No. _____

In The
Supreme Court of the United States

JOSEPH SMITH, ET AL.,

Petitioners,

vs.

PAMELA MOTLEY, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under existing Ninth Circuit and United States Supreme Court authority, a plaintiff can establish an Equal Protection Clause violation in the context of discriminatory policing by presenting either a statistical analysis showing a disparity in the treatment of disfavored and non-disfavored groups or evidence of instances in which the government treated similarly situated individuals differently, allowing for an inference that this disparity resulted from invidious discrimination.

May plaintiffs meet their burden of establishing an Equal Protection Clause violation by a third method, where the plaintiffs have only anecdotal evidence of how the government allegedly treated the disfavored group?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

Joseph Smith, Brian Little, Derrick Johnson, Matthew Couto, Bernard Finley, Bryon Urton and City of Fresno, represented by Scott Wm. Davenport, Esq., and Robert P. Wargo, Esq., Manning & Kass, Ellrod, Ramirez, Trester, LLP, 801 South Figueroa Street, 15th Floor, Los Angeles, CA, 90017; (213) 624-6900

Respondents (plaintiffs and appellants below):

Pamela Motley, Valeria Caldera, Danny Rice, and Yvette Caldera (individually and as the representative of the Estate of Cindy Raygoza) represented by Kevin G. Little, Esq., Law Office of Kevin G. Little, Post Office Box 8656, Fresno, California 93747; (559) 342-5800

RELATED CASES

Motley v. Smith, No. 15-cv-00905-DAD (BAM), U.S. District Court for the Eastern District of California. Judgment entered January 8, 2018.

Motley v. Smith, No. 18-15171, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 22, 2019. Petition for Rehearing denied October 16, 2019.

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The opinion of the Court of Appeals from which this appeal is taken (Appendix [App.] 1-3) was reported at *Motley v. Smith*, 775 Fed. Appx. 371 (9th Cir. 2019). The order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* (App. 36) was not reported. The opinion of the District Court (App. 4-35) was not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on August 22, 2019. The Court denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* on October 16, 2019. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by respondents pursuant to 42 U.S.C. §1983, which states as follows:

> "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."

Respondents allege that the petitioners deprived them of rights secured by the Fourteenth Amendment, the relevant part of which states as follows:

> FOURTEENTH AMENDMENT (Section 1):
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Overview of the Case

In the original complaint filed on June 14, 2015, and all subsequent amended complaints, plaintiff Pamela Motley alleged that she suffered severe personal injuries inflicted by her estranged husband Paul; and plaintiffs Valeria Caldera, Danny Rice and Yvette Caldera (the latter in both her individual capacity and as the representative of the Estate of Cindy Raygoza), alleged that their mother, Raygoza, was killed by an ex-boyfriend, because the City of Fresno Police Department and some of its officers failed to adequately intervene and prevent the attacks upon Motley and Raygoza as a result of discriminatory policing and/or negligence.

After the District Court granted in part, and denied in part, a motion to dismiss portions of the Second Amended Complaint ("SAC") filed by defendants, the following claims remained: (1) denial of equal protection (based on gender and status as a domestic violence victim) and municipal liability—unconstitutional custom/practice or policy (violation under *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978)) re denial of equal protection (based on gender and status as a domestic violence victim), pursuant to 42 U.S.C. § 1983; (2) negligence (by failure to notify of victim's rights, pursuant to California law); and (3) wrongful death (negligence, by failure to notify Raygoza of victim's rights).

On August 21, 2017, defendants filed their motion for summary judgment as to the SAC, and the District Court granted the motion for summary judgment in its entirety and entered judgment on January 9, 2018. The District Court noted that in order to prevail on their equal protection claim, plaintiffs were required to (1) present "a statistical analysis showing a disparity in the government's treatment of disfavored and non-disfavored groups" (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)) or (2) "point to specific instances in which the government treated similarly situated individuals differently, which would allow the factfinder to infer that the different treatment resulted from invidious discrimination" (citing *Gilani v. Matthews*, 843 F.3d 342, 348-349 (8th Cir. 2016); *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001); *Armstrong*, 517 U.S. at 467; and *Elliot-Park v. Manglona*, 592 F.3d 1003, 1006 (9th Cir. 2010)). As plaintiffs presented no such evidence, the District Court granted summary judgment in favor of defendants on this claim.

