

No. _____

In The
Supreme Court of the United States

JOSE LUIS GARZA, individually and as Representative of
the Estate of Jose Luis Garza, Jr., Deceased; VERONICA
GARZA, individually and as Representative of the Estate
of Jose Luis Garza, Jr., Deceased; CYNTHIA LOPEZ
as Next Friend of J.R.G., Minor Son,

Petitioners,

v.

CITY OF DONNA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the panel err – in the summary judgment context – in determining as a matter of law, on the basis of no articulated evidence or authority, that the signs posted by Respondent were too “inexact” and “nebulous” in meaning to constitute municipal policy for § 1983 “episodic act or omission” purposes, rather than treating the interpretation of such self-identified ambiguities as a question of fact, where the non-movant supplied ample evidence establishing that such signs constituted clear official approval of detainee mistreatment?

STATEMENT OF RELATED CASES

- *Garza v. City of Donna*, No. 7:16-cv-00558, U.S. District Court for the Southern District Of Texas. Judgment entered December 15, 2017.
- *Garza v. City of Donna*, No. 18-40044, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 26, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 922 F.3d 626. The opinion of the district court (Pet. App. 21-74) is not reported but is available at 2017 U.S. Dist. LEXIS 206958.

JURISDICTION

The court of appeals entered its judgment on April 26, 2019, and denied a petition for rehearing on May 30, 2019. *See* Pet. App. 1; 75. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C.S. §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.

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.

STATEMENT OF THE CASE

A. Facts

This case arises out of the death-by-suicide of Jose Luis Garza, Jr. (“Decedent”), who hung himself on February 19, 2016 while in the custody of the Respondent, the City of Donna, Texas. As she had in the past, Decedent’s mother had called Respondent’s police department to have her intoxicated son temporarily held in jail, until he sobered up. Although Decedent’s mother explicitly warned the responding officers that that she was “*afraid of [Decedent] hurting himself*” and that she “*feared for his life*,” Respondent’s officers took no precautions in placing Decedent into the Jail, nor did they pass along his mother’s warning to any Jail personnel in charge of his custody. Although formally required, no hourly in-person checks were ever performed on

Decedent. Although formally required, the dispatcher in charge of monitoring Decedent's cell via camera improperly ceased her efforts when two Jailers came on duty, in the wholly erroneous belief that the Jailers had their own monitor. The dispatcher further stated that even if she had noticed any troublesome developments in Decedent's cell, she would not have bothered to notify the Jailers.

Although Respondent's Jailers heard Decedent hitting his body against the cell bars and yelling for attention, they intentionally chose to ignore their Jail's sole occupant, in favor of posting just-arrived signs that Respondent's chief of police (and final policy-maker) had custom-ordered to be placed in the Jail, celebrating Marvel's bloodthirsty vigilante character "The Punisher," and the infamous "Hanoi Hilton" (referenced therein as the "Donna Hilton") renowned for the savage abuse of American POWs (collectively, "Signs"). Respondent's own footage captures the Jailers working on these Signs, while just steps away, the unmonitored Decedent obscured the camera in his cell, and then attempted to hang himself, less than three hours after being booked into Jail.

Strictly by chance, Decedent's suicide attempt was quickly discovered not by Respondent, but by federal ICE agents who happened to be making a routine immigration sweep. Respondent's Jailers made no attempt to personally provide first aid to the unresponsive Decedent, but merely prodded him with a boot and stared, as precious seconds ticked by. Respondent's senior officers ultimately arrived and

initiated CPR efforts, but the drunken dispatcher mispronounced the word “hung” on the 911 call, leading the close-by EMTs to leisurely respond to what they thought was a “tongue” bite call. When the EMTs did arrive, Respondent’s senior officers refused to answer the EMTs’ repeated questions concerning Decedent’s suicide attempt, leaving the EMTs unable to inform the treating hospital of the nature and source of Decedent’s injuries.

