No. 19-_____

In The
Supreme Court of the United States

HEATHER MARLOWE,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO; SUZY LOFTUS; GREG SUHR; MIKAIL ALI; JOE CORDES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When does a *Monell*-based equal protection claim brought pursuant to 42 U.S.C. § 1983 accrue for statute of limitations purposes? Specifically, does the claim accrue when the plaintiff learns of her own injury, or when she learns of evidence demonstrating a discriminatory policy or custom?

II. Does a plaintiff state an equal protection claim based on a municipality's systemic failure to investigate rape cases, 90 percent of which involve women, in favor of other "more important" crimes?

STATEMENT OF RELATED CASES

- *Marlowe v. City and County of San Francisco et al.*, No. 3:16-cv-00076-MMC, U.S. District Court for the Northern District of California. Judgment entered Jan. 10, 2017.
- *Marlowe v. City and County of San Francisco et al.*, No. 17-15205, United States Court of Appeals for the Ninth Circuit. Judgment entered Feb. 20, 2019.

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The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit, dated February 20, 2019, is reproduced in the Appendix at App. 1a-3a. The Northern District of California's Order Granting Defendants' Motion to Dismiss, dated January 10, 2017, is reproduced in the Appendix at App. 4a-9a. The Judgment of the Northern District of California dismissing Plaintiff's Second Amended Complaint without further leave to amend, also dated January 10, 2017, is reproduced in the Appendix at App. 10a-11a. These opinions are unpublished.

JURISDICTION

The Court of Appeals entered its order affirming the District Court's Judgment of Dismissal on February 20, 2019. (App. 1a-3a). Justice Kagan granted an application extending the time to file until July 20, 2019. (Sup. Ct. No. 18A1179). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

- **42 U.S.C. § 1983 – Civil Action for Deprivation of Rights**

  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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

With all the recent attention that has been focused on sexual assault, it is difficult to conceive that our own law enforcement would contribute to the problem by systematically refusing to test "rape kits" and actively discouraging female victims from pursuing a claim of drug-facilitated rape by a stranger. Yet, that is precisely what happened in this case, and what has happened in many cases throughout the country.

Plaintiff Heather Marlowe ("Ms. Marlowe") was drugged, kidnapped, and forcibly raped by a stranger after attending a city-sponsored event in San Francisco in May 2010. She immediately reported the crime to local law enforcement, went to the hospital, and

underwent an invasive medical examination by a sexual assault nurse that included taking a "rape kit." For years thereafter Ms. Marlowe did everything law enforcement told her to do, including putting herself in harm's way by initiating contact with suspects and visiting their homes – all at law enforcement's behest.

Yet despite Ms. Marlowe's Herculean investigative efforts and law enforcement's initial promises to test her rape kit and provide her with the results within 60 days, and despite Ms. Marlowe's persistent follow-ups with the police department, *nothing happened* – other than an officer discouraging her from pursuing her case because it involved a single cup of drugged and contaminated beer. Ms. Marlowe's rape kit sat, untested and unprocessed, first on a shelf and then in a storage facility for "inactive" cases. In response to Ms. Marlowe's continued inquiries, the police department claimed her kit had not been tested because of a "forensic backlog," and its decision to prioritize "more important crimes." Although components of her kit were supposedly eventually tested at the SFPD crime lab, to this day, Ms. Marlowe has never received the full results or an explanation as to the "irregularities" it purportedly contains, and her requests to have it independently tested have been met with silence and stonewalling. In response, she filed a federal lawsuit alleging deprivation of her right to equal protection, which was dismissed at the pleading stage by the district court and affirmed by the Ninth Circuit.

The man who drugged, kidnapped, and raped Ms. Marlowe has never been identified or brought to justice.

