No. _____

In the

Supreme Court of the United States

POLK COUNTY,

Petitioner,

v.

J.K.J. and M.J.J.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a municipality may be held liable under 42 U.S.C. §1983 only for its own unconstitutional acts. "In limited circumstances," such as when a municipality is on notice of a pattern or practice of unconstitutional acts, it may be held liable on the theory that the "decision not to train certain employees about their legal duty to avoid violating citizens' rights" is tantamount to an official policy of condoning constitutional violations. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). This Court has also left open the possibility that in rare cases a municipality could be held liable for a failure to train even absent any such pattern or practice, but it has never sustained a so-called "single-incident" claim.

In the divided decision below, the en banc Seventh Circuit concluded that a county could be held liable for a correctional officer's repeated and covert sexual assault of two inmates. The majority agreed that the county expressly prohibited sexual contact between officers and inmates, that there was no pattern or practice of violations of that policy, and that the officer had been trained and understood that his conduct violated county policy and criminal law. Nonetheless, it concluded that the county could be held liable on the theory that the risk that an officer would violate its clear prohibition on sexual assault was so "obvious" that its failure to do more to address it constituted a *de facto* policy of condoning sexual assault.

The question presented is:

Whether the "single-incident" theory of *Monell* liability may be used to hold a municipality liable

under §1983 on the theory that its failure to do more to prevent an employee from committing crimes that he had been trained and knew were expressly forbidden by municipal policy (and the law) was tantamount to embracing a policy of condoning constitutional violations.

PARTIES TO THE PROCEEDING

Polk County is petitioner here and was defendant-appellant below.

J.K.J. and M.J.J. are respondents here and were plaintiffs-appellees below.

Darryl L. Christensen was a defendant-appellant below, but is no longer a party to these proceedings.

STATEMENT OF RELATED PROCEEDINGS

J.K.J. v. Polk County, Nos. 18-1498, 18-1499, 18-2170, & 18-2177 (7th Cir.) (opinion issued and judgment entered June 26, 2019; rehearing en banc granted, opinion vacated Sept. 16, 2019; opinion issued and judgment entered May 15, 2020; mandate issued June 15, 2020).

J.K.J. v. Polk County, Nos. 15-cv-428-wmc & 15-cv-433-wmc (W.D. Wis.) (opinion and order on motions for summary judgment in part signed Nov. 28, 2016; jury verdict on liability returned Feb. 2, 2017; jury verdict on damages returned Feb. 3, 2017; opinion and order signed Feb. 5, 2018; amended judgment entered Feb. 6, 2018; opinion and order signed May 16, 2018; second amended judgment entered May 18, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Over the course of three years, correctional officer Darryl Christensen repeatedly sexually assaulted two female inmates in the Polk County Jail. He did so knowing full well that his conduct was both criminal and a clear violation of jail policy. Of course, it should go without saying that sexual assault is a crime. But when it came to sexual contact with inmates, Polk County left nothing unsaid. It unambiguously prohibited any sexual contact between officers and inmates, period. Christensen violated that command (and the law) not because he failed to understand it, or because he did not think the County really meant it, but because he simply did not care that what he was doing was obviously and egregiously criminal.

Christensen's actions were horrific, and he is now serving 30 years in prison for his crimes. And in this §1983 case, a jury awarded each of his victims $5.75 million in damages for his Eighth Amendment violations, a judgment that was unanimously affirmed by the en banc Seventh Circuit in the decision below, and that Polk County has never sought to disturb. But a majority of the sharply divided en banc court also affirmed a §1983 judgment against the County itself, on the theory that it was so obvious that one of its officers would violate the County's unambiguous prohibitions on sexual assault that the County violated the Eighth Amendment by failing to adopt various non-binding federal standards aimed at improving efforts to prevent sexual abuse in prisons.

That conclusion rests on a boundless theory of municipal liability under §1983 that is squarely foreclosed by this Court's precedents. It also conflicts

with decisions from nearly a half a dozen other circuits rejecting comparable efforts to hold municipalities liable for the flagrantly criminal conduct of employees who chose to violate municipal policy rather than respect it. As this Court has been at pains to make clear ever since *Monell* itself, §1983 does not subject municipalities to *respondeat superior* or even negligence liability for the constitutional violations their employees commit. It subjects municipalities to liability only for their own unconstitutional acts. Thus, a municipality violates the Constitution either by embracing policies that violate the Constitution, or by consciously declining to teach its employees what the Constitution requires of them. It does not violate the Constitution by unknowingly failing to stop the rare employee who simply does not care what the law commands. By eviscerating the careful constraints that *Monell* and its progeny impose on municipal liability under §1983, the decision below subjects municipalities to exactly the type of *de facto respondent superior* liability that this Court has rejected at every turn. The Court should grant certiorari to restore §1983 to its proper limits and to restore the federal-state balance that those limits so carefully preserve.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 960 F.3d 367 and reproduced at App.1-110. The Seventh Circuit's initial panel opinion, which was vacated and superseded on rehearing en banc, is reported at 928 F.3d 576 and reproduced at App.111-73, and the order granting the petition for rehearing en banc and vacating that panel opinion is reproduced at App.174.

The district court's opinion on post-trial motions is unreported but available at 2018 WL 708390 and reproduced at App.175-98.

JURISDICTION

The Seventh Circuit issued its opinion on May 15, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State …, 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[.]

Section 940.225(2)(h) of the Wisconsin Statutes criminalizes, as second degree sexual assault and a

Class C felony, "sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member." Section 940.225 is reproduced in full at App.199-205.