Plaintiffs appealed the judgment with respect to the equal protection claim (but not the negligence claims) and the dismissal of the claim for Deprivation of the Due Process Right to Familial Association under 42 U.S.C. §1983, as set forth in the SAC, to the Court of Appeals. On August 22, 2019, the Court of Appeals reversed the District Court's grant of summary judgment on the equal protection claim, affirmed the summary judgment on the negligence claims, affirmed the District Court's dismissal of the due process claim for

the denial of the right to familial association, and remanded the case for further proceedings. The Court of Appeals did not disagree with the District Court's legal analysis but, rather, asserted there were triable issues of material fact without identifying any evidence in dispute or the triable issues. The Court of Appeals, contrary to the United States Supreme Court and Ninth Circuit authority cited by the District Court, permitted plaintiffs to proceed on their equal protection claim solely on anecdotal evidence of how the allegedly disfavored group was treated by the government.

On October 16, 2019, the Court of Appeals denied defendants' petition for panel rehearing and for rehearing *en banc*.

2. The Underlying Facts

The District Court set forth the underlying facts in this case in its decision on the motion for summary judgment (App. 5-12):

2.1. Pamela Motley Facts

On March 13, 2014, Pamela Motley called the Fresno Police Department ("FPD") and reported that her husband Paul Motley ("Paul") had attacked her the prior day. FPD Officers Smith and Little responded to Pamela Motley's location the following day. Paul was not present when Officers Smith and Little arrived. The officers observed Pamela Motley's injuries, and later the same day, they located Paul and also observed

injuries on his body. The FPD officers did not arrest Paul at that time because they concluded that his injuries were indicative of "mutual combat," although the parties dispute whether such a conclusion was justified as a matter of law.

The officers also requested an emergency restraining/protective order ("EPO") against Paul, provided the emergency protective order to Pamela Motley, and served it on Paul that same day. That EPO was set to expire by March 21, 2014. The parties disputed whether Paul was subject to a separate court-issued protective order (which did not list Pamela as the protectee) stemming from a January 6, 2014, incident in which he allegedly attacked another woman. The parties disputed whether Officers Smith and Little provided Pamela Motley with an FPD domestic violence information form, as they were required to do under FPD policy. However, it was undisputed that: (a) the only information on the domestic violence victim info form that addressed safety was the notice of the right to go to court and get a restraining order; and (b) by operation of the EPO, Pamela conceded that she was advised by the officers that she knew she could go to court to get a restraining order once the EPO expired.

Specifically, FPD officers are trained to provide a domestic violence information form to each domestic violence victim they encounter on their calls and to advise domestic violence victims of their right to make a citizen's arrest. Plaintiffs contend that as a factual matter, FPD officers frequently fail to do so, and none

of the parties or non-party declarants offered by plaintiffs ever received this information from FPD officers.

Officers Smith and Little discovered a firearm registered to Paul that was in the control of Pamela Motley's adult daughter. The daughter retrieved the firearm and turned it over to the officers. Even though Motley admitted that the firearm was not found in Paul's possession, but was in the daughter's possession, Motley contended that this discovery warranted Paul's arrest, because the conditions of the protective order prohibited him from owning or controlling a firearm.

On March 18, 2014, when the EPO was set to expire, Pamela obtained a separate domestic violence restraining order ("DVRO") against Paul barring him from (among other things) coming to her home or work, contacting her, and harassing her. From that point until April 12, 2014, the parties agree that Paul threatened and harassed Pamela, including by phone and text, but did not physically harm her.