The Ninth Circuit's decision has placed its stamp of approval on a pervasive, systemic, and insidious campaign by law enforcement agencies to hide their own deliberate indifference to crimes of sexual violence behind self-serving and demonstrably false excuses such as a "lack of resources" or a "rape-kit backlog." As several legal scholars and some courts have found, the ever-increasing number of untested rape kits is *not* the result of a lack of resources or funding, but a symptom of a wider systemic problem: the underenforcement of rape complaints – 90 percent of which are brought by women – in favor of diverting resources to over-policing strategies, such as the now-infamous "broken windows" approach, targeted at minority and poor areas.

The result is a double-edged sword of biased and discriminatory provision of police services, in disregard of the Constitution's guarantee of equal protection of the law. The district court's and Ninth Circuit's rejection at the pleading stage of certain equal protection claims by rape victims – who, as noted, are overwhelmingly female – not only is at odds with case law from other circuits and district courts, but perpetuates the very culture of illegal institutional discrimination for which Ms. Marlowe and others like her sought relief in the first place. Adding insult to injury, the Ninth Circuit held her primary claim of a discriminatory policy or custom to be barred by the statute of limitations, failing to recognize – as this Court recently clarified –

that a *Monell* claim brought under § 1983 accrues, not upon the first date of the injury, but upon learning of the discriminatory policy or custom giving rise to the injury.

As Ms. Marlowe pled in her lawsuit, the SFPD made a purposeful policy choice to deprioritize rape investigations and lied about it – to her and to the public – for years. This case presents a perfect vehicle for this Court to hold that such "policy choices" are both unconstitutional and unacceptable, to clarify that there is no heightened pleading standard for rape victims and that rape victims should not be caught in a statute of limitations whipsaw, and to bring the Ninth Circuit into line with modern scholarship and emerging case law that takes seriously the Constitution's guarantee of equal protection for all. Principles of justice and fundamental fairness require no less.

STATEMENT OF THE CASE

A. Factual History

On May 16, 2010, Ms. Marlowe attended the city-sponsored Bay to Breakers race in San Francisco with a group of friends. (SAC ¶ 11.) While there, a stranger offered her what she presumed to be a beer in a red plastic cup, which she accepted and began to drink. (*Id.* ¶¶ 12-13.) Shortly thereafter, she began to feel much more intoxicated than she would have expected from her moderate alcohol consumption to that point; she then lost consciousness. (*Id.* ¶ 13.)

When she regained consciousness about eight hours later, she found herself in an unfamiliar home. (*Ibid*.) She was nauseous and vomited several times, was dazed, confused, and had no memory of what had occurred in the house. (*Ibid*.) She was also physically injured and experiencing vaginal and pelvic pain. (*Ibid*.) She asked the unknown man sitting next to her in a bed in the home what had happened, and he said, "We had sex." (*Id.* ¶ 14.) At that point, she realized she had been drugged and raped. (*Ibid*.)

After gathering herself, Ms. Marlowe went to the nearest emergency room and contacted the San Francisco Police Department to report the rape. (*Id.* ¶ 15.) The SFPD drove her to San Francisco General Hospital, where a sexual assault nurse examiner performed an invasive "rape kit" procedure that included taking samples of biological material from Ms. Marlowe's body. (*Id.* ¶¶ 16-17.) The hospital and the SFPD assured her that the rape kit would be processed and the results returned to her within 14 to 60 days. (*Id.* ¶ 18.)

In May and June of 2010, Ms. Marlowe worked with SFPD officer Defendant Joe Cordes to investigate her rape complaint. (*Id.* ¶¶ 19-28.) Among other disturbing conduct, Cordes instructed Ms. Marlowe to knock on the door of a house while he distracted the owner so that she could see if it was the scene of the crime without him having to bother with a search warrant (*id.* ¶¶ 20-22), and causing her to set up a "date" with a possible suspect under an assumed name and using a disposable mobile phone, again sparing him the work of conducting an investigation (*id.* ¶¶ 25, 27).

At one point, Defendant Cordes told Ms. Marlowe that she should stop pursuing her case because "it was too much work for the SFPD to investigate and prosecute a rape in which alcohol was involved." (*Id.* ¶¶ 26.)

