No. _____

In The
Supreme Court of the United States

SHERIFF OF SANTA ROSA COUNTY, FLORIDA,

Petitioner,

v.

JESSICA ROGERS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a jury exonerates jail deputies of all 42 U.S.C. §1983 claims for deliberate indifference to risk of an inmate's suicide, does the jury's finding as to the deputies foreclose liability for deliberate indifference against the Sheriff employing the deputies under *Monell v. New York City Dept. of Social Services* given this Court's holding in *City of Los Angeles v. Heller* that "neither *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm"?

2. Are the circuit courts of appeal for the Second, Third, Eighth, and Tenth Circuits unlawfully limiting this Court's direction in *Heller* when those courts sometimes allow *Monell* liability against a government agency even where it has been determined that no agency employee committed an underlying constitutional violation?

3. Even if those circuits are correct in so-limiting *Heller*, has the Eleventh Circuit in this case broadened the limitation to the point that it flatly disobeys *Heller*?

4. Whether, in citing jail practices which had never been declared unconstitutional nor previously resulted in an inmate's suicide, the circuit court in this case substituted hindsight analysis of negligence for evidence of deliberate indifference by the Sheriff to a suicide risk?

RELATED PROCEEDINGS

Rogers v. Johnson, et al., Case No. 3:18-cv-0057-TKW, U.S. District Court for the Northern District of Florida. Judgment entered on October 15, 2021.

Rogers v. Johnson, et al., Case No. 21-13994, 2023 WL 2566087 (11th Cir. March 20, 2023). Opinion affirming district court judgment entered on March 20, 2023.

Rogers v. Johnson, et al., Case No. 21-13994. Order denying petition for rehearing or rehearing en banc entered on May 19, 2023.

Rogers v. Johnson, et al., Case No. 21-13994. Judgment (mandate) entered on May 30, 2023.

PARTIES TO THE PROCEEDING

The Petitioner, Defendant below, is the Sheriff of Santa Rosa County, Florida. He is sometimes referred to in the record by name as Sheriff Bob Johnson. The Respondent, Plaintiff below, is Jessica Rogers as personal representative of the estate of Jose F. Escano-Reyes and as parent and natural guardian of Y.C., a minor.

No party is a nongovernmental corporation and so no corporate disclosure statement is applicable under S.Ct. Rule 14.

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OPINIONS BELOW

The Corrected Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming judgment against the Sheriff, is unpublished but is located at Case No. 21-13994, 2023 WL 2566087 (11th Cir. Mar. 20, 2023). A copy of the Opinion is included in this petition as Appendix A and is found at pages 1 through 20 of the Appendix.[1]

JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 20, 2023. The Sheriff, Petitioner here, timely moved for panel or en banc rehearing on April 10, 2023. The circuit court denied the Sheriff's motion for panel or en banc rehearing on May 19, 2023. A copy of the circuit court's order of May 19, 2023, denying panel or en banc rehearing is included in this petition as Appendix B, located at App., pp. 21-23. The petition for rehearing is also included as Appendix F, located at App., pp. 37-61.

Pursuant to S.Ct. Rule 13.3, this Court has jurisdiction over this Petition for Writ of Certiorari as it is

[1] The individual documents reproduced in the Appendix are subdivided into entries A, B, C, etc., but citation to the Appendix in this Petition will be to "App." followed by the page number from the full appendix.

filed within 90 days of the circuit court's May 19, 2023, order denying panel or en banc rehearing.

The statute conferring jurisdiction is 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

> "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. . . ."

U.S. Const. amend. XIV, § 1 provides that:

> "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 privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Summary of the Issues Presented

The Eleventh Circuit affirmed liability in this case against the Petitioner Sheriff of Santa Rosa County under *Monell v. New York City Dept. of Social Svs*., 436 U.S. 658 (1978), despite a jury's determination that Sheriff's deputies had not committed an underlying constitutional violation. In doing so, the Eleventh Circuit ignored this Court's binding contrary precedent in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) that "neither *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."

The premise of *Monell* liability is that a local or state governmental agency is a "person" under 42 U.S.C. §1983 such that, where an agency adopts official policies or customs with the requisite degree of culpability that cause an employee to violate a plaintiff's constitutional rights, then the agency may itself be held liable for that constitutional violation. *Monell*, 436 U.S. at 690-91. This Court has long recognized under *Monell* that the courts must "adhere to rigorous requirements of culpability and causation" to ensure that municipal liability does not "collapse[ ] into respondeat

superior liability." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 415 (1997).

A threshold limitation to this path to agency liability is that in fact the agency's employees actually violated the plaintiff's constitutional rights in the first place. Here, the Respondent is the Estate of a jail inmate who committed suicide. Pursuant to 42 U.S.C. §1983, the Estate sued two specific corrections deputies, John Gaddis and Michelle Bauman, who worked for the Petitioner Sheriff. At trial the Estate claimed that those two employees, *and only those two employees*, violated the inmate's Fourteenth Amendment right to be free from deliberate indifference to a serious medical need – the risk of suicide. The Sheriff was also sued under §1983 on a *Monell* claim premised on the alleged unconstitutional acts of those two deputies.

In answering a special interrogatory verdict form, the jury found that while the two deputies acted with deliberate indifference to the risk of the inmate's suicide, their deliberate indifference did not cause the inmate's death, and, accordingly, the jury exonerated deputies Gaddis and Bauman of the §1983 deliberate indifference claims against them. Under this Court's precedent in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), causation is an essential element of a claim of deliberate indifference to a serious medical need. Numerous circuits have specifically traced a causation

requirement for a claim of deliberate indifference to this Court's decision in *Farmer*. [2]

The jury's finding in the deputies' favor on the deliberate indifference claims based upon an absence of causation was legally correct. Neither party challenged the jury's exoneration of the deputies of the §1983 claims. And, based on *Monell* and *Heller*, this should have resulted in the inevitable conclusion that the §1983 claim against the Sheriff necessarily failed.