On March 24, 2014, Paul went to Pamela Motley's place of work and demanded that she give him the keys to her car. Motley contends that in addition to demanding her car keys, Paul threatened her and said he was going to break all of the car windows if she did not comply with his request. FPD Officers Couto and Johnson responded to her location on the same day. The officers confirmed that the DVRO had been issued, but that Paul was not in violation because he had not been served with the order. Paul was then served with the

DVRO, but he was not arrested—plaintiff contends that he should have been arrested at that time because he was in violation of the January 6, 2014, protective order. Officer Johnson informed Paul that he could not come within 100 yards of Pamela Motley or her place of employment, and could not contact her. The parties dispute whether, before leaving the scene, the FPD officers provided Pamela Motley with the domestic violence information form as required by policy.

On March 25, 2014, Pamela awoke to find that Paul had called and texted her, and she also believed that he had slashed the tires of her car, which was parked at her home. She called the FPD twice that day to report the incident. On March 26, 2014, Officer Finley responded to her location and confirmed that Paul had called/texted Pamela in violation of the DVRO. Officer Finley attempted to contact Paul at his residence but was unsuccessful. Motley's expert (Scott Allen Defoe) opined that Officer Finley did not adhere to best practices pertaining to domestic violence, which required him to issue a warrant, issue a "be on the lookout" notice, make repeated attempts to contact the alleged perpetrator, or advise the victim of her rights under *Penal Code* §13701(c)(9).

Defendants maintain that if Officer Finley had located Paul, he would have arrested him at that time. Motley disputes this because other FPD officers previously had cause to arrest Paul but failed to do so. The parties again disputed whether Officer Finley provided Motley with a domestic violence information form, although Motley testified at her deposition that she did

not know how she would have been better protected if she had received the information contained in the domestic violence form.

On March 28, 2014, Motley called the FPD and reported that Paul had continued to call and text her in violation of the DVRO. She also reported that, through third parties, she heard that Paul had threatened to kill her and her parents. Paul did not personally threaten to kill Motley in his calls and texts to her on this occasion, although Motley contends that he had done so in the past. FPD officers began to respond to Pamela Motley's home, but upon doing so learned that she had relocated outside of their jurisdiction to Kerman, CA. FPD's response was then canceled, although Pamela Motley contends that this response by FPD to Paul's threats was inadequate.

Paul was not arrested that day, or on April 3, 2014 when he appeared in court on related restraining order proceedings initiated by Motley's parents. Motley also contends that Paul had a court appearance in a criminal case on April 1, 2014 and was also not arrested at that time. It is undisputed that no FPD officers were present at these court proceedings, or even aware of them, although Motley contends that if FPD officers had complied with the prevailing practices, documentation would have been generated that would have resulted in Paul's arrest at the time of his appearance in court.

On April 7, 2014, Paul threatened Motley in person that he would kill her with his gun if she did not

return to him by April 14, 2014. FPD Officer Urton responded to Motley's location that same day, although Paul was not present when Officer Urton arrived.

The parties dispute the nature of the interaction between Officer Urton and Motley. Defendants contend that Officer Urton stayed approximately 80 minutes with Motley and that in addition to questioning her about Paul's threat, he also provided her with information about how to protect herself. By contrast, Motley contends that Officer Urton was rude, insensitive, made sexist remarks to Motley, and stayed only about ten to fifteen minutes.

The parties further dispute whether, after this interaction, Officer Urton drove to Paul's house in an attempt to arrest him. Defendants claim that Officer Urton knocked repeatedly on Paul's door and waited outside his house for approximately 40 minutes, while Motley has presented evidence that Officer Urton never went to Paul's house. In any event, Paul was not arrested on April 7, 2014.

On April 9, 2014, Paul made another appearance in court in a proceeding involving Motley. No FPD officers or defendants were present at that time, although plaintiffs contend that, had the officers complied with domestic violence law, policy, and prevailing practices, Paul would have been arrested at that time. Paul was not arrested. On April 12, 2014, Paul, while lying in wait, shot Motley outside of her parents' home, which resulted in her paralysis.