Decedent was ultimately pronounced dead, and the Texas Rangers were called in to investigate. Despite such ongoing investigation, the Jail Log was surreptitiously altered to list a supposed 8:10 cell check, footage of Decedent being booked into custody was destroyed in spite of Petitioners’ explicit preservation request, and no Respondent employees were disciplined in connection with the myriad breaches of duty that led to Decedent’s death.

Petitioners filed suit alleging, *inter alia*, a wrongful death claim under 42 U.S.C. § 1983, in the Southern District of Texas, McAllen Division, the honorable Judge Micaela Alvarez presiding (“District Court”). Respondent eventually filed its Motion for Summary Judgment (“SJ Motion”) and, in their SJ Response, Petitioners argued that the Signs ordered to be custom-made and posted by Respondent’s Chief of Police constituted evidence of a policy of active hostility toward the constitutional rights of detainees such as Decedent, by encouraging mistreatment. As to Respondent’s sign reading “Welcome To Donna Hilton,” Petitioners submitted evidence that the investigating

Texas Ranger immediately interpreted it as being a mocking allusion to the infamous Hanoi Hilton POW camp, and promptly advised Respondent's police chief that "*it's going to look bad as far as the sign goes.*" Petitioners also submitted evidence which established how the term "Hanoi Hilton" had become cultural shorthand for abusive incarceration, and likewise tracked the widespread dissemination of the specific historical phrase "Welcome To The Hanoi Hilton."

As to Respondent's second Sign, bearing the skull symbol of the fictional Marvel vigilante character "The Punisher," Petitioners submitted extensive evidence of the long history of skull imagery being linked to abusive beatings, torture and killings by American municipal police forces, as well as the recent spread of such Punisher imagery from American military combat forces overseas to domestic police forces and jail personnel, via the bestseller *American Sniper*, by Navy SEAL Chris Kyle, who summarized the Punisher skull's message as: "*We're here and we want to f***k with you.*" Petitioners also documented the extensive media firestorm arising from the 2017 decision of two municipalities, in Kentucky and New York respectively, to openly – and prominently – display officially sanctioned Punisher skulls on their squad cars. In the resulting uproar, well over a dozen commentators – including the co-creator of The Punisher character – complained of the gross impropriety of the official adoption of vigilante symbolism, by police officers sworn to uphold the law.

Petitioners also submitted expert testimony opining that the Chief Of Police's posting of the Signs constituted "*clear approval of the mistreatment of those incarcerated.*" Although the movant, Respondent wholly failed to supply any contrary summary judgment evidence indicating that there was any permissible rationale for posting the Punisher Sign in their Jail, with their Chief Of Police claiming instead – in contradiction of Jailer testimony – that he had no earthly idea how the Punisher Sign came to be included with the "Hanoi Hilton" Sign he admitted ordering and paying for.

B. Proceedings Below

In ruling on Respondent's SJ Motion, although Petitioners had extensively briefed their argument that the Signs constituted a critical element of their § 1983 claim, the District Court essentially failed to address such Sign-related arguments, in granting summary judgment in Respondent's favor. Ignoring Petitioners' argument that the Signs communicated and/or reflected Respondent's endorsement and encouragement of the mistreatment of detainees, to its employees who did in fact serially mistreat Decedent, the District Court concluded instead that because Decedent himself could not have seen such Signs from his cell, the Signs could not have frightened him into hanging himself.

In appealing to the Fifth Circuit, Decedent again requested that the court directly address the ramifications of Respondent's "final policymaker ordering the

posting of ‘Punisher’ and ‘Donna/Hanoi Hilton’ signs in its Jail, which explicitly advocated the mistreatment of detainees.” In its Opinion dated April 26, 2019, the Fifth Circuit concluded the final policymaker’s order to post the Signs could not announce an official policy of encouraging detainee mistreatment, because “[t]he import of the signs is too general and inexact for the signs to constitute the sort of specific directive required for municipal liability, and it is too nebulous to constitute a moving force.”