STATEMENT OF THE CASE

A. *Monell* Liability

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that a local government is a "person" that can be sued for constitutional violations under 42 U.S.C. §1983. But the Court went on to hold—and has reiterated in every one of its *Monell* decisions since—that "a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 691; *see also, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 60-62 (2011). Instead, "under §1983, local governments are responsible only for 'their *own* illegal acts.'" *Connick*, 563 U.S. at 60. Accordingly, "[p]laintiffs who seek to impose liability on local governments under §1983 must prove that action pursuant to official municipal policy caused their injury." *Id.*

Typically, that requires identifying some official "decision[] of a government's lawmakers," "act[] of its policymaking officials," or "practice[] so persistent and widespread as to practically have the force of law." *Id.* at 61. "In limited circumstances," however, a §1983 plaintiff may establish liability based on "a local government's decision *not* to train certain employees about their legal duty to avoid violating citizens' rights." *Id.* (emphasis added). That said, this Court has cautioned that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," for an alleged

"'policy' of 'inadequate training'" is inherently "nebulous, and a good deal further removed from the constitutional violation, than" an identifiable policy or custom. *Id.* Accordingly, when a plaintiff proceeds on a failure-to-train theory, the failure "must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (alteration in original). "Only then can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under §1983." *Id.*

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* Thus, a "pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62. But this Court has "left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference." *Id.* at 63. To illustrate, the Court offered a hypothetical:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force … can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989).

While the Court has continued to decline to foreclose the possibility of such a "single-incident" case since it first posited the theory in *Canton*, it has yet to identify a viable one. In fact, the Court has rejected each single-incident claim it has confronted. *See, e.g.*, *Connick*, 563 U.S. at 63-70; *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407-09 (1997). In doing so, the Court has made clear that the single-incident theory is not a path to holding municipalities liable for failing to do more to prevent employees from violating *known* constitutional limits. Instead, it is a theory reserved for the "rare" instance when a municipality fails to equip its employees with any "knowledge at all of the constitutional limits" that govern their conduct in situations that they are all but certain to encounter, even though "there is no reason to assume" that they possess that knowledge on their own. *Connick*, 563 U.S. at 64, 67. Only then can failure to provide that obviously necessarily training be deemed tantamount to embracing an official policy of condoning constitutional violations.

B. Factual Background and District Court Proceedings

The Polk County Jail is a local correctional facility in northwest Wisconsin that houses both male and female inmates and employs about 27 correctional officers. App.3. In 2014, Polk County received a call from an investigator in a neighboring county who reported an allegation that one of Polk County's correctional officers, Darryl Christensen, had engaged in sexual contact with an inmate. App.4. The County immediately commenced its own investigation and confronted Christensen, who resigned on the spot.

App.4. The County continued its investigation and ultimately discovered that, unbeknownst to anyone at the jail, Christensen had repeatedly and covertly sexually assaulted two female inmates, respondents J.K.J. and M.J.J., over a three-year period. App.3-4.

Christensen was prosecuted for his crimes and, after pleading guilty, is now serving a 30-year sentence in prison. App.4. Respondents brought §1983 actions against Christensen, alleging that he violated their Eighth Amendment rights. App.2-3. A jury awarded each of them $5.75 million in compensatory and punitive damages on those claims, a judgment that was unanimously affirmed by both a three-judge panel and the en banc Seventh Circuit, and that no one seeks to disturb here.

In addition to their claims against Christensen, respondents sued Polk County, seeking to hold it liable under both state and federal law. On the state-law front, respondents alleged that the County engaged in negligent supervision and training. But these claims faced an uphill battle because Wisconsin immunizes its counties from negligence claims when (among other things) the alleged act or failure to act involved the exercise of discretion. App.176-81; Wis. Stat. §893.80(4). On the federal-law front, respondents brought §1983 claims, alleging that the County's policies and training with respect to sexual assault of inmates were so deficient as to constitute deliberate indifference to their Eighth Amendment rights. App.2-3. But there, too, their claims faced significant obstacles under *Monell* and its progeny.

First, there is no dispute that Polk County expressly and unambiguously prohibits sexual contact

between officers and inmates. Of course, it requires no specialized training to know that sexual assault is a crime. But Polk County made crystal clear to its officers that sexual contact of any kind with inmates—consensual or otherwise—was not only strictly forbidden, but a felony. *See* Wis. Stat. §940.225(2)(h) (categorizing sexual contact and sexual intercourse by a correctional staff member with an inmate as a Class C felony). That is memorialized in Policy C-202 of the jail's Policy and Procedures Manual, which flatly prohibits any "intimate social or physical relationship with a prisoner," informs officers that sexual contact with an inmate is a crime under Wisconsin law, and instructs that any officer who suspects such conduct has a duty to report it. App.8-9, 40.

Policy C-202 is reinforced by Policy I-100, which forbids any mistreatment or harassment of inmates and instructs that it is never acceptable for "any inmate [to] be the object of verbal, physical, emotional, psychological, or sexual harassment by facility staff." App.40. Policy I-100 also clearly states that "[a]ny officer engaged in such actions is subject to disciplinary charges and/or termination." App.40. Every new officer at the Polk County Jail is trained on all of the jail's policies, including those prohibiting sexual contact between guards and inmates, both by way of an eight-to-ten-week field training program and thereafter by a daily training program. App.47-48. Moreover, every new officer must complete a separate 160-hour state certification program, pursuant to standards set by the Wisconsin Department of Justice, that also includes training on the prohibition against sexual contact with inmates. App.47-48. Inmates are likewise notified in their

inmate handbook that sexual contact between guards and inmates is strictly prohibited. App.9. Accordingly, there was neither any dispute that Polk County has a policy on sexual abuse on which it trains its officers, nor any dispute about what the policy is: Sexual contact with inmates is strictly forbidden, a firing offense, and a crime.

