No. 20-427

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

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

LISA SORONEN
STATE AND LOCAL LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

AMANDA KELLAR
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION, INC.
51 Monroe Street, Suite 404
Rockville, MD 20850

JOHN M. REEVES
Counsel of Record
REEVES LAW LLC
3703 Watson Road
St. Louis, MO 63109
(314) 775-6985
reeves@reeveslawstl.com

Counsel for Amici Curiae

November 2, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing the interests of local governments. They have a critical interest in ensuring the maintenance of the Constitution's federalist structure, under which local governments retain their autonomy to conduct their affairs as they best see fit, so long as they remain within the Constitution's substantive parameters.

To that end, *amici* believe that the Seventh Circuit's en banc decision below amounts to an unprecedented evisceration of that autonomy by morphing 42 U.S.C. §1983 from a statute protecting the Constitutional rights of individuals into one that mandates federal judicial oversight of every aspect of a local government's affairs, even if the local government has not itself committed a Constitutional violation. Given the importance of preserving the Constitution's federalist structure, the Court should intervene and grant certiorari.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

---

[1] *Amici* provided timely notice to both parties of its intent to file this brief, and both parties provided *amici* with written consent to file this brief. No counsel for either party authored this brief in whole or in part, nor did counsel for either party make any monetary contribution intended to fund the preparation or submission of this brief.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Established in 1935, IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective

viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To ensure the Constitution's federalist structure remains intact, local governments can only be held liable for constitutional violations under §1983 when they themselves inflict such violations; they cannot be held liable on a *respondeat superior* theory. *See Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691-95 (1978). The Court's review of the Seventh Circuit's en banc opinion below is critically needed to reiterate these principles and preserve that federalist structure.

The Seventh Circuit found that Polk County could be liable under *Monell* for one of its correctional officers raping two of its inmates. Despite admitting that Polk County's jail had a policy explicitly prohibiting correctional officers from sexually assaulting inmates, that no earlier pattern or practice of such rapes existed in the jail, and that the correctional officer knew his training prohibited the rapes, the en banc opinion found Polk County could be liable on the single-incident failure-to-train theory mentioned in *Canton v. Harris*, 489 U.S. 378, 390 (1989). According to the Seventh Circuit, the jail's failure to adopt the procedures of the non-mandatory federal Prison Rape Elimination Act (PREA) amounted to deliberate indifference under *Monell* and *Canton*.

The Court's review is urgent in order to clarify the scope of *Monell* liability in the context of single-incident

failure-to-train claims. The Seventh Circuit's opinion has warped §1983 into a mechanism whereby federal courts can mandate local governments adopt non-binding federal regulations in practically any area, thus obviating the basic principles of federalism. The facts of this case, furthermore, make it an ideal mechanism for the Court to resolve the inherent tensions between federalism and *Canton's* hypothetical single-incident failure-to-train claim. Finally, and further underscoring the important federalism issues at play in this case, the Seventh Circuit's opinion creates a common law tort action out of §1983, a matter that the States themselves—and not the federal courts—are best equipped to decide.

ARGUMENT

I. Absent the Court's review, the Seventh Circuit's decision ensures that federal courts will have significantly increased control over municipalities' daily operations, thus undermining the Constitution's federalist structure.

The Seventh Circuit's decision undermines the carefully-crafted power balance between the federal government and the States by enabling federal courts to take over local governments and micromanage their daily operations. This warrants the Court granting certiorari. As Polk County describes in its petition, the en banc opinion creates a circuit split and ignores *Monell's* limitations on liability for local governments. Those limitations on liability are reasonable, fair, and respectful of federalism. By expanding *Monell*'s limited holding into *respondent superior* liability and holding

a local government may be liable for failing to adopt a specific policy, the lower court decision operates as a judicial run-around to the prohibition on the federal government directly regulating local governments by enabling federal courts to order them to enact such regulations under the guise of enforcing Constitutional rights under §1983. This expanded liability will drain the financial resources of local governments, cause significant reputation damages to the local entities who have followed *Monell*'s actual requirements, and will further erode the limits of *Monell* liability beyond the facts in the Seventh Circuit's opinion.

A. The federalism issues here are exceptionally important, as §1983 cannot be used as a vehicle to obviate the Constitution's federalist structure.

The Constitution provides for a dual-sovereign system of government, under which the States (of which local governments form a part) have surrendered some of their powers to the federal government while still retaining their status as sovereign entities. *Printz v. United States,* 521 U.S. 898, 918-19 (1997). "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist* No. 39, at 245 (James Madison) (Robert Scigliano ed., 2000), *quoted in Printz*, 521 U.S. at 920-21 (1991). It is not surprising, therefore, that the Court has rejected the notion that federal judges may compel municipalities to enact particular policies in the absence of the municipality

itself having caused any constitutional violations. *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976). But that is what the Seventh Circuit has done here: its en banc opinion imposes *respondeat superior* liability on local governments and requires them to adopt specific policies that are not, of themselves, required under the Constitution.