Petitioners thereafter filed their motion for rehearing, complaining that the Fifth Circuit had erred – in the summary judgment context – in determining as a matter of law that the meaning of the Signs was too ambiguous to be actionable under § 1983, because any such dispute regarding the Signs’ meaning constitutes a question of fact for the jury, with all inferences and doubts to be resolved in Petitioners’ favor. Petitioners further complained that the Fifth Circuit had reached such naked conclusion without reliance upon any legal standard, caselaw or evidence, whereas the relevant expert and non-expert evidence in the record regarding the Signs’ meaning strongly favored the nonmovant Petitioners. Petitioners also noted that the Fifth Circuit’s ruling likewise contradicted its holding in *Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986), where the court – in determining whether a sheriff’s “always shoot first”-style statements officially encouraged the department’s use of excessive force for § 1983 purposes – explicitly based its ruling upon the fact that the plaintiff had submitted absolutely no

evidence as to whether such an invidious “meaning was either intended or in context was understood.” Although Petitioners requested the Fifth Circuit to undertake precisely such an inquiry into what message the Signs were intended or understood to be communicating – in light of the ample evidence supplied by Petitioners – on June 3, 2019, Petitioners’ motion for rehearing was nonetheless denied without comment.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit’s Decision Raises An Issue Of National Importance By Improperly “Greenlighting” The Spreading Law Enforcement Practice Of Officially Adopting Pro-Vigilante Symbols, And So Far Departs From Accepted Judicial Norms As To Merit The Exercise Of This Court’s Supervisory Powers

The reason for granting Petitioners’ Writ could not be more straightforward. Such reason is wholly and solely related to the consequences of allowing law enforcement agencies to openly adopt pro-vigilantism symbolism, without fear of sanction when an arrestee or detainee is consequently injured through their officers’ use of just such vigilante-style policing.

As fully briefed before the District Court, there exists a long historical record of American police forces *clandestinely* utilizing Punisher (and Punisher-like) skull symbols, in connection with extrajudicial beatings and torture. More recently, however, in 2017 municipalities in both Kentucky and New York saw fit to openly – and prominently – display officially

sanctioned Punisher skulls on their squad cars. This Court is also asked to take judicial notice of the recent controversy erupting in November 2018, when the New York Police Department handed out “challenge coins” bearing the Punisher skull logo to its officers. See John Annese and Rocco Parascandola, *Good for morale or bad for community relations? NYPD Gang Squad’s use of The Punisher logo raises questions*, New York Daily News (Nov. 4, 2018), available at <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-the-punisher-logo-gang-squad-nypd-20181102-story.html>. (last visited July 18, 2019).

Even more recently, on July 11, 2019, St. Louis Police Commissioner John W. Hayden issued an official memo condemning the Punisher imagery used in social media posts by his officers, alongside extensive racist and anti-Muslim content uncovered by a watchdog organization. Hayden’s memo noted that the Punisher’s bloodthirsty vigilantism is wholly antithetical to the constitutional rights that police are sworn to uphold. See Colonel John W. Hayden, Jr., *St. Louis Municipal Police Department Memo – Punisher Logo* (July 11, 2019), available at <https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/8/64/864f4a48-a6fe-5860-b3e8-0f09838efc50/5d27a96c0aedf.pdf.pdf>. (last visited Aug. 16, 2019).

Commissioner Hayden’s memo was triggered by a Facebook post by the president of the St. Louis Police Officers’ Association, who urged all officers to adopt the Punisher logo, claiming it to be a “symbol of the war against those who hate law enforcement. It’s how we show the world that we hold the line between good and

evil.” Tim Balk, *St. Louis police union asks officers to post Punisher logo in solidarity with cops under investigation*, New York Daily News (July 12, 2019), available at <https://www.nydailynews.com/news/national/ny-punisher-logo-st-louis-police-plain-view-project-20190712-dcskdnuefvaw5kpvn63wbf4r4-story.html> (last visited Aug. 19, 2019). In sum, it seems clear that both the police commissioner and police officers of St. Louis strongly dissent from the Fifth Circuit’s description of the Punisher skull as being harmlessly “nebulous” in meaning, and appear to agree instead that such logo affirms the police officer’s unquestioned right to dispense good guy/bad guy vigilante justice.