The second difficulty respondents faced with their §1983 claims against Polk County was that no pattern or practice of past conduct could have put the County on notice of any deficiency in its unambiguous prohibitions on sexual abuse, for there was no evidence that anything like what Christensen did had ever before happened at the jail. There was evidence that one officer had been reprimanded for having "an inappropriate relationship with a female inmate." App.5. In particular, he was accused of having "touched [her] on her waist and rear end," made inappropriate sexual comments about her and other inmates, and "focused video cameras on the female housing pod for an inordinate amount of time" while inmates were showering. App.5. There was also evidence that some officers had made several unspecified sexually inappropriate comments about inmates over a 12-year period. App.5-8. But there was no evidence that any officer had ever before engaged in the criminal act of sexually assaulting an inmate.

Accordingly, when the County moved before trial to exclude any evidence or argument trying to claim a pattern or practice of constitutional violations, the district court agreed to exclude "pattern or practice" as a "basis of liability from the jury instructions."

App.181-82. Respondents thus were left relying exclusively on the "single-incident" theory hypothesized in *Canton*—*i.e.*, that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the [municipality] can reasonably be said to have been deliberately indifferent to the need." *Canton*, 489 U.S. at 390. But that effort was frustrated by Christensen's testimony, for Christensen readily admitted that he had been trained and understood at all times that his conduct was both criminal and a violation of jail policy, and that he did not require any additional training to understand that what he was doing was wrong. App.14; *see also* App.47, 105 (Brennan, J., dissenting in part). Moreover, respondents' own expert "conceded at trial that no proof exists that better or more training could have dissuaded Christensen from his predatory and assaultive behavior." App.105.

Respondents thus focused principally on trying to prove something else—namely, that the County could have put in place policies that might have helped *someone else detect* Christensen's criminal conduct sooner. In particular, respondents placed heavy emphasis on the Prison Rape Elimination Act of 2003 ("PREA"), 34 U.S.C. §§30301-09, a federal statute pursuant to which the Attorney General has established "national standards for the detection, prevention, reduction, and punishment of prison rape," *id.* §30307(a)(1). Respondents agreed that Polk County is not required to follow these federal standards, and they did not dispute that Polk County was at all times in compliance with all the state-law

mandates it must follow. App.31; App.54-55 (Brennan, J., dissenting in part). But while Polk County had implemented some of PREA's standards, their expert opined that the County had "inadequately addressed [PREA's] prevention and detection" objectives and that it "could improve its policies" by implementing more of PREA's standards. App.11-12.

The jury returned verdicts for respondents on all claims and awarded each respondent $2 million in compensatory damages against both Christensen and the County, as well as $3.75 million in punitive damages against Christensen alone. App.12-13. The district court granted the County's post-trial motion for judgment on the state-law negligence claim, finding the County immune because respondents' "negligence claims turn on discretionary duties, for which the County is immune" under state law. App.176-81; Wis. Stat. §893.80(4). But the court affirmed the judgment in all other respects. App.197.

C. Seventh Circuit Proceedings

1. Both Christensen and the County appealed to the Seventh Circuit, and a panel unanimously affirmed the verdict against Christensen but divided over the verdict against the County. In an opinion authored by Judge Brennan, the majority overturned that verdict, concluding that respondents failed to prove the "connection between the assaults and any county policy" that is required under *Monell*'s "demanding standards." App.112. In particular, the majority found no legally sufficient basis on which a jury could find "that the jail's express policies were obviously deficient, that the county was or should have been aware that jail policies were inadequate, that

assaults were imminent, or that PREA sets the norm" that all correctional institutions must follow. App.130. Judge Scudder dissented from that aspect of the panel's holding. App.162-71.

2. Respondents petitioned for rehearing en banc, which the court granted. App.174. On rehearing, a divided Seventh Circuit flipped the panel composition. Now writing for the majority, Judge Scudder affirmed the verdict against the County. The majority recognized that "a failure to act amounts to municipal action for *Monell* purposes only if the County has notice that its program will cause constitutional violations." App.21. It also recognized that "[i]n many *Monell* cases notice requires proof of a prior pattern of similar constitutional violations," and it agreed that "[t]his case presents no such pattern." App.22. But the majority found an "alternative path to *Monell* liability … from" the single-incident "door the Supreme Court opened in" *Canton*. App.22.

The majority first focused on purported "gaps" in the County's policies. App.19. Although the majority acknowledged that "Polk County's written policies categorically prohibited sexual contact with inmates and required responses to alleged violations," it faulted the County for failing to adopt all the federal standards established by PREA, and it maintained that "the jury could have found that Polk County's sexual abuse prevention program was entirely lacking" because "[t]he policy stated nothing but the obvious—do not sexually abuse inmates." App.19-21. According to the majority, the jury could have "tallied" these various "gaps" in the County's prevention and detection policies "as part of finding the conscious,

deliberate municipal inaction upon which to rest *Monell* liability." App.21.

The majority next focused on whether the County was on notice that these purported gaps were likely to cause an officer to sexually assault an inmate. It acknowledged that there was no "prior pattern of similar constitutional violations." App.22. But it concluded that no such pattern was necessary because "common sense" told the jury that it "was as obvious as obvious could be" that "male guards would sexually assault female inmates" even if they were instructed that doing so is both prohibited and criminal. App.25-26. Pointing to evidence of unspecified "sexual comments male guards made about female inmates," the majority further posited that the "jury could have viewed the jail's denigrating culture as confirming the undeniable risk that a guard would grow too comfortable, lose his better angels, and step over the clear line marked in Polk County's written policies." App.26-27.