Ms. Marlowe did not give up, although she did tell the SFPD that she would no longer jeopardize her personal safety by performing investigative work that it should have been doing. (*Id.* ¶ 28.)

Meanwhile Ms. Marlowe had never received the results of her rape kit. (*See* SAC ¶ 29.) After repeated and persistent inquiries to the SFPD, she was finally told in May 2011 that her rape kit had not been tested because the crime lab had a "backlog" of "more important crimes," and she should follow up again in six months. (*Id.* ¶¶ 30-31.) Ms. Marlowe did so, in December 2011, when she received a similar response (*id.* ¶ 32), and again in August 2012, at which point she was told that her case was "inactive" due to the passage of time and her untested rape kit was in a storage facility (*id.* ¶ 33). The SFPD also told her that because she was a "woman," "weighs less than men," and had "menstruations," she should not have been out partying on the day that she was drugged, kidnapped, and forcibly raped. (*Ibid.*) Defendant Suhr was Chief of Police at all relevant times and was "responsible for overseeing the entire SFPD." (*Id.* ¶ 5.)

Ms. Marlowe refused to accept the SFPD's view of justice and asked that it remove her case from "inactive" status and test her kit, as it had promised her it would do more than two years earlier. (SAC ¶¶ 34-36.)

In October 2012, Defendant Loftus, who was the chief of the city's Police Commission and in charge of "set[ting] policy for the police department" (*id.* ¶ 4) informed Ms. Marlowe that her kit had been sent for testing, and later that month the SFPD told Ms. Marlowe that her kit had been tested and the results placed in CODIS (*id.* ¶¶ 37-38). Ms. Marlowe herself, however, did not receive the results of her rape kit. (*See ibid.*) The SFPD knew of serious problems and irregularities in its testing process at this time, but made no mention of them to Ms. Marlowe. (*Id.* ¶ 38.)

In May 2013, at Loftus's invitation, Ms. Marlowe spoke at a City Police Commissioner's meeting. (SAC ¶¶ 40-41.) At that meeting, city representatives gave a glowing review of the SFPD's crime lab and represented to Ms. Marlowe and the public that every one of its rape kits had been tested. (*Id.* ¶ 41.)

However, in February 2014, in response to media pressure, the SFPD released results of an audit that showed that it in fact had thousands of untested rape kits in its possession. (*Id.* ¶ 44.) This was the first Ms. Marlowe had heard of the continuing substantial nature of the rape kit stockpile in San Francisco and, by implication, of serious problems with the SFPD's credibility. (*Ibid.*) Ms. Marlowe subsequently learned, through a March 2015 newspaper article, that the SFPD's crime lab itself – under the supervision of Defendant Mikail Ali (*id.* ¶ 4) – also had major deficiencies, including irregularities in evidence-processing and hiring and employing technicians who failed proficiency tests (*id.* ¶ 46).

Now doubtful that her own kit had actually been tested, or tested correctly, Ms. Marlowe filed a public records request in May 2015 seeking the results of her rape kit – results that she had been promised five years earlier – only to be told that this information was not "public record" for purposes of her request. (SAC ¶ 47.) Frustrated by the SFPD's pattern of delay, stonewalling, and affirmative disinformation, she turned to the federal courts to enforce the rights and protections that should have been hers all along.

B. Procedural History

On January 7, 2016, Ms. Marlowe filed her original complaint in the U.S. District Court for the Northern District of California against the City and County of San Francisco and individual defendants Loftus, Ali, Suhr – then the deputy chief of police – and Cordes. On August 4, 2016, she filed a First Amended Complaint ("FAC") against the same defendants alleging violation of her right to equal protection under the Fourteenth Amendment and 42 U.S.C. § 1983, as well as state-law claims. (ER 1-4, 165.) Defendants moved to dismiss and the FAC was dismissed with leave to amend on September 27, 2016. (ER 3, 171.)