Congress carefully wrote what is now §1983 to ensure that federal courts, in applying it against local governments, would only do so to vindicate Constitutional rights, and not use it as a pretext for compelling municipalities to enact policies or take actions that, while seemingly good in the abstract, are not mandated under the Constitution. *See Monell*, 436 U.S. at 691-95. Relying in part on the Court's own federalism rulings, see *id.* at 673-95, Congress recognized how, under the Constitution's federalist structure, local governments have "traditionally been granted the widest latitude in the 'dispatch of [their] own internal affairs….'" *See Sampson v. Murray*, 415 U.S. 61, 83 (1974) (quoting *Cafeteria and Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961)), *quoted in Rizzo*, 423 U.S. at 378-79. Section 1983 is harmonious with the Constitution's dual-sovereign structure. It "is not a 'federal good government act' for municipalities. Rather it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights." *Canton v. Harris*, 489 U.S. 395-96 (1989) (O'Connor, J., concurring in part and dissenting in part). This ensures that local governments retain the autonomy necessary to govern as they best see fit, so long as they stay within the Constitution's boundaries and respect the

substantive rights it accords to individuals. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734-35 (1989). Contrary to the Seventh Circuit's holding, §1983 does not require local governments to adopt specific policies.

To vindicate these federalism concerns, in *Monell* the Court held that §1983 imposes civil liability on municipalities only for constitutional injuries that municipalities themselves cause through an unlawful policy or custom. *See Monell*, 436 U.S. at 673-95. Consequently, a local government cannot be held liable under §1983 on a *respondeat superior* theory, notwithstanding the Seventh Circuit's holding to the contrary. Allowing *respondeat superior* liability under §1983 would do far more than discard the statute's plain language—as the Court has long recognized, it would undermine the Constitution's federalist structure. *See Monell*, 436 U.S. at 673-95. Federal courts are not—and should not be—empowered to encroach on the autonomy of local governments via §1983. *See Connick v. Thompson*, 563 U.S. 51, 61-62 (2011); *Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Canton*, 489 U.S. at 391-92.

In upholding Polk County's liability, the Seventh Circuit primarily relied on how it had failed to adopt the PREA in administering its jail despite conceding that the "PREA is not a constitutional standard." (App.31). It further acknowledged that Polk County's policies—as well as Wisconsin state law—explicitly prohibited sexual assault, and that all correctional officers were explicitly informed of the County's categorical prohibition against sexual contact with inmates. This is a textbook violation of the very

federalism principles that Congress sought to uphold in passing §1983 and that the Court has sought to uphold in its own precedents.

By holding Polk County to the PREA's standards, and not those of the Constitution, the Seventh Circuit has "engage[d] the federal courts in an exercise of second-guessing municipal employee-training programs," *Canton*, 489 U.S. 392, a matter "the federal courts are ill suited to undertake, as well as one that…implicate[s] serious questions of federalism." *Id.* (citing *Rizzo*, 423 U.S. at 378-80). Indeed, Congress itself, in passing the PREA, recognized that it had no Constitutional authority to mandate that municipalities adopt it. Instead, Congress conditioned grants on State and local compliance with certain standards set forth in the Act. *See* 34 U.S.C. §30307(e)(2)(A). This was an appropriate exercise of its authority under the Spending Clause. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) ("We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'"). By upholding Polk County's liability here for failing to adopt measures outlined in the PREA, the Seventh Circuit did precisely what Congress knew the Tenth Amendment, the Constitution's dual-sovereign system of government, and this Court's very own jurisprudence on federalism prohibited it from doing. *See Monell*, 436 U.S. at 673-95; *New York v. U.S.*, 505 U.S. 144, 156-57 (1992) ("The Tenth Amendment… restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment

itself.…Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may…reserve power to the States.").

B. The Seventh Circuit's rationale extends to every facet of municipal government.

The Court's review of the Seventh Circuit's decision is urgent, as the decision has implications reaching far beyond its specific facts. There is no reason why the en banc opinion's rationale cannot—indeed, will not—extend beyond the area of local prison administration and allow federal courts to supervise every facet of local government. After all, if a local government's failure to adopt a particularized federal program in the context of prison administration amounts to a Constitutional violation, why should this rationale not apply to *all* areas of a local government's day-to-day operations?