Notwithstanding its express concession that there was no "prior pattern of similar constitutional violations," App.22, the majority also claimed that the jury could have found "it 'highly predictable,' if not certain, that a male guard would sexually assault a female inmate if the County did not act" after it learned of and reprimanded the officer who was accused of engaging in markedly different "sexual misconduct against [another] inmate," App.27-28. According to the majority, "[t]he jury could have viewed the[se] allegations … as exposing as false any belief the County may have had that its barebones

written policy and training were enough to protect its female inmates from sexual abuse." App.29.

"Viewing this evidence all together," the majority concluded, "the jury could have found that Polk County did little to reinforce the dignity and respect owed female (and indeed all) inmates and instead seemed to enable a culture that condoned the sexual objectification of the women in its custody." App.31. In the majority's view, "the jury was entitled to conclude that if Polk County had taken action in response to the glaring risk that its female inmates' health and safety were in danger, J.K.J. and M.J.J.'s assaults would have stopped sooner, or never happened at all." App.33-34.

Judge Hamilton authored a concurring opinion in which he acknowledged that respondents' *Monell* claims were not based on "whether guards knew right from wrong or knew that it was a crime to have sex with inmates," but rather were based on "the county's failure to monitor its guards and its failure to provide effective channels for complaints so as to discourage such abuse." App.37. He analogized to a bank that "train[s] its tellers that they should not steal and that theft is a crime," but fails to conduct regular audits. App.37. In his view, such "reckless" disregard of a known risk that employees will "g[i]ve in to the temptation" to break the law suffices to constitute "deliberate[] indifferen[ce]." App.37.

3. Judge Easterbrook dissented. As he explained, a failure-to-train *Monell* claim must be based on the failure to train employees to *comprehend* potentially thorny policies, like how much force is "excessive." Here, by contrast, "anyone can understand the rule

against intimate physical relations between guards and inmates," and "[t]he Jail made sure that every guard knew about this rule." App.40. He accordingly concluded that "[t]he problem is not a want of *comprehension* (as in *Canton*'s hypothetical) but a want of *compliance*." App.40. And in his view, "subordinate employees' failure to comply with a valid policy is not a ground of liability against a municipality." App.40. "The question under *Monell*," he explained, "is not whether the County could have done better at inducing compliance with its rules," for "[w]ith the benefit of hindsight, that's always possible." App.43. Judge Easterbrook rejected the majority's contrary approach as "just vicarious liability by another name." App.41.

Judge Brennan also authored a dissent, which Judges Bauer and Sykes joined. He detailed at length all the ways in which in which the majority's "decision stands alone, unaided by precedent" from this Court or any other. App.44 (Brennan, J., dissenting in part). Not only has this Court "never ruled that a *Monell* claim based on a municipality's failure to act is viable in the absence of a pattern," but no other "federal appellate court has extended the single-incident exception to the sexual assault context," "applied that exception when the employee's compliance with the municipality's policy and training would have prevented the injuries," or "held that specialized training is required for an employee to know that rape is wrong." App.44-45. He also walked through each and every way in which this case flunks "the stringent fault and causation requirements set by the Supreme Court to prove §1983 liability," App.44, and explained

in detail how the majority's characterization of the facts was belied by the record, App.45-55.

Judge Brennan closed by lamenting that the majority's "decision departs from Supreme Court precedents, imports a negligence standard into the law of deliberate indifference, permits federal encroachment into an area of traditional state authority, and splits with other federal circuits." App.110. In his view, "[o]n these facts and under the controlling law, the employee, not the employer, should be held responsible for these plaintiffs' injuries." App.110.

REASONS FOR GRANTING THE PETITION

The decision below holds that a county may be held liable under §1983 for failing to prevent a rogue employee from knowingly violating unambiguous county training and policy and state criminal law, on the theory that it should have been "obvious" to the county that one of its correctional officers would sexually assault an inmate unless the county embraced a set of non-binding federal standards on how to better prevent sexual abuse in prisons. That radical expansion of the "single-incident" theory of *Monell* liability is flatly contrary to decades of this Court's precedents, as well as decisions from nearly half a dozen other circuits faithfully following them.

As this Court has made clear, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," for a purported "'policy' of 'inadequate training'" is inherently "nebulous, and a good deal further removed from the constitutional violation, than" an identifiable policy or custom. *Connick*, 563 U.S. at 61. And a

failure-to-train claim is gossamer-thin when it is premised not on a pattern or practice of comparable constitutional violations putting the municipality on notice of a deficiency in its policies or training, but on the so-called "single-incident" theory. Accordingly, while this Court has declined "to foreclose the possibility, however rare, that the unconstitutional consequences of failing to equip employees with critical specialized training could be so patently obvious that a city could be liable under §1983 without proof of a pre-existing pattern of violations," *id.*, it has pointedly rejected every effort to convert the single-incident theory into an exception that swallows the pattern-or-practice rule. Indeed, it has rejected every single-incident claim, period.