But in contravention of the holding in *Heller*, the Eleventh Circuit followed a trend of confused and oftentimes self-contradictory circuit court caselaw allowing *Monell* liability even absent an underlying constitutional violation by a defendant municipality's employees. With regard to the main issue on appeal, and in contradiction to *Heller*, the Eleventh Circuit wrote: "The Sheriff asserts that the jury was required to find either Gaddis or Bauman liable under §1983 as

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[2] "To prove a deliberate-indifference claim, the plaintiff must prove three elements: (1) that he had an objectively serious medical need; (2) that the defendant acted with deliberate indifference to that need; and (3) that the deliberate indifference caused the plaintiff's injury." *Jones v. Rutherford*, 546 Fed. Appx. 808, 810 (11th Cir. 2013) (citing *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007); *Lamb v. Mendoza*, 478 Fed. Appx. 854, 856 (5th Cir. 2012); *Fox v. Fischer*, 242 Fed. Appx. 759, 760 (2d Cir. 2007) (citing *Farmer* and *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996); *Roe v. Elyea*, 631 F.3d 843, 864 (7th Cir. 2011); *Watson v. Swarthout*, 536 Fed. Appx. 747 (9th Cir. 2013) (citing *Farmer*); *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

an element of *Monell* liability. He is incorrect." App., p. 17.

That statement cannot be squared with this Court's decision in *Heller*. The plaintiff in *Heller* sued a police officer and the City of Los Angeles under 42 U.S.C. §1983, claiming false arrest and excessive force. Trial of the claims was bifurcated. When the jury returned a verdict for the officer in the first trial, finding no constitutional violation by him, the district court dismissed the remaining *Monell* claim against the City. The Ninth Circuit reversed, holding that the jury could find that the officer was simply following police department regulations such that the jury could still find a constitutional violation caused by a policy or custom. *Heller*, 475 U.S. at 797-98.

This Court accepted review and reversed the Ninth Circuit, holding that the finding of no underlying constitutional violation by the officer foreclosed *Monell* liability against the city. The Court rejected the Ninth Circuit's reasoning that a jury could still find the city's policies caused its officer to use excessive force, even where the jury first determined that the officer's actions were not unconstitutional: "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Heller* at 799 (emphasis in original).

During trial of this case, the Estate's counsel argued that notwithstanding the fact that all parties

agreed that the only two government actors at issue were deputies Gaddis and Bauman, and even if the jury exonerated them on the underlying constitutional claims, the jury could still find *Monell* liability against the Sheriff. Consistent with *Heller*, the Sheriff objected, noting that *Monell* liability depended in the first instance on a finding of a constitutional violation by the two deputies identified by plaintiff as at fault.

At the charge conference the district court expressly stated that the only employees of the Sheriff whose actions were at issue were Gaddis and Bauman. The court nonetheless, and over the Sheriff's objection, submitted to the jury a verdict form which allowed the jury to find that Gaddis and Bauman did not violate the inmate's rights, but still find *Monell* liability against the Sheriff. And in fact that is what occurred.

The Sheriff sought post-trial relief by seeking to have the Sheriff removed from the ensuing judgment and, when that was denied, appealed to the United States Court of Appeals for the Eleventh Circuit. That court, without even acknowledging *Heller*, relied on its own precedent which in turn relied upon pre-*Heller* opinions from the Eleventh Circuit and opinions from other circuits, to erroneously hold that a finding of a constitutional violation by the two individual deputies responsible for monitoring the inmate was not a prerequisite to *Monell* liability against the Sheriff. App., pp. 17-20.

This result cannot be squared with *Monell* or with *Heller* and the Court should grant the petition for writ

of certiorari to either 1) re-affirm *Heller* as applying in all *Monell* cases, or 2) clarify to the lower courts that have undermined *Heller* that where, as here, a plaintiff sues specific employees under §1983 and it is conclusively determined that those employees did not violate plaintiff's constitutional rights, then there can be no *Monell* liability for their governmental employer.

2. Facts

Jose Escano-Reyes ("Reyes") was arrested by the Okaloosa County Sheriff's Office on January 3, 2016, for driving without a license. He was a Honduran citizen and in the United States illegally. He was transported to the custody of the Santa Rosa County Sheriff's Office and housed at the Santa Rosa County Jail, pending removal proceedings. App., p. 4.

On April 2, 2016, Reyes threatened suicide and in response he was moved from general population and placed on suicide, or "close watch." The only garment he had was a "suicide prevention smock" designed to prevent suicide. The smock was made of a stiff material but could become more pliable over time. App., pp. 4-5. However, the evidence at trial was that no inmate had ever committed suicide using such a smock. App., pp. 49-50.

Reyes was housed in Cell Number 1 of an area of the jail called Admissions, Classification, and Release, or "ACR." ACR-1, the cell in which he was placed, had a metal privacy partition located within it, in order to

comply with the Prison Rape Elimination Act (PREA).[3] No inmate had ever used the partition to commit suicide with a suicide smock. App., pp. 57-58.

Some, but not all, of the windows in the door of ACR-1 were partially covered by curtains or bags, designed to protect female deputies from having to see nude or masturbating male inmates. Deputies were required to make and then document checks of close watch inmates such as Reyes on a staggered 15-minute basis. Deputies often monitored ACR-1 from the booking desk adjacent to it. The combination of the placement of the booking desk and the window coverings meant that most portions of the interior of the cell could not be visualized without corrections deputies going to the cell window to peer inside. App., pp. 4-7.

On the morning of April 7, 2016, the two corrections deputies, Gaddis and Bauman, were assigned to work in the ACR unit. They were posted at the booking desk, which sits just outside ACR-1. Their responsibilities included keeping watch over Reyes and maintaining a log of their well-being checks on him. Gaddis and Bauman were aware of these requirements and that they were responsible for checking on Reyes. App., pp. 6-8.

Rather than follow the Jail's procedures and customs as to checks, however, Gaddis and Bauman failed to visualize Reyes every 15 minutes. In fact, of the fifteen entries on the close-watch form for Reyes leading

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[3] 34 U.S.C. §303.

up to the suicide, ten failed to comply with the Sheriff's practices. Specifically, Gaddis admitted that he falsified five of the entries and as to five other entries Gaddis testified that instead of visualizing Reyes as required he just wrote "shouting" on the close watch form. Auditory checks in this fashion were not permitted by the Sheriff. The remainder of the checks were based on either or both deputies seeing Reyes as he walked by the door of the cell. Reyes created a ligature using the suicide prevention smock. He was able to hang himself at 10:25 a.m. His body was discovered at 10:45 a.m. when a member of the janitorial staff walked by the cell door and saw him. App., pp. 7-8.