2.2. Cindy Raygoza Facts

On or about February 24, 2014, Cindy Raygoza called the FPD to report that her ex-boyfriend, Michael Reams ("Reams"), had entered her home without her consent, attacked her, and tried to choke her. FPD Officer Engum responded to Raygoza's location, but Reams had already fled by the time the officer arrived.

Officer Engum, who was accompanied by Officer Fern, took Raygoza's statement, ran a criminal history check, and informed Raygoza that Reams had been convicted of domestic violence in the past. Plaintiffs contend that when Raygoza told police that she had been a victim of domestic violence in a prior marriage, Officer Engum "criticize[d] her choices of men," a statement which Officer Engum denies making. Officer Engum advised Raygoza that because she was aware of Reams' violent nature, she should avoid associating with him.

Officer Engum then offered Raygoza an EPO, but she declined, stating that she wanted a permanent or full-time restraining order. Plaintiffs contend that one of the officers told Raygoza that if she chose to continue to associate with Reams, her future calls related to him would be viewed as her "crying wolf" and that she "would not receive any responses" from the FPD, while Office Engum denied making such a statement. Officer Engum then advised Raygoza that he intended to arrest Reams for violation of his parole. The parties dispute whether the officers provided Raygoza with an FPD domestic violence form (even though Yvette

Caldera admitted she was not present for the entire interaction between her late mother and Officer Engum), and whether Raygoza displayed any evidence of her physical injuries to the officers. After canvassing the area for approximately 20 minutes, Officer Engum was unable to locate Reams and departed. Following this event, Raygoza did not report any other incidents to FPD regarding Reams (although she did contact the FPD again in April 2014 to report a threatening message that turned out to be a prank by a female family member).

On July 14, 2014, Reams broke into Raygoza's residence, pinned her to the ground, and stabbed her repeatedly. FPD Officers Engum and Ruelas responded immediately after neighbors called FPD to report the incident. Upon forcing their way into Raygoza's residence, the officers saw Reams on top of Raygoza, stabbing her. Officer Ruelas then shot and killed Reams. Raygoza died from her injuries.

The FPD is a fully certified law enforcement agency in compliance with the minimum standards set forth by the California Peace Officer Standards and Training ("P.O.S.T.") Commission, which are statewide standards governing the hiring, training, and supervision of police personnel. The FPD operates with widely recognized and published policies and commonly accepted police procedures. Plaintiffs contend that despite this, with respect to domestic violence cases, the FPD does not in fact comply with best practices or adhere to the minimum standards established by the California P.O.S.T. Commissions.

Although it is undisputed that the FPD or the City of Fresno does not have an official policy discriminating on the basis of gender or against domestic violence victims, the parties very much dispute whether a de facto policy or custom to that effect exists. The parties disputed whether the defendant officers were properly trained on the circumstances under which they must carry out an arrest.

2.3. The District Court's Ruling

The District Court ruled as follows on the equal protection/municipal liability claim (App. 16-23):

Defendants first argue that they are entitled to summary judgment in their favor with respect to plaintiffs' claims that they were denied equal protection based on both their gender and status as victims of domestic violence.

Before addressing plaintiffs' equal protection claims in light of the evidence presented on summary judgment, certain preliminary issues must be addressed. As an initial matter, it has been recognized that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)). By the same token, individuals do have a constitutional right "to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons." *Id.* (citations omitted). In bringing

this action plaintiffs contend, in essence, that their assailants were "given a pass by the police" because of the officers' bias against their victims. *See Elliot-Park v. Manglona*, 592 F.3d 1003, 1006 (9th Cir. 2010). To establish an Equal Protection Clause violation in the context of discriminatory policing, a plaintiff must prove that: (1) defendants' enforcement of the law had the effect of discriminating against members of the disfavored group/class; and (2) the police were motivated by a discriminatory purpose. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

