No.

IN THE

Supreme Court of the United States

CITY OF MIAMI, AN INCORPORATED MUNICIPALITY,
PETITIONER

v.

TAIWAN SMART,
RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

VICTORIA MÉNDEZ
City Attorney

JOHN A. GRECO
Deputy City Attorney/Chief Appellate Counsel

KERRI L. MCNULTY
Counsel of Record
Assistant City Attorney/Senior Appellate Counsel

Office of the City Attorney
City of Miami
444 Southwest Second Avenue, Suite 945
Miami, Florida 33130
klmcnulty@miamigov.com
(305) 416-1800

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

I.Whether the isolated alleged incidents of constitutional violations in Plaintiff's § 1983 claims, which are founded on the actions of non-state actors, are legally sufficient to establish a municipal "custom or practice" as held by the Eleventh Circuit Court of Appeals.

II. Whether the Eleventh Circuit's theory that the jury disbelieved witness testimony to the contrary constitutes sufficient evidence to support the Plaintiff's burden of proof, in the absence of affirmative evidence supporting Plaintiff's claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was not published but it is available at 2018 WL 3201675 (11th Cir. June 28, 2018).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, upholding the jury verdict with respect to two § 1983 claims—for the filming and broadcast of the Plaintiff in handcuffs before and after his arrest and for the filming and broadcast of Plaintiff's interrogation—was handed down on June 28, 2018. (App. 1a-35a). The City of Miami's motion for rehearing was denied on August 13, 2018. (App. 43a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for

> an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

Plaintiff filed an action pursuant to 42 U.S.C. § 1983 against Petitioner, the City of Miami ("the City"), premised upon alleged violations of the Fourth Amendment arising out of the filming of "The First 48" television show by a private company, which broadcasted the City of Miami Police Department's investigation of a double murder, for which Plaintiff was the suspect.[1]

The production company, Kirkstall Road Enterprises, Inc. ("the Company"), filmed and broadcasted the police investigative activities at issue pursuant to a contract with the City, which permitted such activities with the consent of the individuals filmed. The Company used the footage in its television show, "The First 48," which documents police homicide investigations during the first forty-eight hours after a homicide. The contract with the City clearly required that "Company shall be responsible for obtaining all necessary consents including the written consent of [City] officers and personnel featured in the Program." (App. 111a at ¶ 2). The contract also requires that "[n]o film crew may enter upon private property unless they

---

[1] Plaintiff also brought two state law claims under Florida law, for false arrest and false imprisonment, which are not relevant to the instant petition.

have obtained prior consent from the property owner." (App. 114a at ¶ 7(f)).

Plaintiff initially brought three separate claims under 42 U.S.C. § 1983, for the filming and broadcast of three different aspects of the police investigation at issue: (1) the search of Plaintiff's residence, where the murders had taken place; (2) images of Plaintiff in handcuffs before and after his arrest; and (3) Plaintiff's interrogation. At the close of evidence, the City moved for judgment as a matter of law. Regarding the § 1983 claims, the City asserted that there was insufficient evidence of a policy, custom, or practice that would permit municipal liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Plaintiff also moved for judgment as a matter of law with respect to the § 1983 claims, alleging that the evidence established the violations with respect to the City. The district court denied the City's motions, finding that the testimony reflected a "custom that allowed [the Company], along with the homicide units in the City of Miami, to consistently go on private property and film without the permission of the residents, the property owners, or the tenants." (App. 59a). The district court granted the Plaintiff's motion for judgment as a matter of law with respect to the filming and broadcast of the search of Plaintiff's residence, finding that "there was a custom that was pervasive in the department at the time of not receiving consent from individuals before allowing [the Company] to film inside of homes and residences." (App. 75a).