Ms. Marlowe filed her Second Amended Complaint ("SAC") on October 21, 2016, also against the same defendants. (ER 72-86.) The SAC alleged an equal protection violation under § 1983 based on discriminatory provision of police services to rape victims, as well as a claim for injunctive relief under the state constitution.

(SAC ¶¶ 55-77.) Defendants were sued in their individual and official capacities, the latter based on two distinct theories: failure to properly train SFPD personnel, particularly lab technicians, in the preservation and testing of evidence (*see*, *e.g.*, SAC ¶¶ 49, 50, 52-53, 63-64), and a policy of deprioritizing and underinvestigating rape complaints because of gender-based discriminatory animus (*see*, *e.g.*, *id.* ¶¶ 49, 51, 54, 60, 68). On November 23, 2016, Defendants moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (ER 56-71.) On January 10, 2017, the district court granted the motion without leave to amend and entered judgment dismissing the action, finding that Ms. Marlowe had not adequately pled an equal protection claim because she had not alleged facts as to similarly situated comparators, and her action was barred by the two-year personal-injury statute of limitations applicable to § 1983 claims in California. (App. 4a-9a.)

Ms. Marlowe timely noticed her appeal in the Ninth Circuit on February 2, 2017. On February 20, 2019, the Ninth Circuit Court of Appeals affirmed the judgment of dismissal on the grounds that Ms. Marlowe's equal protection claim based on a discriminatory policy or custom was barred by the statute of limitations and that she had not adequately pleaded an equal protection violation under her failure-to-train or supervisory liability theories. (App. 1a-3a.)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY WHEN THE STATUTE OF LIMITATIONS FOR A *MONELL* CLAIM BEGINS TO RUN

This Court has not squarely addressed when the statute of limitations for a *Monell*[1]-based equal protection claim begins to run, and the time is ripe for the Court to do so. In ruling that Marlowe's *Monell* claim was time-barred, the court missed the relevant analysis for the accrual of a *Monell* claim, focusing its statute of limitations analysis on the individual injury to Ms. Marlowe in failing to test her kit rather than on the existence of a discriminatory policy or custom of under-investigating violent crimes including sexual assaults against women.

The Ninth Circuit's approach is in direct conflict with this Court's recent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (June 20, 2019), decided after the Ninth Circuit's decision in this case. In *McDonough*, this Court clarified and explained the rule that the time to bring a claim under § 1983 is "presumptively 'when the plaintiff has "a complete and present cause of action."'" *Id.* at 2155. Applying that rule here, Ms. Marlowe's *Monell* claim should not have accrued until she became aware of evidence, not just of an injury to her, but of a discriminatory policy or custom of handling rape kits in general. Indeed, that was precisely the holding of a Second Circuit opinion, disregarded by

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[1] *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

the Ninth Circuit. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995).

The conflict between the Ninth Circuit's decision and that of this Court and another circuit illuminates the need for this Court to address the issue of when the statute of limitations begins to run for a *Monell*-based claim. The Court's guidance in *McDonough* was invaluable in its context, and the Court should expand its guidance to explain the relevant analysis when the claim is not one of an individual injury but rather of a discriminatory policy or custom. This Court therefore should grant certiorari and hold that the statute of limitations for a *Monell* claim does not begin to accrue until the plaintiff becomes aware of evidence of a discriminatory policy or custom.[2]

A. The Court Should Grant Certiorari to Apply its Recent *McDonough* Decision to *Monell* Claims

In *McDonough*, the Court addressed the issue of when the statute of limitations begins to run on a claim brought as part of a § 1983 action. The Court began by

[2] Alternatively, given that the Court decided *McDonough* after the Ninth Circuit's decision, this case may be appropriate for use of the Court's "grant, vacate, and remand" or "GVR" remedy. Because the Ninth Circuit did not have the benefit of *McDonough*, it misconstrued the appropriate analysis regarding accrual of a *Monell* claim and failed to reach the merits of the *Monell* claim. Accordingly, the Court could simply remand the matter to the Ninth Circuit to reconsider its statute of limitations analysis in light of *McDonough* and decide the merits of the *Monell* claim in the first instance.

observing that "[a]lthough courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.'" *McDonough*, 139 S. Ct. at 2155 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). The Court went on to reaffirm that "[t]hat time is presumptively when the plaintiff has a 'complete and present cause of action,' though the answer is not always so simple." *Id.* (internal quotation marks and citation omitted) (quoting *Wallace*, 549 U.S. at 388).