As extensively discussed in Petitioners’ District Court briefings, commentators agree that the primary impetus behind the recent spread of such Punisher skull imagery was its embrace by the Navy SEAL Chris Kyle who, in his bestselling book *American Sniper*, summarized the message sent by Punisher skull as follows: “*We’re here and we want to f**k with you.*” While opinions may differ regarding the propriety of such sentiments in the kill-or-be-killed context of a battlefield, Respondents are wholly unaware of any constitutionally defensible rationale for officially sanctioned display of the Punisher symbol in the jail-house context, where this Court has long recognized that pretrial detainees have yet to be found guilty of any offense, and are largely at their jailers’ mercy.

Similarly, assuming – as we must for summary judgment purposes – that the investigating Texas Ranger correctly interpreted Respondent’s “Welcome To Donna Hilton” Sign as a mocking evocation of the

notorious Vietnam-era “Hanoi Hilton,” which phrase has unquestionably become cultural shorthand for the abuse of prisoners, it is again hard to see what possible benign rationale there could be behind Respondent’s official embrace of the savage “Hanoi Hilton” mythos in the context of its Jail.

It cannot be overemphasized that the Signs at issue in this case were expressly ordered to be posted in the Jail by Respondent’s chief policymaker, rather than rogue staff members, and served no second, permissible purpose. Under such circumstances, it becomes very hard to see why Petitioners are to be denied their day in court, so as to definitively determine whether the departmental philosophy embodied in such Signs was indeed a moving force behind Respondent’s employees’ serial deprivation of Decedent’s constitutional rights. The stakes inherent in the official adoption of any oppressive symbol – whether swastika, noose, or burning cross – are simply too grave to permit the courts to blithely dismiss the import of such symbol as “inexact” or “nebulous,” based solely on their own say-so. Symbols undeniably have meaning, and a jail’s official adoption of pro-vigilante symbolism undeniably carries a very heavy meaning indeed. Yet despite the vast amount of expert and nonexpert evidence the non-movant Petitioners alone supplied establishing that such Signs constituted Respondent’s “clear approval of the mistreatment of those incarcerated,” the Fifth Circuit inexplicably concluded that the Signs’ supposed ambiguity-of-meaning merited dismissal, rather than created a triable issue of material fact.

Four paragraphs above, the Petitioners supplied a link to a recent New York Daily News article, which prominently features a photograph of an NYPD-issued Punisher symbol which – in all significant respects – corresponds with that the Respondent posted in its Jail. In absolute seriousness, Petitioners request that this Court judicially notice such image, and ask itself whether any reasonable observer could find absolutely anything “inexact” or “nebulous” about the message thereby conveyed.

As recognized by the St. Louis Police Commissioner, the clear answer is no: the relationship between the skull and police officer is no different now than when displayed on the Totenkopf ring of Himmler’s SS,¹ or by their American police contemporaries in the now-forgotten Black Legion, during this country’s last flirtation with fascism.

Ultimately, it is Petitioners’ position that the recent trend of police departments officially adopting symbols which are, deeply and undeniably, linked to the extrajudicial mistreatment of detainees is profoundly antithetical to both the Constitution and the

¹ It was precisely this close relationship to Nazi atrocities which recently led Britain’s elite Special Air Service to ban the wearing of Punisher imagery. Nicole Drum, *‘The Punisher’ Skull Banned From British SAS Helmets*, comicbook.com (Feb. 10, 2019), available at <https://comicbook.com/marvel/2019/02/05/punisher-skull-logo-banned-british-sas-troops-marvel/> (last visited Aug. 16, 2019).

§ 1983 statute, and hence deserving of this Court's full and careful scrutiny.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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