In keeping with this Court's teachings, lower courts have repeatedly rejected efforts to expand the single-incident theory beyond the rare instance in which a municipality wholly fails to equip employees with specialized training that it is obvious their job requires. And every circuit to confront the question has squarely rejected efforts to use that theory to hold a municipality liable for an employee's flagrantly and undeniably criminal acts, like sexually assaulting someone in their custody or care. Courts have done so even when a municipality did not train its employees that such conduct was prohibited, for as one court aptly put it, "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998). And when such conduct *does* violate a clear municipal policy, courts have been equally unreceptive to efforts to use the single-incident theory

to fault a municipality for the unfortunate reality that even the threat of a decades-long prison sentence will not stop some people from violating the law. As all of these courts have recognized, the single-incident theory is a complete misfit for negligence-style cases in which the claim is not that the municipality failed to teach its employees what the law required of them, but that the municipality should have done more to prevent them from doing what they knew the law prohibited.

The decision below breaks sharply from that consensus. The majority conceded (as it had to) that Polk County flatly prohibited sexual contact with inmates and trained all officers that violation of that policy was not just a firing offense, but a felony. The majority also conceded (as it had to) that there was no pattern or practice of past violations of that unambiguous policy. It further conceded (as it had to) that Christensen knew that his conduct was both prohibited and criminal at all times. And respondents' own expert conceded that there was no evidence that the County could have done anything that would have dissuaded Christensen from perpetrating his heinous crimes. Yet the majority nonetheless declared it so "obvious" that the County needed to do something more that its failure to do so was tantamount to an official policy of condoning sexual assault of inmates.

That decision is irreconcilable with this Court's precedents and with decisions from at least five other circuits. As every other circuit to confront a case like this has recognized, the single-incident theory is not a mechanism for imposing liability on the theory that a municipality "could have done more" to prevent a

constitutional violation. If it were, then it not only would swallow the pattern-or-practice rule whole, but would convert §1983 into the very mechanism for *de facto respondeat superior* liability that this Court's precedents confirm it is not. Worse still, it would give federal courts free rein to micromanage state and municipal policy at every level. This is a case in point: The principal deficiency the majority identified in the County's policies and training was its failure to adopt standards established under a non-binding federal statute that Wisconsin has chosen not to require its local correctional facilities to implement. The decision thus effectively constitutionalizes federal policies that the County is not even statutorily bound to follow.

In short, the decision below runs roughshod over this Court's precedents and the careful federal-state balance that they have striven to preserve. Left standing, it will serve as an invitation to impose liability where *Monell* does not permit it. The Court should grant certiorari and reject the Seventh Circuit's effort to convert §1983 into a tool for subjecting municipalities to the very *de facto respondeat superior* form of liability that is squarely foreclosed by decades of this Court's precedent.

I. The Seventh Circuit's Boundless Expansion Of *Monell* Liability Squarely Conflicts With Decisions Of This Court And Other Courts Of Appeals.

A. *Monell* Claims Must Satisfy Demanding Fault and Causation Standards.

In a long line of cases stretching back to *Monell* itself, this Court has repeatedly and emphatically held that municipalities cannot be held liable under §1983

"unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691; *see also, e.g.*, *Oklahoma City v. Tuttle*, 471 U.S. 808, 818-19 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477-79 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-23 (1988); *Canton*, 489 U.S. at 385-92; *Brown*, 520 U.S. at 403-04; *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 35-36 (2010); *Connick*, 563 U.S. at 61-62. As those cases make clear, neither *respondeat superior* nor "simple or even heightened negligence will … suffice" in this context. *Brown*, 520 U.S. at 407. Instead, a municipality may be held liable under §1983 only "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick*, 563 U.S. at 60 (quoting 42 U.S.C. §1983).

Far from marking an exception to that rule, this Court's failure-to-train cases exemplify it. While mere negligence in training employees may suffice to hold a municipality liable under state law, in a §1983 claim it is not enough to prove "[t]hat a particular officer may be unsatisfactorily trained," or even "that an injury or accident could have been avoided if an officer had had better or more training." *Canton*, 489 U.S. at 390-91. After all, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent" it. *Id.* at 392. To sustain a *Monell* claim on that basis alone thus "would result in *de facto respondeat superior* liability on municipalities—a result [the Court] rejected in *Monell*." *Id.* Equally problematic, it would "engage the federal courts in an endless exercise of second-guessing municipal

employee-training programs"—an exercise that they "are ill suited to undertake" and "that would implicate serious questions of federalism." *Id.* Accordingly, only when a municipality has a "policy of inaction" that "is the functional equivalent of a decision by the city itself to violate the Constitution" can a failure to train give rise to municipal liability under §1983. *Id.* at 394-95 (O'Connor, J., concurring).

The "single-incident" theory of failure-to-train liability is no less demanding. Indeed, it is little surprise that this Court has yet to identify a viable single-incident claim, for the theory is designed to capture only exceedingly narrow circumstances—namely, an abject failure to train employees what the Constitution requires of them in situations that they are very likely to face, even though it is "obvious" that "the duties assigned to" them require specialized training that they cannot otherwise be expected to have. *Canton*, 489 U.S. at 390. Only then could the need for the training in question be deemed "so obvious" that the failure to provide it would amount to *deliberate* indifference to constitutional rights.

Even then, moreover, a §1983 plaintiff still must prove that the failure to train was "the moving force [behind] the constitutional violation." *Id.* at 389. For "absent a requirement that the lack of training at issue bears a very close causal connection to the violation of constitutional rights, the failure to train theory of municipal liability could impose 'prophylactic' duties on municipal governments only remotely connected to underlying constitutional requirements themselves." *Id.* at 395 (O'Connor, J., concurring). Accordingly, when the unconstitutional

act "was almost certainly caused not by a failure to give … specific training, but by" a "miscreant" employee's "willful" violation of that training, *Monell* liability cannot attach. *Connick*, 563 U.S. at 76 (Scalia, J., concurring). After all, if an employee is *knowingly violating* a clear and constitutional municipal policy, then it cannot be said either that the municipality failed to train on what the Constitution requires or that the municipality's policy caused the violation.