3. Litigation and trial

Reyes' Estate filed suit against Gaddis, Bauman, and the Sheriff. The claims which were ultimately tried were §1983 Fourteenth Amendment claims for deliberate indifference to a serious medical need against Gaddis and Bauman, the §1983 *Monell* Claim against the Sheriff, and state law negligence claims against Gaddis and Bauman.[4]

The case proceeded to trial. All witness questioned on the matter testified that no inmate had ever used a

[4] On August 24, 2020, the district court entered an Order denying Motions for Summary Judgment filed by Gaddis, Bauman, and Sheriff Johnson. Gaddis and Bauman appealed on an interlocutory basis the denial of qualified immunity to them on the §1983 claims. The Eleventh Circuit denied the qualified immunity appeal in *Rogers v. Santa Rosa County Sheriff's Office*, 856 Fed. Appx. 251 (11th Cir. 2021).

suicide prevention smock to commit suicide. At the close of the Estate's case, the Sheriff moved for judgment as a matter of law under Fed.R.Civ.P. 50(a) on grounds that none of the Sheriff's policies or customs were themselves unconstitutional, but the district court denied the motion. App., p. 11.

The trial continued and, of most significance to the instant petition, the parties and the Court debated at a charge conference the propriety of a jury verdict form which would allow the jury to find the Sheriff liable on a *Monell* policy and custom theory *even if* the jury first found in favor of the deputies on the underlying claim of a constitutional violation. The relevant portions of that conference are included as Appendix G, located at App., pp. 62-97. The completed verdict form is included as Appendix D, located at App., pp. 29-35.

As to the §1983 claims against Gaddis and Bauman, the verdict form asked whether the deputies had subjective knowledge of the risk that Reyes would commit suicide, whether the deputies were deliberately indifferent to that risk, and whether deliberate indifference by the deputies caused Reyes' death. The verdict form, at the Estate's urging, allowed the jury in a later question to consider the *Monell* deliberate indifference claim against the Sheriff even if the jury first determined that neither Gaddis nor Bauman violated Reyes' constitutional rights.

As long as the jury found that Gaddis and Bauman had subjective awareness of the risk of suicide and acted with deliberate indifference, even absent the

critical component of causation, the jury was allowed to find the Sheriff liable under *Monell*. And they did. The jury found that Gaddis and Bauman had subjective knowledge of the risk of suicide and were deliberately indifferent, but the jury explicitly found no causation as between that deliberate indifference and the death of Reyes. Those portions of the completed verdict form as to Gaddis, App., 29-30, are reproduced here.

Federal Claim Against Defendant Gaddis

1. Did Defendant Gaddis have subjective knowledge of the risk that Mr. Escano-Reyes would commit suicide?

YES X NO _____

If your answer to Question 1 is "NO," please proceed to Question 4. If your answer is "YES," please proceed to Question 2.

2. Was Defendant Gaddis deliberately indifferent to the risk that Mr. Escano-Reyes would commit suicide?

YES X NO ____

If your answer to Question 2 is "NO," please proceed to Question 4. If your answer is "YES," please proceed to Question 3.

3. Did Defendant Gaddis' deliberate indifference cause Mr. Escano-Reyes' death?

YES ____ NO X

If your answer to Questions 1, 2, or 3 is "NO," your verdict is for Defendant Gaddis on the federal claim against him. If your answer to Questions 1, 2, and 3, is "YES," your verdict is for Plaintiff on this claim and you will need to determine the damages to be awarded against Defendant Gaddis. But, first, proceed to Question 4.

The highlighted portion of the verdict form as to Gaddis, and later repeated as to the claim against Bauman, clearly informed the jury that a finding of no causation resulted in a verdict in favor of the deputies when it explained to the jury that "If your answer to Questions 1, 2, or 3 is "NO", your verdict is for Defendant Gaddis on the federal claim against him." (emphasis in original). As noted, as to Bauman the same series of questions were then repeated as questions 4, 5, and 6, with the same answers by the jury. App, pp. 30-31. As they did with Gaddis, the jury as to Bauman answered "yes" to questions 4 and 5 but "no" to question 6. Thus, it cannot be denied that the jury intended to exonerate the deputies on the §1983 claims.

With respect to the *Monell* claim against the Sheriff, the verdict form then provided:

Federal Claim Against Defendant Johnson in his Official Capacity

If your answers to Questions 1 and 2 **and/or** Questions 4 and 5 are "YES," please proceed to Question 7. Otherwise, skip Question 7 and proceed to Question 8.

7. Did the Santa Rosa County Sheriff's Office have an official policy or custom that violated Mr. Escano-Reyes' constitutional rights and was the moving force behind his death?

YES X NO ____

If your answer to Questions 7 is "NO," your verdict is for Defendant Johnson on the official capacity federal claim against him. If your answer to Question 7 is "YES," your verdict is for Plaintiff on this claim and you will need to determine the damages to be awarded against him. But, first, proceed to Question 8.

Questions 8 through 11 concerned state law claims against Gaddis and Bauman, which were resolved in favor of the Estate. Question 12 was the damages question and the jury, having found for the Plaintiff on the state law claims against Gaddis and Bauman and against the Sheriff on the §1983 *Monell* claim, awarded the Estate $1,762,500. The jury rejected the claim of punitive damages against Gaddis and Bauman on the state law claims. App., pp. 34-35.

During the charge conference and consideration of the verdict form, counsel for the Sheriff explained that the jury should have to answer all three questions as to the constitutional violation claims against Gaddis and Bauman "yes" before entertaining a *Monell* claim against the Sheriff. That is, the jury should have to

answer "yes" to questions 1, 2, and 3, or to questions 4, 5, and 6 in order to reach *Monell* liability; – otherwise, there would be no underlying constitutional violation to tether to the *Monell* claim against the Sheriff. App., p. 74. This is completely consistent with this Court's holdings in *Heller* and in *Farmer*.