Significantly for this case, the Court held that "[a]n accrual analysis begins with identifying 'the specific constitutional right' alleged to have been infringed." *Id.* (quoting *Manuel v. Joliet*, 580 U.S. ___, ___, 137 S. Ct. 911, 920 (2017)). In that case, the Court identified the plaintiff's fabricated-evidence claim as a due process claim and analogized it to a common law malicious prosecution claim. *Id.*

A critical portion of the Court's statute of limitations analysis turned on application of the Court's opinion in *Heck v. Humphrey*, 512 U.S. 477, 480, n.2 (1994). In *Heck*, the Court held that claims that challenge the integrity of a criminal prosecution cannot be brought unless and until the plaintiff has obtained a favorable termination of that prosecution. The Court in *McDonough* "follow[ed] the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution." *Id.* at 2156. Therefore, the Court concluded, "[o]nly once the criminal proceeding has ended

in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run." *Id.* at 2158.

The Court in *McDonough* distinguished between the date the "injury" occurs and the date on which the cause of action accrues:

> The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. *Cf. Wallace*, 549 U.S. at 389–391, and n. 3, 127 S. Ct. 1091 (explaining that the statute of limitations for false-arrest claims does not begin running when the initial arrest takes place). To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date. *See Heck*, 512 U.S. at 484, 114 S. Ct. 2364.

Id. at 2160. Given *Heck*'s requirement of a favorable termination, the Court concluded that "McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor." *Id.* at 2159.

Applying this rationale here, Ms. Marlowe's *Monell* claim could not have accrued until she had the requisite knowledge of a discriminatory policy or custom by the SFPD. It was only then that she had a "complete and present cause of action." As made clear in *McDonough*, the relevant point in time is not when

the injury occurs, but when the requirements to bring the lawsuit have been satisfied. Thus, contrary to the Ninth Circuit's and district court's decisions, the focus of the inquiry in determining accrual of a *Monell* claim is not the harmful act itself, but rather, the point in time in which a plaintiff should reasonably understand that the harmful act was the consequence of a municipal policy or custom.

Ms. Marlowe alleged that the first time she learned of any facts suggesting that the SFPD maintained a policy, practice or custom of providing unequal treatment to victims of sexual assault was in February of 2014 when the SFPD announced that its audit revealed several thousand untested rape kits in its possession. At no time prior to this announcement was Ms. Marlowe aware, nor should she have been aware, that the harm she was experiencing, namely, the delay in the processing of her rape kit, was the consequence of the SFPD's discriminatory policy.

The Ninth Circuit's reliance on a mere statement to Ms. Marlowe by an SFPD officer that there were "more important crimes" was misplaced because such a comment was insufficient to support a claim of a policy or custom. Rather, as discussed below, to establish a policy or custom, it was essential to evaluate the treatment of others. It was only when it became apparent to Ms. Marlowe that the SFPD had failed to test thousands of rape kits that she had the basis for her claim of a policy or custom. Pursuant to *McDonough*, because Ms. Marlowe's allegations plausibly support a conclusion that her *Monell* claim accrued in February

of 2014, her lawsuit filed in January of 2016 was timely.

B. The Ninth Circuit's Decision Is in Conflict with the Second Circuit's Approach, and the Court Should Grant Certiorari to Resolve the Conflict

The Ninth Circuit's decision is also in conflict with the approach taken by the Second Circuit. That court has elaborated on the meaning of an "injury" in the context of a *Monell* claim:

> Since an actionable claim under § 1983 against a county or municipality depends on a harm stemming from the municipality's "policy or custom," *see Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978), a cause of action against the municipality does not necessarily accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a county "policy or custom."

