NO. 23-165

In the Supreme Court of the United States

BOB JOHNSON,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS
SHERIFF OF SANTA ROSA COUNTY, FLORIDA,

Petitioner,

v.

JESSICA N. ROGERS,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
JOSE F. ESCANO-REYES AND AS PARENT
AND NATURAL GUARDIAN OF Y. C., A MINOR,

Respondent.

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

BRIEF OF AMICUS CURIAE THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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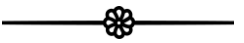
AMICUS CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION

The National Sheriffs' Association respectfully submits this amicus curiae brief.[1]



IDENTITY AND INTEREST OF AMICUS CURIAE

The National Sheriffs' Association (the "NSA") is a non-profit association under I.R.C. § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,086 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

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[1] Amicus notified all counsel of record of its intent to file this brief more than 10 days before the due date. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The language of Sec. 1983 as originally passed plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights. Governing bodies cannot be liable solely on the basis of the existence of an employer-employee relationship with a tortfeasor. This Court clearly required in *Monell* that a policy must cause an employee to violate another's constitutional rights to impose liability on the government entity. Here, the jury held that deputies did not violate the inmate's constitutional rights.

Accordingly, the government entity cannot be held liable under Sec. 1983.

ARGUMENT

I. *MONELL* LIABILITY REQUIRES AN UNDERLYING CONSTITUTIONAL VIOLATION BY AN INDIVIDUAL IMPLEMENTING THE POLICY OR CUSTOM.

Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (June 6, 1978). "On the other hand, the language of § 1983 . . . compels the conclusion that Congress did not intend municipalities to be held

liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*

In *Monell*, this Court held, "In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691.

In *Monell*, this Court provided, "The [language of Sec. 1983 as originally passed] . . . plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692. Accordingly, in *Monell*, this Court clearly required a policy to "cause an employee to violate another's constitutional rights" to impose liability on the government entity. The *Monell* Court went on to say, "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.*

In the present case, "B's liability" here, Petitioner Bob Johnson, the Sheriff of Santa Rosa County, did not cause "A [officers] to subject another to a [constitutional] tort." The jury specifically found that officers did not "cause" decedent's constitutional rights violation. Further, "Congress did not intend Sec. 1983 liability to attach where such causation was absent." *Id.* Accordingly, *Monell* liability cannot apply to petitioner.

In *City of Los Angeles v. Heller*, 475 U.S. 796, 475 U.S. 796 (April 21, 1986), this Court reaffirmed what was decided in *Monell*. Specifically, this Court held in *Heller* that, "if the latter [officers] inflicted no constitutional injury on respondent [plaintiff], it is inconceivable that petitioners [City of Los Angeles and the L.A. Police Commission] could be liable to respondent." *Heller*, 475 U.S. at 799. The *Heller* Court explained 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." *Heller*, 475 U.S. at 810-811.

Most relevant to the instant case, this Court provided in *Heller*, "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." *Id.* at 811. In the instant case, respondents claim that the alleged practice of petitioner housing suicidal inmates in a particular cell was unconstitutional. However, as in *Heller*, the alleged "fact that the department regulations might have authorized the use of constitutionally [here, alleged inadequate housing and supervision of suicidal inmates] is quite beside the point." *Id.* Decedent suffered no constitutional injury at the hands of the individual police officers. Accordingly, *Monell* liability is not applicable to petitioner.

A policy or practice must be the moving force behind a constitutional violation. In other words, the policy must have caused the constitutional violation. However, a policy is words on a paper or computer file.

A policy can only cause a constitutional violation through an actor, such as deputies, who apply the policy.

Likewise, a custom or practice is a repeated way of acting in a certain situation. Here, a custom or practice of monitoring and housing suicidal inmates is the way deputies act. The jury found that the deputies involved did not cause a constitutional violation. Accordingly, the sheriff, who was not present and did not individually perform any functions as to the inmate, cannot have caused a constitutional violation.

In sum, if the application of a policy, practice or custom by deputies is determined by a jury to have not caused a constitutional violation, then the policy maker in his official capacity, the Sheriff, cannot have caused a constitutional violation, consistent with *Heller*.