A lengthy discussion ensued, with the Sheriff expressing worry of the exact outcome here – that the jury could find in Gaddis' and Bauman's favor on the §1983 claims against them, but then find against the Sheriff despite the lack of an underlying constitutional violation by Gaddis and Bauman. App., pp. 74-85. As part of this discussion, the district court stated that the jury could find that the "cause" of the death was the policies and customs of the Sheriff. App., p. 75.

In response, defense counsel asked that the verdict form specify that the *Monell* claim against the Sheriff was premised on whether specifically Gaddis and/or Bauman violated Reyes' rights, not some other unidentified employees. "Otherwise, that is a vicarious liability suggestion, and the only two people that could have violated his rights for liability for this case is Gaddis or Bauman." App., p. 79.

To this, the district court agreed: "There hasn't been any evidence of anybody else, has there?" Counsel for the Estate agreed and identified no other employees of the Sheriff as committing an underlying constitutional violation. App., p. 79. As to the notion that a jail custom could generally be at fault such that the Estate did not have to prove an underlying

constitutional violation by Gaddis or Bauman, the district court concluded that "I think you're right that a *Monell* claim based upon policies doesn't have to be grounded on an individual, but here, **this *Monell* claim was.**" App., p. 81 (emphasis added). Notwithstanding this correct statement by the trial judge, he approved, over defense objection, the verdict form as shown above which allowed the jury to find *Monell* liability against the Sheriff even absent an underlying constitutional violation by Gaddis or Bauman.

Post-trial, the Sheriff moved for judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b), based in part on the lack of evidence of unconstitutional deliberate indifference in the jail's customs identified by the plaintiff as at fault. This was largely premised on the fact that no one had previously used a smock designed to prevent suicide to commit suicide. The Sheriff also moved for an order removing the Sheriff from the judgment under Fed.R.Civ.P. 59(e). The Sheriff asserted that in the absence of an underlying constitutional violation by Gaddis or Bauman the Sheriff could not be held liable on a *Monell* theory. The district court denied the motion. Appendix C, found at App., pp. 24-28.

On appeal by the Sheriff, the United States Court of Appeals for the Eleventh Circuit first determined that the evidence was sufficient to establish that the jail's policies of placing a close-watch inmate into a cell with a metal partition, a suicide prevention smock, and partially concealed windows "created an obvious risk of suicide." The Eleventh Circuit then affirmed the

§1983 *Monell* judgment against the Sheriff even in the absence of an underlying constitutional violation by Gaddis or Bauman. App., p. 19.[5]

Although *Heller* is binding precedent that squarely addressed the issue before the Eleventh Circuit in this case, the court completely ignored the existence or applicability of *Heller*. Instead, the Eleventh Circuit cited one of its own cases, *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020), which also failed to acknowledge *Heller*, in which the court began to follow the trend announced by several other circuits that *Monell* liability may attach even without an underlying constitutional violation.

In *Barnett*, the Eleventh Circuit theorized that a policy or custom, rather than the acts of individual employees following such customs or policies, can be the moving force behind a constitutional violation even where no particular employee committed a constitutional violation, yielding *Monell* liability. *Barnett* involved a scenario in which a Sheriff's Office directed its jail employees to hold for eight hours all persons who had properly been arrested with probable cause for driving under the influence (DUI), even where the

[5] Gaddis and Bauman did not appeal the state law claims against them and the ensuing collective judgment of $1,762,500 has been paid. However, because the Estate prevailed on the §1983 claim against the Sheriff, and the Sheriff maintains (including in this petition) that said judgment against him is unlawful, the issue of attorneys' fees and costs under 42 U.S.C. §1988 remains pending in the district court premised on the judgment for the Estate against the Sheriff on the *Monell* claim. App., 24-28.

arrestee had posted bond and it was no longer evident the arrestee was still under the influence of alcohol or drugs. *Barnett*, 956 F.3d at 1297, 1301-02. *Monell* liability in *Barnett* did not depend on the actions of individual employees in continuing to detain the plaintiff. It did not involve the same situation as the instant matter, in which two specific employees, and only those two employees, were alleged to be at fault – Gaddis and Bauman.[6]

Even the district court in this case, in the midst of the charge conference, recognized the difference: while it might be possible for a policy or custom to direct unconstitutional conduct generally, across an entire agency, that is not this case. Petitioner again notes that the district court said, "I think you're right that a *Monell* claim based upon policies doesn't have to be grounded on an individual, but here, **this *Monell* claim was.**" App., p. 81 (emphasis added).

And so, even if *Barnett* could be reconciled with *Heller*, something the Eleventh Circuit's opinion did not contemplate, the instant case is not that scenario. The Estate's *Monell* claim against the Sheriff was pinned specifically to the actions of Gaddis and Bauman. Ultimately, the Estate's case was that Gaddis and Bauman *did not* follow policy and custom in that they

[6] The Sheriff considers it profoundly remarkable that neither the decision in *Barnett* nor the panel opinion in this case even cited *Heller*, despite its obvious import to the issue.

failed to get up and visualize Reyes when they could not see him from the booking desk.[7]

The Eleventh Circuit's holding in this case – that an underlying constitutional violation is not required for *Monell* liability even when the Plaintiff specifically claims that two employees committed constitutional violations and those claims fail – does not even follow *Barnett*. This undermining of the holding in *Heller* and the confusing cases cited within it has been, and is bound to be, repeated in the lower courts. This Court should grant the petition and reverse the court of appeals and the district court here, holding that based on *Heller* and in light of the jury's verdict that Gaddis and Bauman did not violate Reyes' constitutional rights, then the Sheriff may not be held liable under *Monell*.

[7] Usually, when it is established that an injury resulted from employees' failure to follow agency practices, a *Monell* claim fails for lack of causation. See, e.g., *Floyd v. Rosen*, No. 21-CV-1668, 2022 WL 1451495, * 10 (S.D.N.Y. May 9, 2022) (a claim that agency employees failed to follow policy is "the antithesis of a *Monell* claim") (collecting cases). Otherwise, liability is essentially grounded on respondeat superior, which is unsupportable. *Brown*, 520 U.S. at 403.