For example, a federal court could easily utilize the en banc opinion to find a local police department violated a discharged employee's procedural due process rights merely because the local police department did not enact deprivation procedures identical to those that may be provided by a federal law enforcement agency, such as the U.S. Marshals Service, even though the Fourteenth Amendment does not require such procedures. *See Bradley v. Village of Univ. Park, II.*, 929 F.3d 875, 907 (7th Cir. 2019) (Manion, J., dissenting) ("[I]f the State has provided sufficient post-deprivation remedies, then there is no justification to supplant the State's authority and subvert federalism

by allowing the plaintiff to pursue a federal due process claim instead of the State's provided remedies.").

Similarly, the Seventh Circuit's opinion enables a federal court to hold that a local or state court system's failure to adopt the Federal Rules of Civil Procedure or the Federal Rules of Evidence itself amounts to a due process deprivation. Such a holding would, of course, be absurd. *See Rizzo*, 423 U.S. at 379 (noting that federalism principles counsel restraint on the part of a federal court interfering with the operations of state courts). Nevertheless, it is the natural outcome of the en banc opinion's rationale.

In short, and absent the Court's review, the Seventh Circuit's decision will wreak havoc on the ability of thousands of local governments around the country to manage their own affairs without the potential of federal courts intruding and watching their every move in the spirit of the Eye of Sauron, rendering *Monell* practically meaningless. *See* 1 J.R.R. Tolkein, *The Lord of the Rings* 392 (1991).

II. This case presents an ideal vehicle to resolve the tension between *Canton's* theoretical single-incident failure-to-train claim and the federalism principles underlying *Monell's* admonishment against *respondeat superior* liability.

So far as *amici* are aware, the Seventh Circuit's opinion is only the second time any federal appellate court has upheld a §1983 verdict against a local government on a single-incident failure-to-train theory. *See Canton*, 489 U.S. at 390 ("[I]t may happen that in

light of the duties assigned…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 policymakers of the city can reasonably be said to have been deliberately indifferent to the need."*)*. The last time a federal appellate court did so, the Court granted certiorari to clarify the scope of single-incident failure-to-train liability. *See Connick*, 563 U.S. at 54. But this area of the law remains murky even following *Connick*, and the facts of this case present the Court with the perfect opportunity to bring clarity to the matter.

This case is unique in that Christensen—the correctional officer who committed the underlying violations under the Eighth and Fourteenth Amendments—explicitly admitted that he knew, from his training, that raping inmates was wrong before he committed his terrible actions. (App.105). In addition, it is undisputed both that the jail's policies themselves explicitly prohibited correctional officers from raping inmates and that there was no prior pattern or practice of such rapes taking place within the jail. (App.71). Nevertheless, and paradoxically, the Seventh Circuit found that the need to ensure correctional officers not rape inmates was an area where "the need for more or different training [was] so obvious" in Polk County despite Christen himself admitting he knew, from Polk County's very training, that such conduct was wrong, and despite nothing like this ever occurring before in the jail (App.77-84). It is difficult, if not impossible, to see how "it could be obvious" that there could be a need for further training, or that such training was adequate, given the fact that the perpetrator himself

admitted to knowing that what he was doing was wrong, and that he did not require additional training to know that what he did was illegal and contrary to Polk County's policy. (App.105). The Court's review is sorely needed to provide clarity in this area.

If it was appropriate for the Court to grant certiorari in *Connick* to address the scope of single-incident liability in the context of a prosecutor's decision to commit *Brady*[2] violations, it is all the more appropriate (and urgent) for the Court to grant certiorari here to address the scope of single-incident liability in the context of in the context of a correctional officer's decision to commit a sexual assault, something that Polk County's policy and training had taught him was illegal. The *Brady* violations in *Connick* involved decision making in an area that of its very nature required years of legal training. *See Connick*, 563 U.S. at 63-68. By contrast, here the decisionmaker himself admitted he knew, ahead of time, that his decision was wrong, and that his training explicitly prohibited it. And as Judge Brennan noted in his dissent from the en banc opinion below, the decision was one forbidden "by the law, written policies and training here, as well as any moral code." (App.83).

It is nearly impossible to imagine a more ideal fact pattern under which the Court can resolve the inherent tension between *Canton's* theoretical single-incident liability and federalism principles. Absent the Court's review, this area will remain unclear.

---

[2] *See Brady v. Maryland*, 373 U.S. 83 (1963).

III. The en banc opinion imposes a negligence standard upon §1983 claims under *Monell*, and in effect turns them into common law tort claims. It should be up to the states themselves to determine whether to allow such claims.

The Seventh Circuit's en banc opinion effectively opens the door for the federal judiciary to create new common law negligence actions under the guise of §1983, thus interfering in an area the Constitution's federalist structure leaves to the determination of state governments. The Court should grant certiorari to bolt that door shut.