II. MANY CIRCUIT COURTS FOLLOW THIS COURT'S INSTRUCTIONS IN *MONELL* AND *HELLER*.

The Eighth Circuit follows this Court's decision in *Heller* by requiring an underlying constitutional violation for *Monell* liability. In *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. April 12, 2018), Norman Whitney, Sr. ("Whitney Sr.") brought this action after his son, a pretrial detainee who had recently been treated for suicidal thoughts, hanged himself in a cell that was monitored by closed-circuit television. *Id.* at 858. Whitney Sr. asserted state law wrongful death claims and federal claims under 42 U.S.C. § 1983 against correctional officer Shelley Sharp and the City of St. Louis. The district court dismissed the federal claims because the complaint failed to allege that Sharp knew that Whitney Sr.'s son presented a suicide risk and because the City could not be liable without an underlying constitutional violation. *Whitney*, 887

F.3d at 858. The district court declined to exercise supplemental jurisdiction over the state law claims. *Id.* at 859. The Eighth Circuit affirmed. *Id.*

In his § 1983 claim against the City, Whitney Sr. alleged that the City violated Whitney's rights by failing to have a policy of constant surveillance in place at the Justice Center. *Whitney*, 887 F.3d at 860. The Eighth Circuit explained that under *Monell*, "[s]ection 1983 liability for a constitutional violation may attach to a municipality if the violation resulted from . . . an 'official municipal policy," *quoting Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). *Whitney*, 887 F.3d at 860. The Eighth Circuit held in *Whitney,* "It follows that, absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City." *Whitney*, 887 F.3d at 861, *citing Malone v. Hinman*, 847 F.3d 949, 955 (8th Cir. 2017) ("Because we conclude that Officer Hinman did not violate Malone's constitutional rights, there can be no § 1983 or *Monell* liability on the part of Chief Thomas and the City."); *Sitzes v. City of W. Memphis*, 606 F.3d 461, 470 (8th Cir. 2010) (agreeing with district court that plaintiffs' claims "could not be sustained absent an underlying constitutional violation by the officer"); *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) ("Without a constitutional violation by the individual officers, there can be no § 1983 or *Monell* . . . municipal liability.").

Likewise, in another Eighth Circuit decision involving an inmate suicide, the court held, " . . . under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Washington County may be liable under § 1983 only if

the constitutional violation resulted from an official municipal policy. *Brabbit v. Capra*, 59 F.4th 349, 354 (8th Cir. February 3, 2023). After the court determined that officers did not violate the decedent's constitutional rights, the court explained, "Because there is no cognizable constitutional violation, there is no basis for *Monell* liability." *Id*.

The Ninth Circuit also follows this Court's decision in *Heller* by requiring an underlying constitutional violation for *Monell* liability. In *Lockett v. Cty. of Los Angeles*, 977 F.3d 737 (9th Cir. October 2, 2020), the court explained, "To establish municipal liability under *Monell*, Lockett must prove that (1) he was deprived of a constitutional right; (2) the municipality had a policy; (3) the policy amounted to deliberate indifference to Lockett's constitutional right; and (4) the policy was the moving force behind the constitutional violation." *Lockett*, 977 F.3d at 741. The court further explained, "Accordingly, while *Monell* claims cannot predicate municipal liability for constitutional violations of its officers under the theory of respondeat superior, *Monell*, 436 U.S. at 691, such claims are still 'contingent on a violation of constitutional rights.'" *Lockett*, 977 F.3d at 741, *citing*, *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) (holding that "municipal defendants cannot be held liable because no constitutional violation occurred.").

The Ninth Circuit in Lockett clearly explained what is required for *Monell* liability as follows:

> *Monell* claims thus require a plaintiff to show an underlying constitutional violation. For example, the Court has held that a jury's determination that an individual officer did not use excessive force precluded § 1983

> municipal liability on that ground. *Heller*, 475 U.S. at 799 ("[N]either *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.").

Lockett, 977 F.3d at 741.

The *Lockett* court also stated, "As the Ninth Circuit Model Civil Jury Instructions demonstrate, in the excessive force context, a plaintiff cannot succeed on a *Monell* claim without establishing an officer's deprivation of a federal right." *Lockett*, 977 F.3d at 741, *citing*, Model Civ. Jury Instr. 9th Cir. 9.5 (providing that an element of a *Monell* claim is that the plaintiff must prove "the acts of [name of defendant's official or employee] deprived the plaintiff of his . . . particular rights under . . . the United States Constitution") (simplified); *see also* Model Civ. Jury Instr. 9th Cir. 9.8. The court explained, "While the County correctly argues that *Monell* liability is limited to the 'acts of the municipality,' *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (simplified), the peace officer's conduct still constitutes an element of a *Monell* claim." *Lockett*, 977 F.3d at 741.