Here, defendants' argue that there is no evidence before the court on summary judgment of disparate treatment of plaintiffs vis-à-vis similarly situated individuals who are not members of the protected class. In an analogous case in which an Equal Protection Clause violation was alleged based upon discriminatory prosecution, the Ninth Circuit observed that in order to prove a discriminatory effect, "the claimant must show that similarly situated individuals . . . were not prosecuted." *Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012) (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). In other words, it is not enough to show that plaintiffs were treated poorly; there must also be a showing that they were treated in a *worse* fashion than similarly situated individuals. Plaintiffs may satisfy this requirement in multiple ways. First, a plaintiff may present a statistical analysis showing a disparity in the government's treatment

of disfavored and non-disfavored groups. *See Armstrong*, 517 U.S. at 470 (considering whether a study showing racial disparities in prosecution was sufficient to show discriminatory effect); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding that a facially neutral city ordinance regulating laundromats violated the Equal Protection Clause where the plaintiff demonstrated that permits were denied to 200 Chinese persons but granted for 80 similarly situated non-Chinese persons). Alternatively, a plaintiff may point to specific instances in which the government treated similarly situated individuals differently, which would allow the factfinder to infer that the different treatment resulted from invidious discrimination. *See Gilani v. Matthews*, 843 F.3d 342, 348-49 (8th Cir. 2016) (considering both specific instances of disparate treatment and statistical analysis in determining whether a plaintiff had demonstrated discriminatory effect); *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (citing *Armstrong*, 517 U.S. at 467) (same); *see also Elliot-Park*, 592 F.3d at 1006 (noting a discriminatory effect in policing where an officer fully investigated an identical crime that occurred on the same night, but declined to fully investigate the crime committed against plaintiff).

Here, defendants persuasively argue that plaintiffs have failed to present evidence on summary judgment supporting the required showing of discriminatory effect. There is no evidence before the court on summary judgment suggesting that the FPD treats men or non-domestic violence victims any differently than the

crime victims who have brought this action. Plaintiffs merely state in their opposition brief that "[t]he officers' recurring failures to follow state law and best practices stand in stark contrast to the [FPD's] handling of other cases." (Doc. No. 118 at 12.) But plaintiffs do not direct the court's attention to evidence with respect to the "other cases" to which they refer, nor does the court find any such evidence before it. The court is therefore left with plaintiff's conclusory assertion that crime victims Pamela Motley and Cindy Raygoza were somehow treated "differently" than other similarly situated victims, with no explanation as to how this is so. Such conclusory assertions, unsupported by any evidence, are insufficient to survive a motion for summary judgment.

[B]ecause plaintiffs have failed to come forward with any evidence of a discriminatory effect, defendants' motion for summary judgment with respect to plaintiffs' Equal Protection claims must be granted.

2.4. The Court of Appeals' Opinion

In its opinion reversing the grant of summary judgment on the equal protection/municipal liability claim, the Court of Appeals stated (App. 2):

> The record in this case is extensive, and the parties are familiar with the facts so we do not repeat them here. The record includes contradictory accounts involving material facts. Drawing all inferences in favor of Motley and Raygoza's estate and children, we conclude

> that there are genuine disputes of material facts about whether the FPD treats disfavored groups of crime victims—women and domestic violence crime victims—differently than similarly situated victims. See *Navarro v. Block*, 72 F.3d 712, 716-17 (9th Cir. 1995). Therefore, we reverse the district court's grant of summary judgment on the equal protection claim and remand the case for further proceedings.

REASONS FOR GRANTING CERTIORARI

In granting defendants' motion for summary judgment, the District Court issued a detailed and well-reasoned decision, supported by United States Supreme Court and Ninth Circuit authority, explaining that in order to establish an equal protection clause violation in the context of discriminatory policing, plaintiffs were required to present either a statistical analysis showing a disparity in the treatment of disfavored and non-disfavored groups or evidence of instances in which the government treated similarly situated individuals differently, allowing for an inference that this disparity resulted from invidious discrimination. Since plaintiffs presented no such evidence in opposition to the motion for summary judgment, the District Court properly granted the motion.