Pinaud, 52 F.3d at 1157.

The Second Circuit's approach, though decided decades earlier, is consistent with this Court's recent decision in *McDonough*. As the Second Circuit correctly recognized, a cause of action under *Monell* requires the showing of a policy or custom, and therefore the plaintiff does not have a "complete and present cause of action" until such a policy or custom becomes

evident. Only then will the statute of limitations begin to run.

The Ninth Circuit's decision flies in the face of this rationale. This uncertainty in the law between circuits cannot be allowed to stand. Ms. Marlowe is not the only one with similar claims of discriminatory under-investigation, and putative plaintiffs need clarity about the running of the statute of limitations. The Court should provide guidance on the important issue of the accrual date for *Monell*-based claims in this and other contexts, avoiding future errors by the lower courts and making clear that such a cause of action does not begin to accrue until the plaintiff knows, or should know, of the facts demonstrating that the unconstitutional conduct was the result of a policy or custom.

II. THIS COURT SHOULD MAKE CLEAR THAT A RAPE-VICTIM PLAINTIFF WHO PLEADS DELIBERATE UNDER-INVESTIGATION OF CRIMES OF SEXUAL VIOLENCE MAY STATE A PRIMA FACIE CLAIM FOR AN EQUAL PROTECTION VIOLATION

To make a traditional equal protection claim, as Ms. Marlowe did, the plaintiff need only show that she is a member of a protected class – here, women – and the defendants' conduct was motivated by gender-based discriminatory animus. *See*, *e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 255-56 (1977) (requiring showing

of discriminatory effect and discriminatory animus without discussion of similarly situated comparators); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 439 (2d Cir. 2009) (no similarly situated comparators required to state claim of discriminatory non-investigation of domestic violence). An "invidious discriminatory purpose may often be inferred from the totality of the relevant facts," including that a policy "bears more heavily on" members of a protected class. *Washington v. Davis*, 426 U.S. 229, 242 (1976). Further, an equal protection inquiry is highly dependent on a nuanced consideration of the facts and circumstances at issue, *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2241-43 (2019) (discussing Equal Protection Clause in context of *Batson* claim of discriminatory jury selection), thus making it particularly inappropriate for dismissal at the pleading stage.

Indeed, as set forth below, public policy urges a finding that a plaintiff who pleads that law enforcement made a deliberate policy choice to deprioritize rape investigations states a prima facie claim for denial of her right to equal protection. Other courts across the country have recognized such claims and allowed them to survive a motion to dismiss, and existing case law on discriminatory under-investigation of domestic violence logically supports Ms. Marlowe's position.

A. The Decisions Below Ratify a Culture of Minimizing, Deprioritizing, and Ignoring Crimes of Sexual Violence Against Women Through Conscious and Discriminatory Policy Choices

As discussed above, the Ninth Circuit mischaracterized the injury for which Ms. Marlowe seeks relief. Although Ms. Marlowe knew that there were problems with her own rape investigation, she did not know until much later that those problems were the result of a deliberate and pervasive policy of belittling rape cases in general. (*See* SAC ¶¶ 44-47.)

Those acts, and the Ninth Circuit's misunderstanding of Ms. Marlowe's claim, reflect and ratify a widespread law-enforcement culture of purposefully deprioritizing rape investigations by, among other things, failing to properly investigate rape complaints, failing to collect, handle, or store evidence properly, and allowing hundreds or thousands of untested rape kits to pile up, all the while bemoaning a nonexistent "lack of resources" to test them. The failure to properly test rape kits and the under-policing of rape complaints go hand-in-hand. As Corey Rayburn Yung writes, "[u]ntested rape kits are the most visible symptom of the United States' crippled and dysfunctional system of prosecuting rapists," and represent not a "lack of resources," but a judgment that the rape allegations have "already been disregarded." Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L.REV. 205, 208 (2017). Thus, the municipal liability claim under *Monell* is not tied specifically to whether or when Ms.