The *Lockett* court concluded, "Because there can be no *Monell* claim based on excessive force without an underlying constitutional violation by the officers, the peace officer's conduct in violation of the Constitution here becomes the 'necessary logical condition' to formulate a *Monell* claim. *Lockett*, 977 F.3d at 742, *citing*, *Safeco Ins. Co. of Am.*, 551 U.S. at 63; *see also Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002)

("Exoneration of [the officer] of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force.").

Even the Eleventh Circuit has recently acknowledged that *Monell* liability requires an underlying constitutional violation by the deputy. In *Jacobs v. Ford*, 2022 U.S. App. LEXIS 10265 (11th Cir. April 15, 2022), Defendant Nelson, another officer of the Bay County Sheriff's Office, completed Jacobs's booking into the jail. *Jacobs*, 2022 U.S. App. LEXIS at 4. Officer Nelson placed Jacobs, who was still visibly intoxicated, into a solitary cell that had a corded telephone mounted on the wall. *Id.*

Defendant Brown, a deputy of the Bay County Sheriff's Office, was tasked with performing security checks in the area of the jail where Jacobs was located on the afternoon of May 2. *Id.* Per Bay County Sheriff's Office policy, security checks were supposed to occur in male booking areas at least every 30 minutes. *Id.* However, Deputy Brown failed to timely perform a security check at 5:00 PM, which was when Jacobs attempted suicide by hanging using a piece of his shirt and the telephone cord in his cell. *Id.* Deputy Brown noticed that something was wrong in Jacobs's cell around 5:15 PM and called for emergency assistance. *Id.* at 5. Jacobs was rushed to a hospital, where he was diagnosed with acute respiratory failure and asphyxiation and remained in a coma for several weeks. *Id.* As a result of his suicide attempt, Jacobs suffered permanent physical and cognitive injuries. *Id.*

In deciding the case, the Eleventh Circuit provided, "Because Jacobs did not plead a plausible deliberate indifference claim against the sheriff's office employees who came into contact with him on May 2, 2019, his

Monell and supervisory liability claims fail as well." *Jacobs*, 2022 U.S. App. LEXIS at 13.

The court explained, "There can be no policy-based liability or supervisory liability when there is no underlying constitutional violation." *Id.*, *citing*, *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 821 (11th Cir. 2017); *see also Gish*, 516 F.3d at 955 (holding that county and sheriff could not be liable for *Monell* and supervisory liability claims against them arising from a detainee's suicide where the deputy transporting the detainee was not "deliberately indifferent to a known risk" the detainee would commit suicide and, therefore, "there was no underlying constitutional violation by [the deputy]"). Accordingly, the court concluded, "The district court properly dismissed Jacobs's § 1983 claims for failure to state a claim upon which relief could be granted. *Jacobs*, 2022 U.S. App. LEXIS at 14.

In *Grabow v. County of Macomb*, 580 Fed. Appx. 300 (6th Cir. August 29, 2014), the Sixth Circuit, in an inmate suicide case, recognized the need for an underlying constitutional violation for *Monell* liability. There, the court held, "We affirm the grant of summary judgment on Grabow's municipal liability claim against Macomb County." *Id.* at 311. "Grabow failed to present facts upon which a reasonable juror could conclude that Franks violated any of Prochnow's Eighth and Fourteenth Amendment rights to adequate medical care." *Id.* at 311-312. Absent an underlying constitutional violation, Grabow's claim against the county under § 1983 must also fail." *Grabow*, 580 Fed. Appx. At 312. "There can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act." *Grabow*, 580 Fed. Appx. At 312.

III. TO FIND THAT A GOVERNMENT ENTITY WAS DELIBERATELY INDIFFERENT TO A RISK, A PLAINTIFF MUST PROVE THAT THE GOVERNMENT ENTITY HAD ACTUAL KNOWLEDGE OF THAT RISK.

The Ninth Circuit decided a case involving *Monell* liability with facts similar to the instant case. There, the Ninth Circuit meticulously explained what is needed to find *Monell* liability against a Sheriff for failure to protect an inmate.