In reversing the grant of summary judgment, the Court of Appeals issued a curt two-page opinion, stating that there are "genuine disputes of material facts

about whether the FPD treats disfavored groups of crime victims—women and domestic violence crime victims—differently than similarly situated victims." However, plaintiffs had opposed the motion for summary judgment only with anecdotal evidence of how Motley, Raygoza and other alleged victims of domestic violence allegedly were treated by defendants, and *no evidence* of how the allegedly favored groups were treated differently. The Court of Appeals did not disagree with any of the authority cited by the District Court, but cited no authority that plaintiffs' anecdotal evidence, standing alone, is sufficient to establish an equal protection clause violation in the context of discriminatory policing.

Accordingly, Certiorari is necessary to resolve this important federal question, which conflicts with prior United States Supreme Court and Ninth Circuit precedent.

ARGUMENT

Plaintiffs alleged that the individual officer defendants discriminated against Motley and Raygoza "by denying them the equal protection of the laws protecting women from gender-based violence" and that the Fresno Police Department's "customs, policies and practices, were also a moving force behind the aforementioned constitutional violations."

Defendants demonstrated through affirmative evidence, as well as plaintiffs' own factually deficient

discovery responses and deposition testimony, that they were entitled to judgment on this claim because there was no evidence that Motley and Raygoza were treated differently (with inferior law enforcement protection) because of their gender/sex or their status as victims of domestic violence and because the City of Fresno had no policy of long-standing practice of unlawful discrimination by gender or status as victims of domestic violence.

In opposition to the motion for summary judgment, plaintiffs submitted evidence of Motley and Raygoza's alleged interactions with the officer defendants, as well as declarations from approximately thirteen other female victims of domestic violence in Fresno describing alleged instances of alleged substandard policing by the FPD dating back to 2005 and continuing through 2017. None of these alleged incidents involved the defendant officers or Motley or Raygoza.

The Court of Appeals did not disagree, in any manner, with the legal analysis offered by the District Court in granting the motion for summary judgment. The "State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3, 109 S. Ct. 998, 1004 (1989). Where an equal protection claim is based on discriminatory policing, a plaintiff must prove that: (1) defendants' enforcement of the law had the effect of discriminating against plaintiffs as members of the disfavored group/class;

and (2) the police were motivated by a discriminatory purpose in doing so. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)); *see also Hynson By & Through Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1031 (3d Cir. 1988) (to establish an equal protection claim against police based on gender discrimination in the domestic violence context, a plaintiff must show that "it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom").

Additionally, in order to prove a discriminatory effect, a plaintiff may either (1) present "a statistical analysis showing a disparity in the government's treatment of disfavored and non-disfavored groups" (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)) or (2) "point to specific instances in which the government treated similarly situated individuals differently, which would allow the factfinder to infer that the different treatment resulted from invidious discrimination" (citing *Gilani v. Matthews*, 843 F.3d 342, 348-49 (8th Cir. 2016); *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001); *Armstrong*, 517 U.S. at 467; and *Elliot-Park v. Manglona*, 592 F.3d 1003, 1006 (9th Cir. 2010)). A "smattering of anecdotal experiences is not enough under the law to prove a violation of the Equal Protection Clause." *Villanueva v. City of Scottsbluff*,

779 F.3d 507, 511 (8th Cir. 2015); *see also O'Brien v. Maui County*, 37 Fed. Appx. 269, 273 (9th Cir. 2002) (affirming grant of summary judgment to County because plaintiff, a domestic violence victim, "[o]ther than proffering evidence of irregular domestic violence training and arguably improper police responses to several domestic violence victims, . . . has failed to provide evidence of the requisite 'invidious intent' to prove an equal protection violation").

Plaintiffs submitted *no evidence* in opposition to the motion for summary judgment "suggesting that the FPD treats men or non-domestic violence victims any differently than the crime victims who have brought this action," either in the form of a statistical analysis or specific instances of how the FPD treated male victims of crime differently than female victims of crime, or domestic violence victims differently from the victims of other crime.