"Section 1983 imposes liability for violations protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). It is precisely the need to prevent §1983 claims from degenerating into such tort claims that justifies a heightened standard of fault beyond mere negligence. *See Bryan Cty.*, 520 U.S. at 407 ("A showing of simple or even heightened negligence will not suffice."). Yet the en banc opinion ignores all of this, and effectively holds that Polk County was negligent in failing to prevent its correctional officer from raping the respondents and that such negligence amounted to a constitutional violation.

Nobody denies that what Christensen did to J.K.J. and M.J.J. was horrendous. (App.4). He has been convicted of his crimes and is now spending 30 years in

prison. (Pet.1). In addition, the jury below found him personally liable under §1983 for violating J.K.J. and M.J.J.'s Eighth Amendment rights, awarding each of them $5.75 million in damages on their claims against him. (App.110). The Seventh Circuit, furthermore, quickly and correctly rejected his challenge to that verdict. (App.14-15). Nor does anybody deny that, as a general policy goal outside of any Constitutional requirements, correctional institutions should protect their inmates from suffering harm at the hand of others—be they correctional officers or fellow inmates. But that is not the issue here. Rather, the issue is whether, given Congress's concern to uphold the Constitution's federalist structure in enacting §1983 and this Court's longstanding precedent seeking to vindicate that concern, §1983 can serve as a vehicle for changing correctional institution's policies and practices in the absence of any evidence that such polies and practices caused a violation of the Eighth and Fourteenth Amendments. Plainly it cannot, but absent the Court granting certiorari the Seventh Circuit's opinion will result in §1983 doing just that.

While J.K.J. and M.J.J. also brought a negligence claim under Wisconsin state law against Polk County (App.3), the district court dismissed that claim after discovery and a jury trial on the ground that Polk County was, as a matter of Wisconsin law, immune from liability on that claim. (App.13, 178-181). As the district court noted, Wisconsin has immunized local governments like Polk County from such negligence claims. (App.178-181). Under our Constitution's federalist structure, Wisconsin—along with the other 49 states in the union—is free to mold its tort law as it

sees fit. Whether to allow a common law negligence action against a municipality under facts like this is exactly the type of matter over which different entities can—and do—reasonably come to different conclusions, which is precisely why its resolution is better suited to state legislatures than to an unelected federal judiciary.

Many states disagree with Wisconsin and allow common law tort claims under facts similar to this case. For example, Colorado *has* authorized inmates of correctional centers to bring negligence actions against correctional facilities for injuries they allegedly suffer while in custody. *See Flores v. Colo. Dep't of Corr.*, 3 P.3d 464 (Colo. Ct. App. 1999) (ruling that the Colorado General Assembly had abrogated sovereign immunity in actions for injuries arising out of the operation of correctional facilities). The same can be said for Louisiana, California, Washington, and Hawaii. *See Applewhite v. City of Baton Rouge*, 380 So.2d 119 (La. Ct. App. 1979) (ruling a city could be liable after a police officer and a correctional officer forced a detainee to perform sexual acts on them); *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991) (holding a city could be liable under *respondeat superior* for a police officer raping a detainee); *Savage v. State of Wash.*, 899 P.2d 1270 (Wash. 1995) (ruling the State could be held liable for its parole officer's failure to supervise a parolee after the parolee raped a third party); *Upchurch v. State of Haw.*, 454 P.2d 112 (Haw. 1969) (ruling that the State owed a duty of reasonable care to an inmate who had suffered an attack from another inmate).

The Constitution's federalist structure leaves it to the States themselves to determine which common law tort actions are appropriate and which are not. This is a matter of prudential judgment over which reasonable disagreements can exist, not a matter of safeguarding one's rights under the federal Constitution. Section 1983 addresses the latter situation, not the former. To hold otherwise and conclude that *Monell* liability is satisfied under a negligence standard—as the Seventh Circuit did—expands §1983 beyond what both Congress and the Court have concluded are constitutional boundaries. Left standing, the en banc opinion will erode the ability of the States and their local governments to "remain independent and autonomous within their proper sphere of authority." *See Printz*, 521 U.S. at 928.

CONCLUSION

The Seventh Circuit's opinion renders the federalist system of government set forth in the Constitution practically meaningless and invites other circuits to issue holdings that do the same. To vindicate this fundamental part of the Constitution's structure and foreclose other courts from further weakening it by following the Seventh Circuit's lead, the Court should grant Polk County's petition for a writ of certiorari.

Respectfully submitted,

JOHN M. REEVES
Counsel of Record
REEVES LAW LLC
3703 Watson Road
St. Louis, MO 63109
(314) 775-6985
reeves@reeveslawstl.com

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St. NW
Suite 515
Washington, DC 20001

AMANDA KELLAR
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION, INC.
51 Monroe Street, Suite 404
Rockville, MD 20850

Counsel for Amici Curiae