Marlowe's own kit was tested or properly tested, but that Defendants' approach – or lack thereof – to the thousands of untested rape kits in their possession demonstrates that they have a policy of deliberate indifference to the rights of rape victims to equal provision of police services.

It is well settled that the state may not "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989). Scholars have noted that systemic indifference to testing rape kits in favor of policies like "broken windows policing" has serious constitutional implications for both the women who form the majority of rape victims, and the underrepresented minorities who bear the brunt of over-policing in other areas. *See* Yung, *supra*, at p. 243; Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L.REV. 1287, 1288-89 (2016) (both underpolicing of rape and over-policing of petty crime in poor or minority neighborhoods implicate Equal Protection Clause). Allowing the decisions below to stand places a judicial stamp of approval on systemic law-enforcement bias against rape victims, 90 percent of whom are women, and by implication also ratifies the corresponding law enforcement decision to divert resources toward over-policing of people of color.

In light of subsequent case law developments in this Court and the Ninth Circuit's misconstrual of her claims, Ms. Marlowe deserves a full and fair judicial consideration of her *Monell* claim on its merits, and

public policy amply supports her position. This Court should review her case for that reason alone.

B. The Dismissal of Ms. Marlowe's Complaint for Failure to State a Claim Is in Tension with Decisions of the Sixth Circuit Court of Appeals and Federal District Courts

With respect to the district court's dismissal on the ground that Ms. Marlowe had not identified similarly situated comparators (*see* App. 5a-6a), which the Ninth Circuit did not address, numerous other courts have held that allegations that a police department had a "policy or custom to provide less protection to victims of sexual assault than those of other crimes, and that gender discrimination was the motivation for this disparate treatment" states an equal protection claim without any need for a showing of similarly situated comparators. *Jane Doe v. City of Memphis*, ___ F.3d ___, No. 18-5565, 2019 WL 2637637, at *8 (6th Cir. June 27, 2019) (at *summary judgment stage*, "[t]o make out their Equal Protection claim, Plaintiffs must show that it was Defendant's policy to provide less protection to victims of sexual assault than those of other violent crimes and that this was motivated by gender discrimination"); *see also*, *e.g.*, *Lefebure v. Boeker*, ___ F.Supp.3d ___, No. CV 17-1791-SDD-EWD, 2019 WL 2604767, at *9-10 (M.D. La. June 25, 2019) (denying motion to dismiss plaintiff's equal protection claim against law enforcement and district attorney based on "an implied policy or custom to not properly

investigat[e] claim[s] of sexual assault by women[,] which violates their official duties to protect the public equally"); *White v. City of New York*, 206 F.Supp.3d 920, 931 (S.D.N.Y. 2016) (upholding equal protection claim based on police refusal to take transgender man's complaints against motion to dismiss under Rule 12(b)(6)); *Chase v. Nodine's Smokehouse, Inc.*, No. 3:18-CV-00683 (VLB), 2019 WL 1469412, at *3 (D. Conn. Apr. 3, 2019) ("the police may not choose to shirk their duty to pursue a criminal sexual assault complaint because of some animus against women who make such claims"; finding plaintiff's proposed amended complaint brought on this basis adequately pled an equal protection claim).

Ms. Marlowe pleaded specific facts showing that the SFPD had a longstanding practice of deprioritizing and refusing to properly investigate rape complaints, sometimes outsourcing the investigations to the victims themselves, shelving thousands of rape kits for years, affirmatively lying about the voluminous quantity of untested kits, using shoddy testing practices and employing lab technicians who failed proficiency tests when it did bother to test rape kits, and, as if that were not enough, even actively discouraging rape victims from pursuing justice. (SAC ¶¶ 19-26, 31, 33, 38, 46, 49-68.) Ms. Marlowe further pleaded that the SFPD told her that this was because she was a "woman," who "weighs less than men" and has "menstruations" and because it wanted to prioritize other "more important crimes." (*Id.* ¶¶ 31, 33.) Had she been able to bring her case in another federal jurisdiction, the results likely

would have been different. Thus, this Court should grant the petition in order to resolve the discord among the circuit and district courts.