The only evidence submitted in opposition to the motion was how Motley, Raygoza and several other alleged victims of domestic violence were treated by the FPD, without any evidence of how they were treated differently or worse than allegedly favored groups (i.e., men and victims of crime other than domestic violence). The Court of Appeals cited not a single legal authority holding that in order to establish an equal protection clause violation in the context of discriminatory policing, anecdotal evidence of how the plaintiffs or alleged disfavored group was treated, *standing alone*, is sufficient to prove a claim or defeat summary judgment.

Notwithstanding that plaintiffs submitted only anecdotal evidence of the alleged treatment of the alleged disfavored group and said evidence is legally insufficient to prove plaintiffs' equal protection claim or defeat summary judgment, the Court of Appeals declared that there are "genuine disputes of material facts," without identifying what specific evidence it is referring to and citing only to a single legal authority: *Navarro v. Block*, 72 F.3d 712, 716-717 (9th Cir. 1995).

Navarro, however, is factually distinguishable and did not justify the reversal of the summary judgment on the equal protection claim. In *Navarro*, the plaintiffs sued the County of Los Angeles and Sheriff of Los Angeles County pursuant to 42 U.S.C. §1983 over their allegedly discriminatory policy and custom of according lower priority to 911 calls related to domestic violence than to non-domestic violence calls. Plaintiffs claimed that "it was the policy and custom of the Sheriff's Department, which administers the 911 emergency system, not to classify requests for assistance relating to domestic violence as an 'emergency' " and that such a policy and custom discriminated against abused women, in violation of the Fourteenth Amendment to the United States Constitution. *Id*. at 713-714.

The district court granted the defendants' motion for summary judgment, concluding that the plaintiffs "failed to offer any evidence of a County policy or custom of treating domestic violence 911 calls differently from non-domestic violence 911 calls, nor any evidence of a County policy or custom of depriving residents in minority neighborhoods of equal police protection, nor

any evidence of the Sheriff's deliberate or conscious indifference to the rights of abused women or residents in minority neighborhoods." *Id*. at 714.

Navarro held that even though the plaintiffs had not demonstrated that the sheriff's department in question had intentionally discriminated against women, their equal protection claims survived a motion for summary judgment on the basis of discrimination against victims of domestic violence "because they could prove that the domestic violence/non-domestic violence classification fails even the rationality test." *Id.* at 717. In other words, even though there was no evidence that the county sheriff's department intended to discriminate against women, there was evidence presented on summary judgment showing that the county had a policy of responding less urgently to domestic violence calls. Specifically, a 911 dispatcher had testified at deposition that dispatchers in the county "were not instructed to treat domestic violence calls as emergencies." *Id.* at 715.

The plaintiffs in *Navarro* came forward on summary judgment with direct evidence that the sheriff's department treated domestic violence victims differently than victims of other crimes and that "it was the *practice* of the Sheriff's Department not to classify domestic violence calls as an emergency." *Id.*

However, plaintiffs submitted no evidence whatsoever in opposition to the motion for summary judgment that defendant officers actually treated Motley or Raygoza, or any of the non-party domestic violence

victims, differently than victims of other crimes or female crime victims differently than male crime victims or that there was any policy or practice of differential treatment. The Court of Appeals cited to no specific evidence submitted by plaintiffs in opposition to the motion for summary judgment with respect to any differential treatment by defendants. It did not do so because plaintiffs submitted no such evidence in opposition to the motion for summary judgment. Therefore, *Navarro* provided no basis for the reversal of the summary judgment on the equal protection claim.

Under the Court of Appeals' view of the law as articulated in this case, a plaintiff can circumvent long standing precedent on failure to protect claims and prevail on an equal protection claim in the guise of discriminatory policing based solely on anecdotal evidence of how an allegedly disfavored group was treated, without any evidence of how the allegedly disfavored group was treated other than the fact that they were victims of crime or evidence of how the alleged favored group was treated differently. There is no legal authority to support this position. Certiorari, therefore, is necessary to resolve this important federal question, which conflicts with prior United States Supreme Court and Ninth Circuit precedent.

CONCLUSION

For all of the foregoing reasons, the petitioners urge the Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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