REASONS FOR GRANTING OF THE PETITION

A. The Court should grant the petition to clarify and reaffirm its holding in *Heller* that, especially where the claim is that specific employees violated a plaintiff's constitutional rights, but the jury finds that they did not, then *Monell* liability against their government employer is not possible.

The Eleventh Circuit's affirmance of *Monell* liability against Santa Rosa County Sheriff Johnson in this case, even after a jury exonerated his deputies from the §1983 deliberate indifference claims against them, is directly contrary to this Court's ruling in *Heller*. The telltale signs that the Eleventh Circuit in this case deviated from this Court's binding precedent on this critical aspect of *Monell* liability are, first, the court failed to even mention *Heller* much less acknowledge that *Heller* squarely addressed the issue before it; and, second, even though there are numerous Eleventh Circuit cases approvingly citing to *Heller*, the court reached back to one of its pre-*Heller* opinions to justify its declaration in *Barnett* that "*Monell* . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government." *Barnett*, 956 F.3d at 1301 (citing *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985)).

As explained below, the Second, Third, Eighth, and Tenth Circuits have all described various circumstances in which there can be a limitation to the holding in *Heller* whereby a municipality can be held liable under *Monell* for a policy or custom even where no

underlying constitutional violation by its employees has been found. The circumstances vary. The holdings are inconsistent. And, other circuits simply disagree and follow *Heller*, without exception.

The First and Seventh Circuits for example have explicitly rejected the notion that there is any limitation to *Heller*, declining to follow the Third Circuit's reasoning on this precise issue. Other circuits, such as the Fourth, Fifth, and Sixth Circuits, appear not to have confronted the limitation identified by their sister courts. Even a review of cases in the circuits where such a limitation has been observed reveals that those courts' decisions are confusing and sometimes self-contradictory. Those courts struggle to define or to articulate when *Heller* applies to a given §1983 claim under *Monell*, and when it can be set aside. Given the range of approaches by the circuit courts to this issue this Court should grant this petition so as to either reaffirm the holding in *Heller* that there can be no *Monell* liability absent an underlying constitutional violation, or to clarify any limitation to that holding.

In this case, the Eleventh Circuit relied on its holding in *Barnett* to conclude that no underlying constitutional violation by Gaddis or Bauman need be proven in order to secure *Monell* liability against the Sheriff. In turn, the Eleventh Circuit in *Barnett* began by citing its pre-*Heller* opinion in *Anderson*, then moved on to citing the Tenth Circuit's pre-*Heller* decision in *Garcia v. Salt Lake Cty.*, 768 F.2d 303, 310 (10th Cir. 1985), all for the proposition that "*Monell* does not require that a jury find an individual defendant liable

before it can find a local governmental body liable [under § 1983]. . . . Although the acts and omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Barnett*, 956 F.3d at 1301-02.

But the Tenth Circuit has since then questioned its own opinion in *Garcia* and has struggled with how to apply *Heller*. In *Crowson v. Washington County Utah*, 983 F.3d 1166 (10th Cir. 2020), the Tenth Circuit addressed claims against jail employees and their County employer. In a lengthy discussion of the issue, the Tenth Circuit recognized tension between *Heller* and a number of its own decisions over the years, including *Garcia*, on the issue of whether there could be *Monell* liability for the government agency when there was no underlying constitutional violation by an individual. *Crowson*, 983 F.3d at 1185-91.

The Tenth Circuit strained to ultimately conclude in *Crowson* that although a *Monell* failure to train claim could not proceed without establishing an underlying constitutional violation by an individual employee, a "systematic failure" *Monell* claim could proceed even absent proof of an underlying constitutional violation.

> Under *Trigalet* [*v. City of Tulsa, Okl.*, 239 F.3d 1150 (10th Cir. 2001], there is no question that where the actions of a municipality's officers do not rise to the level of a constitutional violation and the claim against the municipality

> is based on it serving as the driving force behind those actions, liability cannot lie. But the question here, and in *Garcia*, is different: whether, even where no individual action by a single officer rises to a constitutional violation, a municipality may be held liable where the sum of actions nonetheless violates the plaintiff's constitutional rights. *Garcia* answers that question in the affirmative. And the Supreme Court's subsequent decision in *Heller* does not cast doubt on *Garcia*; in *Heller* the theory of municipality liability was predicated on the actions of one officer who was determined not to have violated the plaintiff's constitutional rights.

Crowson, 983 F.3d at 1191.

This "sum of actions" of a group of employees, even if unidentified, is the key difference observed in cases like *Barnett* and *Garcia* on the one hand, versus *Heller* and the instant case on the other. In the instant case, as in *Heller*, the plaintiff *explicitly* pinned her *Monell* claim against the Sheriff to the claim that Gaddis and/or Bauman acted unconstitutionally. At the charge conference the district court observed the distinction between the generalized approach that might be allowed under *Barnett* versus the case at hand, observing that the *Monell* claim in this case depended entirely on the acts of Gaddis or Bauman being unconstitutional. The plaintiff even agreed, but successfully convinced the district court that the jury be allowed to

affix *Monell* liability even if there was no underlying constitutional violation by Gaddis or Bauman.[8]

The common thread in this line of cases, and other cases cited below, is the conclusion by some circuit courts that *Heller* does not apply where the *Monell* claim is not tied to the acts of specific employees. For example, in *Barnett* the DUI hold policy was universally applied to DUI arrestees by all employees. Conversely, the *Monell* claim in this case necessarily depended on a constitutional violation by one or both of the deputies, Gaddis or Bauman, and therefore cannot be squared with *Barnett*. The decision here flatly disregards and disobeys *Heller*.