B. The Decision Below Is a Stark Departure from Decisions of this Court and Others.

The decision below breaks sharply from these settled principles and from decisions of other circuits that have faithfully followed them. Indeed, the decision "stands alone, unaided by precedent" from this Court or any other court, and "expands municipal liability under §1983 beyond" recognition. App.44, 99 (Brennan, J., dissenting in part). Not only has no other circuit "extended the single-incident exception to the sexual assault context"; no other circuit has applied the single-incident exception "when the employee's compliance with the municipality's policy and training would have prevented the injuries." App.99-100. To the contrary, courts across the country—including the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits—have repeatedly rejected efforts to use the single-incident theory to fault a municipality for failing to prevent an employee from committing flagrant crimes.

In *Flores v. County of Los Angeles*, for example, the Ninth Circuit rejected a single-incident claim based on an alleged "failure properly to train deputy

sheriffs 'to ensure that Sheriff's [d]eputies do not sexually assault women that [d]eputies come in contact with.'" 758 F.3d 1154, 1156 (9th Cir. 2014) (alterations in original). In doing so, the court explained that, unlike "the constitutional constraints o[n] the use of deadly force" *Canton* posited in its hypothetical, "[t]here is … every reason to assume that police academy applicants are familiar with the criminal prohibition on sexual assault, as everyone is presumed to know the law." *Id.* at 1160. Accordingly, the court rejected as a matter of law the theory "that the unconstitutional consequences of failing to train police officers not to commit sexual assault are so patently obvious that the County" could be deemed "deliberately indifferent" for failing to do so. *Id.*

The Tenth Circuit likewise has repeatedly rejected single-incident claims premised on a failure to prevent employees from committing flagrant crimes. For instance, in *Waller v. City & County of Denver*, 932 F.3d 1277 (10th Cir. 2019), the court rejected a single-incident claim brought by a plaintiff who was violently attacked by a deputy sheriff during a court hearing with no provocation or warning of any kind. As the court explained, "[t]his case does not involve technical knowledge or ambiguous 'gray areas' in the law that would make it 'highly predictable' that a deputy sheriff … would need 'additional specified training' to … put [him] on notice that [he] may not violently assault a restrained detainee." *Id.* at 1288 (quoting *Brown*, 520 U.S. at 409 & *Connick*, 563 U.S. at 71); *see also, e.g.*, *Barney*, 143 F.3d at 1308 ("we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates").

The Eighth and Eleventh Circuits also have repeatedly rejected efforts to use the single-incident theory to hold municipalities liable for failing to prevent employees from knowingly violating the law. *See, e.g.*, *Parrish v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010) (rejecting single-incident claim because "it is not so obvious that not" "tell[ing] officers not to sexually assault detainees … would result in an officer actually sexually assaulting a female detainee");[1] *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489-90 (11th Cir. 1997) (rejecting failure-to-train claim because police officers need no special training to know they should not "barter arrests for sexual favors").[2]

Unsurprisingly, courts have been just as hostile to single-incident claims when, as here, they seek to hold a municipality for blatantly criminal conduct that it *did* train employees was prohibited. For example, in *Schneider v. City of Grand Junction Police Department*, the Tenth Circuit rejected a single-incident claim brought by a plaintiff who was raped by

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[1] *See also, e.g.*, *S.J. v. Kansas City Mo. Pub. Sch. Dist.*, 294 F.3d 1025, 1029 (8th Cir. 2002) (rejecting single-incident claim because there is no patently obvious need for public schools to train volunteers not to commit sexual abuse); *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) (rejecting single-incident claim because there is no "patently obvious need for the city to specifically train officers not to rape young women").

[2] *See also, e.g.*, *Floyd v. Waiters*, 133 F.3d 786, 796 (11th Cir. 1998), *vacated on other grounds by* 525 U.S. 802 (1998), *reinstated by* 171 F.3d 1264 (11th Cir. 1999) (rejecting effort to hold board of education liable under §1983 for actions of security guards who sexually harassed and raped students because board was "entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct").

the officer who responded to her 911 call. 717 F.3d 760, 774 (10th Cir. 2013). While the court observed that "[s]pecific or extensive training hardly seems necessary for" an officer "to know that sexually assaulting [women] is inappropriate behavior," it also emphasized that the officer "was, in fact, instructed against relationships with women he met on duty," and was "told … that it was unacceptable to engage in sexual relationships with women whom he met through his job." *Id.* "Given that [the officer] acted in violation of this direct warning," the court refused to hold the municipality liable on the theory that some additional training "would have prevented the assault." *Id.*

The Fourth Circuit similarly rejected an effort to hold a city liable under the single-incident theory based on "an isolated incident of excessive force" when the city "*did* have an aggression policy" that the employee's conduct violated. *Estate of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 671-72 (4th Cir. 2020). As the court explained, "the City apparently understood that it needed a use-of-force policy to avoid the risk of likely constitutional violations, and it had one." *Id.* Because the plaintiff could not "prove that any deficiency in training reflect[ed] a deliberate or conscious choice by a municipality" to tolerate the use of excessive force, the court concluded that the "City cannot be liable under *Monell*." *Id.* The Fifth Circuit likewise has emphasized that the single-incident theory should be "reserved for those cases in which the government actor was provided no training whatsoever," not for claims that the training employees did receive was inadequate. *Peña v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018).