The jury ultimately found against the City on the remaining two § 1983 claims, and awarded damages

on all three claims. (App. 38a – 42a). Notably, with respect to the § 1983 claim as to the filming and broadcast of Plaintiff's interrogation, the jury found as follows:

> Did the City of Miami have a *custom or practice* of permitting unreasonable seizures of individuals during the interrogations filmed by the First 48 AND IF SO, was the City's custom or practice the moving force behind Plaintiff's constitutional violation?
>
> Yes x No _____

(App. 39a) (emphasis supplied). Similarly, with respect to the § 1983 claim as to the filming and broadcast of Plaintiff in handcuffs before and after his arrest, the jury found as follows:

> Did the City of Miami have a *custom or practice* of permitting unreasonable seizures of individuals by First 48 filming them in handcuffs AND IF SO, was the City's custom or practice the moving force behind Plaintiff's constitutional violation?
>
> Yes x No _____

(App. 41a) (emphasis supplied).

Following the verdict, the City filed a renewed motion for judgment as a matter of law as to the § 1983 claims, again arguing that the Plaintiff presented insufficient evidence of either a policy or a custom or practice on the part of the City that would permit

municipal liability under *Monell*. (D.E. 115 at p. 11-14). The City noted that the Contract with the Company specifically required the Company to obtain consents prior to filming or broadcast, thereby negating any argument that an official policy of the City caused the alleged violations. *Id.* at p. 11-12. The City added that there was no evidence presented of a widespread custom or practice that would permit municipal liability here, noting that although there was evidence in the record as to the number of episodes of the show that featured City investigations, there was no evidence in the record of a single prior complaint or claim by a suspect that his or her filming or broadcast was accomplished without consent. *Id.* at p. 12.

During the hearing on the City's motion, Plaintiff asserted for the first time that the § 1983 claims were supported by evidence of an official policy of the City, rather than a custom or practice, as was the basis for the district court's denial of the City's initial motion for judgment as a matter of law and the jury's verdict. (App. 93a – 94a). The district court denied the City's motion, finding that this was "not a situation where the Plaintiff had to show a pattern or practice" because "they had an actual . . . policy based upon the actual contract." (App. 106a).

On appeal to the Eleventh Circuit Court of Appeals, the City again argued that there was insufficient evidence of either a policy or a custom or practice that would permit municipal liability under *Monell*. There was no evidence of an official policy, in the form of the City's contract with the Company, because that contract required the Company to obtain all required consents, thereby protecting constitutional

rights. Further, the City asserted that there was insufficient evidence of a custom or practice, because there was no evidence of any violations presented outside of the Plaintiff's own case. The Eleventh Circuit reversed the verdict as to the § 1983 claim related to filming and broadcast of the search of Plaintiff's residence, finding that the district court had improperly granted judgment as a matter of law in favor of the Plaintiff on that claim, where there was conflicting evidence in the record as to whether there was a custom or practice on the part of the City that caused the violation. The Eleventh Circuit affirmed as to the verdicts on the remaining two § 1983 claims, however, finding that "the evidence—viewed in the light most favorable to [Plaintiff]—. . . permitted the jury to find a custom or practice on the part of the City to allow The First 48 to film individuals without obtaining consent." (App. 23a). As support for this statement, the Eleventh Circuit cited no evidence put forth by the Plaintiff that the City had been put on notice of any prior constitutional violations resulting from the filming and broadcast of police activities by the Company. Rather, the Eleventh Circuit acknowledged that witnesses had testified that the Company generally obtained the required consent, but concluded that "[t]he jury apparently disbelieved both witnesses as to whether the First 48 generally obtained consents, and having rejected their testimony, was entitled to find that 'the truth [was] the opposite of [their] story," i.e., that the First 48 generally did not secure consents." (App. 25a).

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Erroneously Held That the Isolated Alleged Incidents of Constitutional Violations in Plaintiff's § 1983 Claims, Which are Founded on the Actions of Non-State Actors, Were Legally Sufficient to Establish a Municipal "Custom or Practice"

The Eleventh Circuit panel opinion affirmed the jury verdict as to the § 1983 claims based on its determination that the "the evidence—viewed in the light most favorable to [Plaintiff]—…permitted the jury to find a custom or practice on the part of the City to allow The First 48 to film individuals without obtaining consent." (App. 23a). But there was no affirmative evidence of any constitutional violations resulting from the filming and broadcast activities of The First 48 in Miami aside from the circumstances of Plaintiff's case. The Eleventh Circuit's determination that a "custom or practice" under *Monell* can be founded on the isolated incidents of the Plaintiff's own case runs contrary to long standing precedent from this Court and other federal courts.