In cases involving a direct claim of an unconstitutional policy or custom causing employees to collectively violate a plaintiff's rights, courts at all levels struggle with reconciling *Heller*'s admonition that in the absence of a constitutional violation by a specific employee there can be no *Monell* liability. See, e.g., *Metris-Shannon v. City of Detroit*, 545 F.Supp.3d 506, 527 (E.D. Mich. 2021) ("[a] municipality or county cannot be liable under §1983 absent an underlying constitutional violation by its officers," quoting *Blackmore v. Kalamazoo County*, 390 F.3d 890, 900 (6th Cir. 2004),

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[8] To be sure, where there is a finding of qualified immunity for a named individual defendant based on a conclusion that the law was not clearly established, there can still theoretically be *Monell* liability because a grant of qualified immunity does not rule out a constitutional violation. But that is not this case. Here, the deputies were determined by the jury not to have violated a constitutional right.

which in turn cited *Heller*, 475 U.S. at 799. In *Metris-Shannon* the district court, after acknowledging *Heller*, then cited *Barnett* for the proposition that as long as a plaintiff can prove that he has suffered an underlying injury, he need not prevail on a claim against a specific actor in order to pursue municipal liability. 545 F.Supp.3d at 517.

A justice of the Alabama Supreme Court, in a §1983 case, recently cited *Heller* and even *Barnett* for the conclusion that when a jury has determined that no underlying constitutional violation occurred: "[t]here are some (albeit rare) instances in which municipal liability can exist absent individual liability, such as when a jury finds that the plaintiff sustained a constitutional [deprivation] that was caused by a municipal policy, custom, or practice, yet does not have enough evidence to find that any particular officer is individually liable for that deprivation." *Ex parte City of Vestavia Hills*, ___ So.3d ___, 2022 WL 1721484, *4 n. 2 (Ala. May 27, 2022) (Mitchell, J., concurring) (citing *Barnett*) (internal quotations omitted).

Similar to the Tenth Circuit's decision in *Crowson*, however, Alabama Supreme Court Justice Mitchell observed in this concurrence that *Heller* invariably bars *Monell* claims where, as in the instant case, a plaintiff squarely contends that *Monell* liability attached to the acts of an individual and that underlying claim failed: "But in cases like the present one, where a court's ruling in favor of an individual defendant is expressly based on its determination that no constitutional deprivation has occurred at all, then the judgment in favor

of the individual defendant does mean – as a matter of logic and the law-of-the-case doctrine – that there cannot be municipal liability under *Monell*."

Similarly, other circuit cases cited in *Barnett* distinguish *Heller* from scenarios wherein the plaintiff's claim was not based on acts of individual employees but against policy or custom, directly. See, e.g., *Barrett v. Orange County Human Rights Com'n*, 194 F.3d 341, 350 (2d Cir. 1999) (cited in *Barnett*, 956 F.3d at 1302) (holding that "at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants" then *Heller* might not bar the *Monell* claim); *Speer v. City of Wynne*, 276 F.3d 980, 985-86 (8th Cir. 2002) (cited in *Barnett*, 956 F.3d at 1302) (discussing *Heller* and limiting it to cases where "the theory of municipal liability asserted was entirely dependent on the municipal defendants' responsibility for the officer's alleged unconstitutional acts").

Barnett also cited *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) in support of the conclusion that a *Monell* claim does not necessarily require a showing of a constitutional violation by municipal employees. *Barnett*, 956 F.3d at 1302. *Fagan* was a high-speed pursuit case founded on a substantive due process theory. The district court granted summary judgment to the Defendant police officers on grounds they committed no underlying constitutional violation and therefore also granted summary judgment to the Defendant City on a *Monell* claim. The Third Circuit reversed as to the City, distinguishing *Heller* on the dubious basis that this Court's holding in *Heller* was

based on a Fourth Amendment claim and does not necessarily apply to substantive due process police pursuit claims. "We hold that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." *Fagan*, 22 F.3d at 1291.

The Third Circuit has subsequently limited *Fagan* to substantive due process cases involving pursuits and states that it otherwise adheres to *Heller*. *Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120, 124 n. 5 (3d Cir. 2003) (the holding in *Fagan* as to municipal liability was "carefully confined" to substantive due process claims: "Here, however, like *Heller* and unlike *Fagan*, the question is whether the City is liable for causing its officers to commit constitutional violations, albeit no one contends that the City directly ordered the constitutional violations. Therefore, once the jury found that (the officers) did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it."). See also *Johnson v. City of Philadelphia*, 975 F.3d 394, 403 n. 13 (3d Cir. 2020) (emphasizing that *Fagan's* limitation of *Heller* applies only to substantive due process police pursuit cases).

The Third Circuit's conclusion that *Heller* does not apply to due process claims simply makes no sense. The foundation of *Heller* was the principle that a municipality may be held liable under *Monell* only where execution of the municipality's policies or customs causes an underlying constitutional violation. The nature of the claimed underlying constitutional violation

– be it founded on the Fourth or Fourteenth Amendments – is utterly irrelevant to that question.

The First Circuit has in fact expressly rejected the Third Circuit's decision in *Fagan*, even in the substantive due process arena, holding that where Boston police officers in a police pursuit did not engage in conduct which shocks the conscience, then the City could not be liable under *Monell* for failure to generally train or monitor police pursuits based on *Heller*. *Evans v. Avery*, 100 F.3d 1033, 1039-40 (1st Cir. 1996), ("[W]e believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . . . Consequently we follow *Heller*'s clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers.").

Like the First Circuit, the Seventh Circuit has rejected the Third Circuit's reasoning in *Fagan* on this issue. In a case where a plaintiff sued an officer and his employing City on a *Monell* claim based on the officer's use of force, but the jury found the officer's use of force to be constitutional, the Seventh Circuit held that the verdict for the officer "precludes the possibility" that the Plaintiff could prevail on a *Monell* claim against the City. *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994) (citing *Heller*).

