No. 19-1112

In The

Supreme Court of the United States

STEPHANIE JONES,

Petitioner,

v.

JEREMY EDER, J. DALE, B. BAKER, R. NG, and FORT BEND COUNTY,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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I. Introduction.

Respondents contend there was neither a case nor controversy resolvable by a ruling on the constitutionality of a Texas statute (BIO 25) but fail to address the implications of refusing to analyze the constitutionality of a statute being wielded to produce these exact deprivations of constitutional rights. Respondents' voluntary concessions (*e.g.,* that they still believe Ms. Jones's hydrocodone is justifiably seized contraband) evidence Fort Bend County's liability under *Monell.*

II. Respondents concede Ms. Jones's Supremacy Clause argument.

Respondents concede, "both the Texas and federal statutes allow possession of controlled substances with a prescription." BIO 30. Ms. Jones had a valid prescription for her hydrocodone and her father had a valid prescription for the Xanax. App. 2a. Respondents' apparent agreement that Ms. Jones legally possessed her hydrocodone under federal law implicates the Supremacy Clause because she was arrested and her pill was seized based on "possession alone". See *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982) ("[A] state statute is void to the extent that it actually conflicts with a valid federal statute[.]"); see also *Wright v. State*, 981 S.W.2d 197, 200 (Tex. Crim. App. 1998) ("The Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 provides that a person may lawfully possess a controlled substance if the substance 'was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.'") (citing 21 U.S.C. § 844).

III. This case presents a "case and controversy".

Ms. Jones and Respondents were adverse parties, all parties submitted their respective contentions concerning the constitutionality of relevant conduct and statutes for adjudication, and the court was capable of acting upon both Ms. Jones's claims and Respondents' defenses in a manner that provided relief. Therefore, Ms. Jones presented a case. See *Muskrat v. United States*, 219 U.S. 346, 357 (1911) (quoting *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (N.D. Cal. 1887)).

Additionally, Respondents' ultimate reliance upon Texas Health and Safety Code Section 481.117(a) created new controversies, *e.g.*:

(a) can a state statute authorize state actors to warrantlessly arrest the People inside their homes whenever controlled substances are observed therein without requiring a reasonable investigation into whether such substances were present pursuant to a lawful prescription?;

(b) can state actors conduct secondary warrantless searches inside the People's homes for "labels or pill containers for pills" (App. 14a) whenever controlled substances are found therein?; and

(c) can state actors reasonably arrest the People without informing them of the underlying charges or asking any related questions, even when they appear to subjectively believe that the existence of

> "labels or pill containers for pills" would affect (if not control) their probable cause analysis? App. 14a.

These questions were presented but avoided below; the answer to each must remain "no". Compare *Trupiano v. United States*, 334 U.S. 699, 707 (1948) ("The limitless possibilities afforded by the absence of a warrant were epitomized by the one agent who admitted searching 'thoroughly' a small truck parked in the farmyard for items of an evidentiary character.") with App. 14a (Respondents Eder and Ng searched Ms. Jones's house for labels or pill containers).[1]

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[1] See also *Jones v. United States,* 357 U.S. 493, 497-98 (1958) ("It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant * * * The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy[.]") (internal citations omitted); *Johnson v. United States,* 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern not only to the individual, but to a society, which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."); *Trupiano*, 334 U.S. at 707 ("Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present."); and *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) ("[A]ny intrusion in the way of search or seizure is an evil,

Respondents contend this case is an "exceedingly poor vehicle for certiorari review" because the lower courts "did not address petitioner's argument that Texas Health and Safety Code § 481.117(a) violated the Supremacy Clause and Commerce Clause[.]" BIO 32. Ms. Jones presented and properly preserved these issues and should not be prejudiced by the judiciary's failure to address controlling and briefed questions of law.

IV. Neither the warrant nor the supporting affidavit referenced pills.

Respondents acknowledge (1) the warrant authorized searching for "any illicit contraband described in the [warrant] affidavit" (BIO 11) and (2) the supporting affidavit did not mention pills of any kind. BIO 10. Therefore, the seizure of Ms. Jones's legally possessed hydrocodone was illegal. See *Trupiano,* 334 U.S. at 707 ("The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure.") (citing *Amos v. United States*, 255 U.S. 313 (1921); *Byars v. United States*, 273 U.S. 28 (1926); and *Taylor v. United States*, 286 U.S. 1, 6 (1932)).

Respondents continue to contend the pills were seized because they "were in 'plain view' and of an immediately apparent incriminating character." BIO 1. This remains consistent with its "possession alone" argument and evidences unreasonable overreach prohibited by the Fourth Amendment. The pills were not contraband and the court agreed (before relying on

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so that no intrusion at all is justified without a careful prior determination of necessity.").

dicta from *Threlkeld*). Compare App. 148a with App. 29a-31a. No reasonable officer or municipality could ever believe the criminality of a legally possessed prescription pill was "immediately apparent" under these (or similar) circumstances. Fort Bend County's unsolicited insistence that its Task Force lawfully seized Ms. Jones's hydrocodone despite her uncontested and legally established prescription evidences its policy, practice, custom, procedure, or training that "possession alone" justified its seizures (a moving force behind the constitutional deprivations herein).