As these and other decisions reflect, it is an unfortunate reality that there are some people who will violate the law no matter how clear it is or how harsh the consequences. But, as courts repeatedly have recognized, the single-incident theory is not a tool for subjecting municipalities to quasi-negligence or *de facto respondeat superior* liability whenever someone in their employ proves to be one of those people. Whether to impose liability on such standards is a question that Congress reserved to state and local governments that are closer and directly accountable to the people. The single-incident theory simply acknowledges the possibility of the rare case in which a municipality fails to provide employees with *any* training on how to answer constitutional questions that it is both obvious they will confront and obvious they are not equipped to answer without some sort of specialized training. Whether it is permissible to use lethal force to stop a fleeing suspect undoubtedly is such a question. Whether it is permissible to rape an inmate undoubtedly is not.

C. The Decision Below Is Wrong.

Under a correct application of the governing legal principles, the decision below is plainly wrong. The majority did not claim that Christensen's actions were the product of "a failure to equip [him] with specific tools to handle" some specialized aspect of the task of guarding female inmates. *Brown*, 520 U.S. at 409. Nor could it have, for Christensen readily admitted at trial that he had been trained that his conduct was both criminal and a violation of jail policy, and that he did not need any more training to understand that what he was doing was illegal and wrong. App.14; *see*

also App.47, 105 (Brennan, J., dissenting in part). And respondents' own expert "conceded at trial that no proof exists that better or more training could have dissuaded Christensen from his predatory and assaultive behavior." App.105. That should have been the end of the matter, for the County cannot have been the cause of respondents' constitutional injuries in the "direct" sense that *Monell* liability requires when there is no dispute that Christensen knew that he was violating respondents' rights *in derogation of* county policy (not to mention state law).

The majority grounded its contrary conclusion in an amalgam of theories, each as flawed as the next. Indeed, the majority's analysis succeeds only in underscoring that the single-incident theory is a complete misfit for cases in which the conduct in question concededly was prohibited and the employee concededly knew as much.

The majority first posited that it "was as obvious as obvious could be" that "male guards would sexually assault female inmates" even if they knew that doing so is both prohibited and criminal, and even if there was no pattern or practice of violations of that prohibition. App.25-26. But the question is not whether the County was on notice of the possibility that someone could *violate* clear county policy. If that were the question, then no §1983 plaintiff would ever need to prove a pattern or practice of past violations, for it is always "obvious" that there is at least some risk that a prison guard, or a police officer, or a teacher, or anyone else in a position of trust and power may choose to abuse that position even though they know full well that doing so will get them fired, and

could even land them in prison. The deliberate-indifference standard demands something very different—namely, a showing that the municipality is on notice that its employees do not *understand* where the constitutional line is, yet nonetheless chooses not to train them. That is why every other circuit has rejected a single-incident claim like this one out of hand, for "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Barney*, 143 F.3d at 1308; *see also, e.g.*, *Andrews*, 98 F.3d at 1077 (finding no "patently obvious need for the city to specifically train officers not to rape young women").

The majority next faulted the County for failing to put in place various policies established through PREA, such as "designat[ing] a PREA coordinator," "train[ing] staff on what to look for and how to report abuse as well as how to make inmates feel comfortable coming forward," or "provid[ing] a safe, confidential way for inmates to report abuse (through, for example, the use of a locked drop-box), instead of putting inmates in the position of having to hand a grievance to an officer who may be friends with the abuser." App.12. Again, that confuses "a want of *compliance*" with "a want of *comprehension*" of what the Constitution commands. App.40 (Easterbrook, J., dissenting in part). The single-incident theory is not about whether there is more a municipality "could have done to prevent," or to train its employees how to prevent, someone from violating the Constitution. *Canton*, 489 U.S. at 392. It is about whether a municipality "fail[ed] to equip [its employees] with specific tools to" understand what the Constitution commands. *Brown*, 520 U.S. at 409.

Here, "[a]ll agree that Polk County's written policies categorically prohibited sexual contact with inmates," App.19, and that everyone understood what those policies meant. That should have foreclosed a single-incident claim. Indeed, it is quite telling that Judge Hamilton candidly acknowledged that the majority's decision had nothing to do with any failure to train *Christensen* that his conduct was prohibited. App.37. It was instead based on the County's purported "failure to monitor its guards" or "to provide effective channels for complaints so as to discourage such abuse," App.37—in other words, its failure to do more to train *others* how to better detect or prevent violations of clear county policy. That may be a perfectly fine theory for a negligence claim, and may be a standard to which States may choose to hold their municipalities. But it is not a viable theory of liability pursuant to a statute under which "local governments are responsible only for 'their *own*'" violations of the Constitution. *Connick*, 563 U.S. at 60.

That is not to say that a written policy that complies with the Constitution is an absolute shield against *Monell* liability. But when the acts for which the plaintiff seeks to hold a municipality liable plainly and indisputably *violated* official policy, it is incumbent upon the plaintiff to prove a pattern or practice of past violations demonstrating either that the *de jure* policy did not match the *de facto* one, or that the municipality was deliberately indifferent to an obvious need for additional training to ensure that employees were aware of and understood that policy. The single-incident theory is not an "alternative path," App.22, to impose quasi-negligence or *respondent-superior*-style liability when no pattern or practice of

past violations put the municipality on notice of any pervasive failure to understand or refusal to follow a clear county policy.