With regard to *Fagan*, the Seventh Circuit faulted the Third Circuit's reasoning on grounds it incorrectly assumed that the decision in *Heller* was based on respondeat superior, which is not possible under *Monell*. 33 F.3d at 859 n. 11. ("Thus we choose to follow the

clear holding of *Heller* that '[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.'"). And in *Petty v. City of Chicago*, 754 F.3d 416, 424 (7th Cir. 2014) the Seventh Circuit cited *Thompson* and *Sallenger v. City of Springfield, Ill.*, 630 F.3d 499, 504 (7th Cir. 2010), for the proposition that "[A] municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee."[9]

Citing their own 1999 decision in *Barrett*, relied upon by the Eleventh Circuit in *Barnett*, the Second Circuit ten years later in *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 9 (2d Cir. 2009), held where, as in the instant case, a plaintiff ties his *Monell* claim to acts of specific employees then he must prove constitutional violations by those specific employees:

> "[Plaintiff] correctly points out that we have held a municipality may be found liable under §1983 even in the absence of individual

[9] The Fourth Circuit adheres to *Heller* without reservation. *Waybright v. Frederick County*, 528 F.3d 199, 203 (4th Cir. 2008) ("[S]upervisors and municipalities cannot be liable under §1983 without some predicate 'constitutional injury at the hands of the individual [state] officer,' at least in suits for damages."). The Sixth Circuit has observed that some circuits allow *Monell* liability even absent a constitutional violation by employees, *North v. Cuyahoga County*, 754 Fed. Appx. 380, 389-90 (6th Cir. 2018) (collecting cases and describing limitation to *Heller*) but also generally adheres to *Heller*. *Blackmore*, 390 F.3d at 900. So does the Fifth Circuit. *Buehler v. Dear*, 27 F.4th 969, 992 n. 92 (5th Cir. 2022) (citing *Heller*).

> liability. This is true, but only in very special circumstances. The rule we articulated in *Barrett* applies where the combined acts or omissions of several employees acting under a governmental policy or custom may violate those rights. [Plaintiff] has not alleged any such combined acts or omissions of several employees acting under a governmental policy or custom. Accordingly, the District Court was correct in saying that *his* particular theory of municipal liability required a showing that one or more individual officers had violated his rights." (internal quotation marks and citation to *Barrett* omitted) (emphasis in original).

Thus, even if the Eleventh Circuit's decision in *Barnett* – and all the decisions cited in it were correct – the reasoning of *Barnett* and those cases does not apply to the instant case. *Heller* applies here and bars the *Monell* claim against the Sheriff precisely because the Estate grounded its *Monell* claim on the actions of Gaddis and Bauman, and no one else.

When this Court rejected the Ninth Circuit's reasoning in *Heller* it emphasized that even if the city's policies might have *allowed* excessive force, a jury had already determined that the officer's actions were not unconstitutional: "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Heller* at 799 (emphasis in original). So, per the reasoning of *Barnett* and the

cases cited therein, where a plaintiff's claim depends on showing a constitutional violation by individuals, then the *Monell* claim will fail when there is no underlying violation by those individuals.

The Eleventh Circuit has committed essentially the same reversible error here that the Ninth Circuit committed in *Heller*. Customs of allowing partial window coverings, permitting seated checks if the inmate can be seen in the cell window from the desk, or a metal partition in a cell housing an inmate issued only a suicide prevention smock might make it *possible* for Gaddis and Bauman to be deliberately indifferent and cause the death of Reyes, but that does not compel the conclusion that the deputies violated Reyes' rights simply because he managed to commit suicide. A jury has determined that Gaddis and Bauman did not violate Reyes' constitutional rights and so the logic of *Heller* is inescapable. The Sheriff should have been removed from the judgment under Fed.R.Civ.P.59(e).

There is undeniable tension between *Heller* and the Eleventh Circuit opinion in this case on the question of whether and under what circumstances a *Monell* claim may proceed against a government agency when a jury has expressly found that the alleged at-fault employees did not commit an underlying constitutional violation. The Tenth Circuit has, since *Barnett*, observed in *Crowson* the same tension even in its own cases. Other circuits, as discussed above, limit

Heller to cases where the *Monell* claim is premised on the acts of individuals.[10]

Finally, adding to the confusion, even the circuit courts that have recognized some sort of limitation to *Heller* have themselves in other cases properly applied *Heller* to dispense with a *Monell* claim, with little or no discussion of the nuance articulated in *Barnett* or the cases cited therein. This includes even the Eleventh Circuit. See, e.g., *Baker v. City of Madison*, 67 F.4th 1268, 1282 (11th Cir. 2023) ("Here, because there was no underlying constitutional violation, Baker's municipal liability claim against the City fails as a matter of law.") (citing *Heller* and *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 821 (11th Cir. 2017)); *Baker v. Clearwater County*, Case No. 22-35011, 2023 WL 3862511, *3 (9th Cir., June 7, 2023) ("Because the constitutional claims against the individual defendants upon which Baker premises his *Monell* claim were properly dismissed, Baker's *Monell* claim was also properly subject to summary judgment.") (internal citation to *Heller* omitted); *Frey v. Town of Jackson, Wyoming*, 41 F.4th 1223, 1239 (10th Cir. 2022) ("If a plaintiff suffered no constitutional violation, he cannot

[10] This approach, too, is problematic for it encourages pleading gamesmanship to avoid summary judgment or judgment as a matter of law on *Monell* claims. For example, if three deputies are equally involved in failing to adequately watch a suicidal inmate, the plaintiff could sue only two, strategically reserving one. Should a court grant the two deputies summary judgment, the plaintiff could argue that her *Monell* claim against the Sheriff survives because she did not premise her *Monell* claim solely on the acts of the named individual capacity defendants.

recover simply because some municipal policy might have authorized an officer to violate the Constitution.") (citing *Heller*).

This Court in *Heller* held without qualification that where employees are identified and sued and held not to have violated plaintiff's constitutional rights, there can be no *Monell* liability. The limitation imprinted onto that holding by some circuit courts – that *Heller* does not apply to all *Monell* cases, only a certain type – has not been authorized by this Court.

The Court should grant this petition, review the case, reverse the Eleventh Circuit's erroneous ruling, and either reaffirm *Heller* as applicable to all *Monell* claims or clarify that under *Heller* where a §1983 plaintiff identifies specific employees as at fault, and the jury finds no constitutional violation by those employees, then as a matter of law there can be no *Monell* liability. Given the jury's exoneration of Gaddis and Bauman of all §1983 claims the Court should reach the natural conclusion that the *Monell* claim against the Sheriff based on the actions of Gaddis and Bauman also failed, ultimately reversing with directions that the Sheriff be removed from the judgment.

B. The Court should grant the petition so as to establish that the Jail's customs regarding suicide prevention, even if those customs may have allowed Gaddis and Bauman to be deliberately indifferent in their failure to monitor Reyes, are not themselves unconstitutional, and that the mere fact of Reyes' successful suicide is insufficient evidence of deliberate indifference on which to ground *Monell* liability.