C. The Decision Below Is an Irrational Departure from Existing Case Law On Discriminatory Policing of Domestic Violence

The Ninth Circuit's decision also deserves review because it flies in the face of existing nationwide case law on discriminatory policing of domestic-violence claims. It has already been established in other circuits that a plaintiff can state a gender-based equal protection claim based on law enforcement decisions to deprioritize investigating claims of domestic violence. *See Villanueva v. City of Scottsbluff*, 779 F.3d 507, 511 (8th Cir. 2015) ("A police department's failure to protect victims of domestic violence can amount to an equal protection violation actionable under 42 U.S.C. § 1983"); *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1031 (3d Cir. 1988) (same); *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) (plaintiff had adduced sufficient evidence of gender discrimination behind police department's policy of ignoring or minimizing domestic violence complaints to survive summary judgment).

It defies reason not to extend the logic behind existing domestic-violence case law to deliberate underinvestigation of rape – a crime whose victims, as Ms. Marlowe alleged in her SAC, are 90 percent female.

(*See* SAC ¶¶ 58, 68.) If under-investigation of violence against women by those known to them is an equal protection violation, then surely under-investigation of violence at the hands of strangers, such as Ms. Marlowe suffered, is as well.

D. Ms. Marlowe Adequately Alleged Claims Against the Individual Defendants and for Failure to Train

It is unclear what more the Ninth Circuit expected Ms. Marlowe to plead in order to adequately allege liability for failure to train and as to the individual defendants. She specifically pled that, as reported in a national news article, the SFPD's crime lab, headed by Defendant Ali, had engaged in widespread substandard testing practices and retained unqualified technicians lacking in basic proficiency. That plausibly supports an inference that better training would have remedied the situation. *City of Canton v. Harris*, 489 U.S. 378, 387-91 (1989).

As to the supervisor defendants, Loftus, Suhr, and Ali, "a plaintiff may state a [§ 1983] claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011). Defendant Ali, as chief of the crime lab at relevant times (SAC ¶ 6), was surely responsible for the conduct and policies espoused during his tenure. Defendants Loftus and Suhr were the chief of the Police Commission and

of the SFPD, respectively, at relevant times. (*Id.* ¶¶ 4-5.) Defendant Loftus was described on the Police Commission's website as being responsible for "set[ting] policy for the Police Department." (*Id.* ¶ 4.) Defendant Suhr was alleged to be "responsible for overseeing the entire SFPD" (*id.* ¶ 5), hardly a conclusory allegation in the context of his position as Chief of Police. Ms. Marlowe alleged widespread and pervasive practices of minimizing rape complaints, failing to investigate them properly, allowing thousands of untested rape kits to pile up, and then testing them with substandard and sloppy procedures performed by incompetent technicians. (*See*, *e.g.*, SAC ¶¶ 49-68.) Again, it beggars belief that Loftus, Suhr, and Ali did not know of and acquiesce in this conduct, particularly as they were alleged to have affirmatively concealed it and even lied about it to the public for several years, and Loftus's own professional website specifically held her out as being responsible for setting SFPD policy. (*See* SAC ¶ 4.) That is enough to plausibly plead a constitutional violation against them that would survive a motion to dismiss. *Starr*, 652 F.3d at 1207. The Ninth Circuit's insistence to the contrary simply compounds the equal protection violation that gave rise to Ms. Marlowe's suit in the first place.

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CONCLUSION

For the foregoing reasons, this Court should grant Ms. Marlowe's petition for a writ of certiorari.

Respectfully submitted,

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