V. Fort Bend County is liable under *Monell*.

Fort Bend County has (as alleged in Ms. Jones's live Complaint):

> "taken the unconstitutional official position that its officers need not establish the *sine qua non* of a criminal offense (in this case, the lack of a prescription); instead, Defendants unconstitutionally believe that said element is an affirmative defense which may be disregarded by officers in the field when they seek to determine probable cause."

Fort Bend County's brief proves this point.[2] There, it continues to affirm its official position (through its

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[2] BIO 14 ("[P]ossession of a prescription is not an affirmative element of the offense under Texas law, but rather a defense to prosecution."); see also BIO 15 ("Texas law did not and does not require law enforcement officers

County Attorney's Office) that no officer committed any wrong and that state law somehow permits warrantless searches and seizures based on "possession alone". This position is unreasonable, deliberately indifferent to the People's clearly established Fourth Amendment rights, and a moving force behind the constitutional deprivations herein.

a. Policymaker

Fort Bend County now contends (for the first time in this case) its Sheriff is not its policymaker for law enforcement. Either Fort Bend County does not know the identity of its relevant policymaker or impermissibly withheld names of individuals likely to have discoverable information supporting its new defenses in violation of Federal Rule of Civil Procedure 26(a)(1)(A). Either way, this issue was not presented below and is not before the Court.

b. Policy, practice, custom, procedure, or training

The County argues there is no evidence of *Monell* liability. BIO 19. Despite the fact that the pills were legally present in Ms. Jones's home pursuant to prescriptions (App. 2a), the County continues to argue that the criminality of both pills was (and remains) immediately apparent (BIO 1, 12), that both pills were of an "incriminating character" (BIO 11), and that its seizure were therefore lawful. This manifestly unconstitutional position evidences the County's official and ratified policy, practice, custom, and procedure.

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to negate the arrestee's possession of a valid prescription prior to arrest.").

Respondent Eder's brief to the Fifth Circuit also admitted he "had been trained he had legal authority to seize controlled substances such as these under the plain view doctrine."[3] These trainings despite the County's "operational supervision"[4] was unreasonable, deliberately indifferent, and a moving

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[3] See also Respondent Eder's Appellate Brief to the United States Court of Appeals for the Fifth Circuit, at 4 ("Lieutenant Eder was also trained the individual who possessed a controlled substance or dangerous drug was obligated to raise, and provide evidence which supported, a defense the suspect lawfully obtained an possess the controlled substance or drug."); *id.*, at 33 ("[P]rosecutor Sistrunk's [Respondents' expert] testimony establishes that relevant police training regarding application of these Texas statutes also supported the arrest."); *id.*, at 27 ("Lieutenant Eder knew from his training and experience as a narcotics investigator that cocaine can be packaged in pill form."); and *id.*, at 29 ("[H]e [Eder] discovered two pills that had a similar appearance as cocaine in pill form."). But see App. 35a, at n. 63 ("In fact, in the twenty-eight years as a U.S. Magistrate Judge reviewing complaints, search warrants, and other related criminal filings, the court has never heard that cocaine or crack cocaine has been pressed into tablet form.").

[4] According to Fort Bend County's Memorandum of Understanding pertaining to its Narcotics Task Force, the County has operational supervision, will fund operations, and:

> "The Task Force supervisors will be responsible for the opening/closing, monitoring and directing investigations in accordance with all applicable local, state and federal laws as well as policies and procedures established by the Board of Directors related to the mission of the Task Force."

force behind the deprivations herein. See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) ("We hold today that the inadequacy of police training may serve as the basis for 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."). Finally, Respondent officers admitted they had repeatedly engaged in similar conduct[5] and submitted an expert report reinforcing their position.

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[5] *E.g.*: (1) "I [Eder and Ng] have investigated many drug crimes and I have worked with prosecutors from the Fort Bend County District Attorney's Office on many drug case prosecutions. No prosecutor has ever informed me that it would be illegal to arrest a person who I found possessing hydrocodone or alprazolam that was not kept in the prescription bottle in which it was dispensed that identified the individual the drug was prescribed for and delivered to."; (2) "To the contrary, I [Eder and Ng] have filed several criminal cases based on such circumstances and no prosecutor or judge ever informed me I was misapplying Texas law by doing so."; and (3) "In my [Baker's and Dale's] opinion, no reasonable and well-trained law enforcement officer would have believed that he or she was violating any clearly established law enforcement procedure or civil rights by arresting Plaintiff, based on the totality of the circumstances now known to me as viewed from the standpoint of what Detective Eder actually knew at the time he arrested Plaintiff. Indeed, I have investigated many drug crimes and I have worked with prosecutors from the Fort Bend County District Attorney's Office on many drug case prosecutions. No prosecutor or judge has ever informed me it would be illegal for an officer to arrest a person who is found in presumptive possession of loose hydrocodone and/or alprazolam that did not objectively appear to have been lawfully prescribed to that person."

Conclusion

The Court should grant the petition.

Respectfully submitted.

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