Heller draws a critical distinction between a policy and custom that in theory *could* result in a constitutional violation versus a policy or custom that actually *does* cause an employee to commit a constitutional violation. In the absence of a constitutional violation by agency employees in the case at hand the fact that *Monell* policies or customs could have caused a violation is irrelevant because no violation occurred. As this Court succinctly put in *Heller*, "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Heller* at 799 (emphasis in original).

The circuit courts that have touched on this issue all appear to be in accord that policies or customs which create an opportunity for a constitutional violation cannot sustain a *Monell* verdict if those policies and customs did not cause the underlying violation of plaintiff's rights. See, e.g., *Frey v. Town of Jackson, Wyoming*, 41 F.4th 1223, 1239 (10th Cir. 2022) ("If a

plaintiff suffered no constitutional violation, he cannot recover simply because some municipal policy might have authorized an officer to violate the Constitution.") (citing *Heller*); *Pulera v. Sarzant*, 966 F.3d 540, 555 (7th Cir. 2020) (where plaintiff alleged nurses acted pursuant to policy and training, but did not act wrongfully such that, even if the policies or training could cause a violation of constitutional rights, the absence of such a violation precluded *Monell* liability) (citing *Heller*); *Gill v. Judd*, 941 F.3d 504, 526 n. 6 (11 Cir. 2019) (that a policy might authorize a constitutional violation is irrelevant if it did not actually cause one) (citing *Heller*).

A *Monell* claim in a case like this actually requires a showing of two levels of deliberate indifference. First, there must be deliberate indifference by the deputies to a serious medical need that causes an injury. *Farmer*. Second, there must be a showing that the constitutional violation by the deputies was truly caused by a policy or custom, adopted by the Sheriff with deliberate indifference to its known or obvious consequences. *Brown*, 520 U.S. at 410; *Canton v. Harris*, 489 U.S. 378, 390 (1989).

The Eleventh Circuit identified three jail customs as at issue in this case:

(1) permitting the covering of two of the three windows of ACR-1;

(2) housing suicidal inmates in ACR-1, although the cell contained a metal partition and its interior

could not be fully viewed from the Jail's booking desk; and

(3) allowing deputies to perform visual checks on suicidal inmates by glimpsing the inmate through a cell window while the deputy remained seated at the booking desk. App., p. 9 (footnote omitted).

But none of these practices have ever been declared to be unconstitutional by the Eleventh Circuit or by this Court and these customs had not previously resulted in suicide at the jail. There was no showing of deliberate indifference by the Sheriff in failing to appreciate that this confluence of strange events even could, much less likely would, result in an inmate using a suicide prevention smock to commit suicide. *Brown*, *Canton*.

The Eleventh Circuit in this case instead relied simply on the fact that Reyes did in fact commit suicide to conclude that these customs evolved with the necessary mens rea by the Sheriff to show that the customs were the unconstitutional cause of the suicide. At worst these customs could be said simply to have created a condition, an *opportunity*, for Reyes to commit suicide if Gaddis and Bauman failed to complete valid checks of Reyes. But, none of these three customs actually caused the deputies to fail to perform valid checks.

As discussed in the Eleventh Circuit's opinion in this case, the last three entries in the log book by the deputies were "DOOR," indicating that Gaddis and Bauman glimpsed Reyes as he walked by the cell door

windows. Gaddis and Bauman were seated at the booking desk from 9:30 a.m. to 10:25 a.m., which is the period during which further back in the cell Reyes was manipulating the suicide smock onto the PREA partition. The evidence was that Gaddis and/or Bauman disobeyed Jail protocol in ten of the 15 checks they documented. Five checks were fabricated and five more checks were auditory, which even the Eleventh Circuit acknowledged violated the Sheriff's practices as an improper substitute for physically visualizing Reyes, including if need be getting up and looking into the cell. App., pp. 6-8.

The Sheriff has been held liable under *Monell* because Gaddis and Bauman to a large degree did *not* follow the Sheriff's customs for close watch inmates. What the Eleventh Circuit did here is make the same fundamental mistake as did the Ninth Circuit in *Heller*. That the customs of partial window coverings, or glimpsing the inmate from the booking desk, or placement of the PREA-consistent partition in the back of the cell *could* create the *opportunity* for a constitutional violation by Gaddis and Bauman does not mean that those customs *did* cause a constitutional violation by the deputies.

The Eleventh Circuit opinion in this case on the one hand defined the constitutional rights claims against Gaddis and Bauman as requiring that the jury find causation. App., pp. 12-13. On the other hand, and in cursory but completely contradictory terms given *Farmer* and *Heller*, the Eleventh Circuit held simply that the jury found causation directly tied to

the policies and customs of the Sheriff. "The jury's verdict represents a finding that the Jail's policies – not the actions of the individual deputies – were the 'moving force' [behind] the constitutional violation." App., p. 19.

A custom cannot be the cause of a constitutional violation where no constitutional violation occurred in the first place. Given that the Estate based its *Monell* claim on the actions of the deputies, but the deputies were exonerated, the *Monell* claim cannot survive. And the fact that the customs created the opportunity for Gaddis and Buman to violate Reyes' rights is "quite beside the point," *Heller* at 799, if as here the jury finds that the deputies did not violate Reyes' rights.

This Court should grant the petition to reaffirm that a policy or custom allegedly causing a constitutional violation must have itself been adopted with deliberate indifference, and that policies or customs which might create the opportunity for violation of a constitutional right, but do not cause it, cannot sustain *Monell* liability. The Court should then review this case and hold that the mere fact of Reyes' suicide cannot suffice to sustain *Monell* liability such that the Sheriff is entitled to judgment as a matter of law.

CONCLUSION

The Court should grant this petition for writ of certiorari so as to reaffirm or to clarify the application of *Heller* to cases like this one where the plaintiff

explicitly pins *Monell* liability to the actions of specific employees, but those employees are determined not to have committed an underlying constitutional violation. The Court should also grant the petition for writ of certiorari to hold that the Sheriff is not liable under *Monell* where his customs were not themselves shown to be deliberately indifferent and did not cause his employees to act unconstitutionally.

Respectfully submitted,

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