Finally, to the extent the majority held that the County *was* on notice that some deficiency in its clear policy prohibiting sexual contact with inmates was causing constitutional violations, that theory is legally untenable too. The district court squarely held, and the majority squarely agreed, that there was no "proof of a prior pattern of similar constitutional violations" in this case. App.22; App.181-82.[3] And rightly so, as a single accusation of sexual harassment that was markedly different from the assaults committed by Christensen could not plausibly be deemed a "pattern of similar constitutional violations." *See Connick*, 563 U.S. at 62-65 (rejecting argument that four dissimilar *Brady* violations put district attorney's office "on notice that specific training was necessary to avoid this constitutional violation"). If a single violation of a clear policy that did not rise to the level of a pattern or practice nonetheless sufficed to make it "obvious" under the single-incident theory that the policy was constitutionally deficient, then the entire failure-to-train doctrine would be reduced to incoherency.

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[3] That readily distinguishes this case from *Cash v. County of Erie*, 654 F.3d 324 (2d Cir. 2011), the principal case on which the majority relied, *see* App.28, 30, for *Cash* was neither a single-incident nor even a failure-to-train case. *See* 654 F.3d at 336 ("[t]he deliberate indifference concern in this case, however, is not with a failure to train"). At any rate, to the extent *Cash* supports the majority's decision, that would only heighten the need for review to bring both the Second and the Seventh Circuits back in line with this Court's *Monell* jurisprudence.

In sum, the decision below stands alone for good reason: It is profoundly wrong. As this Court has held for more than 40 years, §1983 is not a vehicle for holding municipalities liable for any and all unconstitutional acts by their employees. It is reserved for cases in which a municipality's *own* actions are directly responsible for the constitutional violation—*e.g.*, unconstitutional policies (whether official or *de facto*) or conscious failures to train employees in the face of a known and serious risk of constitutional violations. By allowing §1983 to be used to hold a municipality liable for an employee's knowingly prohibited and knowingly criminal *violations* of clear training and policy, the decision below distorts *Monell* beyond recognition.

II. The Question Presented Is Exceptionally Important.

The decision below has profound consequences, both for municipalities and for federalism. Indeed, it "open[s] municipalities to" exactly the kind of "unprecedented liability under §1983" that this Court has repeatedly construed the statute to avoid. *Canton*, 489 U.S. at 391. As *Canton* cautioned, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent" it. *Id.* at 392. A standard that asked only whether the municipality could have done more thus "would result in *de facto respondeat superior* liability on municipalities." *Id.* That may be a perfectly valid policy for States to adopt for imposing liability on their own cities and counties. But it is not the standard for municipal liability under

§1983. Under §1983, a municipality may not be held liable for the actions of its employees, or even for negligent failure to better control the actions of its employees. It may be held liable only for its *own* constitutional violations.

That is no oversight. This Court has construed §1983 in that manner to avoid the "serious questions of federalism" that would arise under a standard that allowed federal courts to "second-guess[]" everything municipalities may do. *Connick*, 563 U.S. at 74 (Scalia, J., concurring). The rule "that a pattern of constitutional violations is ordinarily necessary to establish municipal culpability and causation" is "indispensable" to that effort, for without it, "'failure to train' would become a talismanic incantation producing municipal liability" in virtually every case, "thereby diminishing the autonomy of state and local governments." *Id.*

This case vividly illustrates the consequences of allowing the single-incident theory to become the exception that swallows that rule. The principal deficiency the majority identified in the County's sexual assault policies was a failure to adopt certain policies and practices established under PREA—a federal statute that imposes no mandate on state or local correctional facilities, and that Wisconsin has chosen not to require its correctional facilities to implement. *See* App.11-12, 19-21. Yet according to the decision below, the County not only acted unlawfully, but *violated the Eighth Amendment*, by failing to follow these non-binding federal practices—even though the majority conceded that there was no pattern or practice of past violations resulting from

the failure to do so. In other words, the decision declares it "obvious" that correctional facilities are *constitutionally compelled* to adopt policies that neither Congress nor state legislatures have seen fit to impose—or at least are compelled to do so as long as one correctional officer has ever been accused of any type of sexual harassment. The decision thus converts §1983 into a mechanism for "constitutionalizing … requirements that States have themselves elected not to impose." *Brown*, 520 U.S. at 415.

While the decision below has particularly profound consequences for the hundreds of prisons and jails in the Seventh Circuit, nothing about the majority's reasoning is limited to the context of sexual assault in correctional facilities. One could just as easily declare it "obvious as obvious could be" that "the power dynamic" between police officer and civilian, *see Schneider*, *Sewell*, *Parrish*, or teacher and student, *see S.J.*, is so "imbalanced" as to be ripe for abuse by someone willing to flout the law even at the risk of losing both his job and his liberty. App.26. If that were all it took to invoke the single-incident theory, then it is difficult to see why a plaintiff would ever bother trying to prove a pattern or practice of past violations, for "deliberate indifference" could be inferred any time there was anything more a municipality could have done to try to prevent someone from violating its crystal-clear policies (which is to say in virtually every case).

None of that is to say that municipalities bear no responsibility for ensuring that their employees comply with the Constitution and the law at all times. They undoubtedly do. But §1983 is not a "'federal good

government act' for municipalities," *Canton*, 489 U.S. at 396 (O'Connor, J., concurring), and it does not give federal "courts *carte blanche* to micromanage local governments throughout the United States," *Connick*, 563 U.S. at 68. This Court has construed §1983 to impose liability on municipalities only when their *own* actions violate the Constitution. States are certainly free to make different choices about the circumstances in which municipalities may be held accountable for the actions of their employees, and many have. But the core lesson of *Monell* and its progeny is that the bar for holding a municipality liable for violating the Constitution under §1983 is a high one. It is not for courts to lower that bar whenever they dislike the outcome it produces. By doing so, the decision below defies this Court's precedent and subjects municipalities to a sweeping form of liability that has profound consequences for our constitutional system of federalism.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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