding or even the existence of certain prior collateral determinations not explicitly referenced in and attached to the complaint).

Finally, even if Plaintiff had alleged that even one named officer was responsible for the constitutional violation, that officer and the City would both be subject to dismissal because any alleged underlying unconstitutional search would have been constitutionally irrelevant for reasons discussed in point three below.

II. The Supreme Court Should Grant Certiorari as to the Second Issue Presented

The City petitions for writ of certiorari on the second issue of what inferences from a consent decree -- concerning a municipalities alleged unconstitutional custom -- can be deemed plausible. Plaintiff argues that the Third Circuit majority's inferences were justified by the directive of the Consent Decree that "Newark police officers had to be trained 'on the requirements of the Fourth Amendment.'" Opp. at 9 (emphasis and citation omitted). Plaintiff ignores the Supreme Court's precedent that "[a] pattern of **similar** constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick v. Thompson*, 563 U.S. 51, 62 (2011) (emphasis added) ("Those four

reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the **sort of *Brady* violation at issue** here." (emphasis added)). Plaintiff also takes this quotation out of context, and ignores that the Complaint and the news articles referenced therein stated that the only Fourth Amendment violations at issue leading to the Consent Decree were "in areas including stop[] and arrest practices, use of force, and theft by officers," not nonconsensual searches of homes without probable cause. (*See* App. 7, 23, 39 n.4). As the dissent stated, "[t]he consent decree itself admits no specific pattern or practice of rights violations." (App. 39 n.4). The majority's inference was not warranted by the Consent Decree.

III. The Supreme Court Should Grant Certiorari as to the Third and Fourth Issues Presented

The City petitions for writ of certiorari on a third issue of whether *res judicata* applies to estop a civil rights plaintiff from re-litigating adverse facts from a prior criminal proceeding, in the subsequent civil rights proceeding. The fourth issue for which certiorari is sought, is whether a certain set of facts establish probable cause for arrest and simultaneously bar an unlawful search claim as constitutionally irrelevant.

Preliminarily, Plaintiff does not dispute the third issue that *res judicata* can apply as between a criminal proceeding and a subsequent civil rights proceeding. Likewise, Plaintiff does not contest that his unlawful search claim is barred as constitutionally

irrelevant if there was probable cause to believe that he was in constructive possession of narcotics. Rather, Plaintiff argues that the Third Circuit properly found that an ownership interest in a residence, standing alone, is insufficient to support probable cause for constructive possession of contraband. Opp. at 9-10.

This argument is a red herring. The City acknowledged that a possessory interest in a residence is insufficient, standing alone, to support a finding of probable cause for constructive possession. Pet. at 28. Rather, the issue presented by the City is "what minimal evidence, **over and above a possessory interest in a residence**, is necessary to a finding of probable cause." Pet. at 28 (emphasis added). Plaintiff provides no contrary law or arguments on this issue.

CONCLUSION

For the foregoing reasons, Petitioner City of Newark respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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