Monell established that a municipality cannot be made liable for § 1983 violations by the application of the doctrine of *respondeat superior*. *Monell*, 436 U.S. at 691. This Court has since explained that this holding was "about responsibility," because Congress, in enacting § 1983, "never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose

liability in order to oblige municipalities to control the conduct of *others*." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in original). A municipality can only be held liable, therefore, when the constitutional violation at issue is caused by either a "policy" or a "custom" of the municipality. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) ("the *Monell* Court held that only deprivations visited pursuant to municipal 'custom' or 'policy' could lead to municipal liability"). Here, the jury verdict and the Eleventh Circuit opinion find liability based on a "custom or practice," rather than a "policy." (App. 23a, 39a, 41a).

The isolated incidents of alleged constitutional violations presented by Plaintiff's own case are insufficient to establish *Monell* liability here. In *Tuttle*, this Court explained that

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.

Tuttle, 471 U.S. at 823–24. As this Court later explained

> an act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.

Bd. of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 404 (1997).

Although this Court has since clarified the holding in *Tuttle* to explain that single constitutional violation can form the basis of municipal liability, that was only in circumstances where a single decision by "municipal policymakers" causes the constitutional violation. *Pembaur*, 475 U.S. at 479-80. In other words, if an "official policy" has been established by any official with such decision-making authority, the Plaintiff need not establish widespread violations based on that policy to prevail on a claim for municipal liability. *Id.* at 480-81. But federal courts continue to apply the principal that, absent an official policy, municipal liability premised on a "custom or practice" cannot be supported by evidence of a single or isolated incidents of constitutional violations. *See, e.g.*, *Vippolis v. Vill. of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) (finding it improper for "jury to find municipal liability without any proof beyond the wrongful action taken by the officer"); *Brewington v. Keener*, 902 F.3d 796, 803 (8th Cir. 2018) ("a single incident cannot serve as notice for a pattern of misconduct"); *Gant v. County of Los Angeles*, 772 F.3d 608, 618 (9th Cir. 2014) ("proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker").

Here, the Eleventh Circuit affirmed municipal liability under § 1983 based on a "custom or practice" supported only by the evidence of the constitutional violations associated with Plaintiff's arrest and

interrogation. (App. 23a – 26a). This is in direct conflict with the precedent described above, and constitutes an end run around this Court's core *Monell* holding that municipal liability cannot be premised on *respondeat superior*. If allowed to stand, the Eleventh Circuit holding constitutes the imposition of liability on the City of Miami for the actions of its employee officers, absent evidence that the City would have any reason to know that such constitutional violations could be taking place. Even worse, the liability is premised on the idea that those City officers were responsible for ensuring that non-state actors, employees of the Company involved in the production of The First 48, complied with the Company's contract with the City by obtaining the contractually required consent. The imposition of liability based on a "custom or practice" that is supported only by the example presented by the circumstances of the instant case has the dangerous potential to eviscerate *Monell*.

II. The Eleventh Circuit Erroneously Held That Its Theory That the Jury Disbelieved Witness Testimony to the Contrary Constituted Sufficient Evidence to Meet the Plaintiff's Burden of Proof in the Absence of Affirmative Evidence Supporting Plaintiff's Claim

The Eleventh Circuit opinion also erroneously allowed for an inference of additional constitutional violations based on its assessment of what witness testimony the jury may or may not have believed. In finding sufficient evidence of a "custom or practice" of the City to allow employees of The First 48 to film

without consent, the Eleventh Circuit concludes that the jury's *disbelief* of City witnesses who testified that the consent was regularly obtained could constitute affirmative evidence that "The First 48 generally did not secure consents." (App. 25a). Although the opinion first addresses some aspects of the contract, without acknowledging that the contract specifically requires that the "Company shall be responsible for obtaining all necessary consents including the written consent of [City] officers and personnel featured in the Program" (App. 111a at ¶ 2), the opinion goes on to address the City witnesses who testified that The First 48 generally obtained consents, as follows:

> [T]he jury was not required to accept the testimony of Sergeant Williams and Commander Cooper. . . . The jury apparently disbelieved both witnesses as to whether The First 48 generally obtained consents, and having rejected their testimony, was entitled to find that "the truth [was] the opposite of [their] story," i.e., that The First 48 generally did not secure consents. *See N. L. R. B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (quoting *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

(App. 25a). However, the *Dyer* case quoted by the Eleventh Circuit completely refutes its premise—that if a witness testifies to something, the jury is free to infer the opposite is true, even in the absence of affirmative evidence to support that version of the facts.

In *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), Judge Learned Hand addressed the premise relied on by the Eleventh Circuit here:

> It is true that the carriage, behavior, bearing, manner and appearance of a witness- in short, his 'demeanor'- is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Id. at 268–69. Judge Hand went on to explain, however, that

> although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in

> spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him. This is owing to the fact that otherwise in such cases there could not be an effective appeal from the judge's disposition of a motion for a directed verdict. He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was. Thus, he would become the final arbiter in all cases where the evidence of witnesses present in court might be determinative. We need not say that in setting aside a verdict the judge has not a broader discretion that in directing one; for we have before us only the equivalent of a direction. It may be argued that such a ruling may deprive a party of a possibly rational verdict, and indeed that is theoretically true, although the occasions must be to the last degree rare in which the chance so denied is more than fanciful. Nevertheless we do not hesitate to set against the chance so lost, the protection of a review of the judge's decision.

Id. at 269.

Judge Hand's point has since been affirmed by the Second Circuit and adopted by the D.C. Circuit. *See Mandelbaum v. United States*, 251 F.2d 748, 752 (2d Cir. 1958) ("The disbelief of a witness does not necessarily establish an affirmative case."); *United States v. Zeigler*, 994 F.2d 845, 849 (D.C. Cir. 1993). The

D.C. Circuit more recently explained in *Zeigler*, in which the government argued that its case was supported by the theory that the jury disbelieved the defendant's testimony, that

> Because we cannot evaluate demeanor, a decision along the lines the government proposes would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each such case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available-the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence-that juries sometimes get things wrong.

Zeigler, 994 F.2d at 849.

While, theoretically, the jury here could have inferred that The First 48 generally did not obtain the required consents, simply by virtue of the jury's disbelief of the witnesses who testified to the contrary, that holding by the Eleventh Circuit deprived the City of any meaningful appellate review. The City argued throughout that there was insufficient evidence to establish a "custom or practice" upon which municipal liability could be imposed because the Plaintiff proffered no evidence of constitutional violations beyond those asserted in his own case. The Eleventh

Circuit determined that the jury's theoretical disbelief of witness testimony to the contrary was sufficient for the Plaintiff to have met his affirmative burden of proof. As Judge Hand pointed out in *Dyer*, to allow the Eleventh Circuit holding on this point to stand deprived the City of meaningful appellate review, particularly where the contract at issue required The First 48 to obtain consents and the witnesses testified that The First 48 generally obtained consents.

This Court should accept review because the Eleventh Circuit opinion conflicts with the above prior decisions of the Second and D.C. Circuits. Further, if left undisturbed, the decision below would allow any matter involving testimonial evidence to be affirmed by an appellate court based on the theory that the jury disbelieved a witness, in the absence of *any* affirmative evidence to satisfy his or her burden of proof on a claim. Such precedent would truly deprive a party of the meaningful appellate review that is essential to our judicial system.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

VICTORIA MÉNDEZ
City Attorney

JOHN A. GRECO
Deputy City Attorney/Chief Appellate Counsel

KERRI L. MCNULTY
Counsel of Record
Assistant City Attorney/Senior Appellate Counsel

Office of the City Attorney
City of Miami
444 Southwest Second Avenue, Suite 945
Miami, Florida 33130
klmcnulty@miamigov.com
(305) 416-1800