In *Castro v. Cnty. of Los Angeles*, 797 F.3d 654 (9th Cir. August 11, 2015), the court was faced with a claim that Jonathan Castro was arrested for being drunk in public, was housed in a "sobering cell" at the jail, and was then savagely attacked by another intoxicated arrestee, Gonzales, who had been placed in the cell with him. 797 F.3d at 660. The county and Sheriff's Department (collectively, "County") were sued, along with officers. Castro's basic theory of liability under 42 U.S.C. § 1983 was that both the County and the individual officers were deliberately indifferent to the substantial risk of harm created by housing him in the same sobering cell as Gonzalez and by failing to maintain appropriate supervision of the cell. *Castro*, 797 F.3d at 662.

The individual defendants moved to dismiss the claims against them on the ground of qualified immunity, but the district court rejected their arguments. It concluded that a jury could find that placing an actively belligerent inmate in an unmonitored cell with Castro constituted deliberate indifference to a substantial risk of harm, in violation of Castro's constitutional rights. *Id.*

The case proceeded to trial. After Castro rested his case, the defendants moved for judgment as a matter of law on three grounds: (1) insufficient evidence that the design of a jail cell constitutes a policy, practice, or custom by the County that resulted in a constitutional violation; (2) insufficient evidence that a reasonable officer would have known that housing Castro and Gonzalez together was a violation of Castro's constitutional rights; and (3) insufficient evidence for the jury to award punitive damages. *Id.* The district court denied the motion in its entirety. Five days later, the jury returned a verdict for Castro on all counts and awarded him $2,605,632.02 in damages. After trial, the defendants timely filed a renewed motion for judgment as a matter of law. The trial court denied the renewed motion without issuing a written opinion. This appeal followed.

In evaluating the case, the Ninth Circuit explained, "A formal policy exists when 'a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Castro*, 797 F.3d at 670-671. Further, the court explained, "When pursuing a *Monell* claim stemming from a formal policy, a plaintiff must prove that the municipality 'acted with the state of mind required to prove the underlying violation.'" *Castro*, 797 F.3d at 671, *citing*, *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143-44 (9th Cir. 2012) (internal quotation marks omitted) (explaining that the plaintiff must prove that the municipal defendants acted with deliberate indifference, the same standard that a plaintiff has to establish in a § 1983 claim against an individual defendant).

The *Castro* court elaborated, "An informal policy, on the other hand, exists when a plaintiff can prove the existence of a widespread practice that, although not authorized by an ordinance or an express municipal policy, is 'so permanent and well settled as to constitute a custom or usage with the force of law.'" 797 F.3d at 671. Further, the court stated, "Such a practice, however, cannot ordinarily be established by a single constitutional deprivation, a random act, or an isolated event. *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). Instead, a plaintiff such as Castro must show a pattern of similar incidents in order for the factfinder to conclude that the alleged informal policy was 'so permanent and well settled' as to carry the force of law." *Castro*, 797 F.3d at 671, *citing*, *Praprotnik*, 485 U.S. at 127.

The court found "the record is devoid of any similar incident to that suffered by Castro. He thus failed to establish that the County had an informal policy in relation to the sobering cell that caused him harm. The County's liability thus hinges on its final argument, which boils down to (1) whether the design of the sobering cell constitutes a formal County policy and, if so, (2) whether the County was deliberately indifferent to the harm that befell Castro as a result of that formal policy." *Castro*, 797 F.3d at 671.

Having determined that the County's design of the [jail] sobering cell constituted a formal municipal policy, the court turned next to the issue of whether that policy violated Castro's constitutional rights. Castro alleged that the County's policy deprived him of the same constitutional right that was violated by the individual defendants—his right to be free from violence at the hands of other inmates. "As with the

individual defendants," the court stated, "Castro must demonstrate that (1) he faced a substantial risk of serious harm, (2) the County, knowing of the risk, showed deliberate indifference by failing to take reasonable corrective measures, and (3) the County's failure to mitigate the risk was a proximate cause of the harm that he suffered." *Castro*, 797 F.3d at 673, *citing*, *Farmer*, 511 U.S. at 828, 842.

The *Castro* court then explained the difference between actual and constructive knowledge as follows:

> Both sides—and, in our view, the dissent—have muddled the issue of knowledge by failing to distinguish between actual versus constructive knowledge. The law has long recognized a distinction between constructive knowledge (*i.e.*, what a reasonable person should have known in a given situation) and actual knowledge (*i.e.*, what a particular person did in fact know in the same situation). Constructive knowledge is an objective standard, whereas actual knowledge is a subjective standard.

Castro, 797 F.3d at 673.

The *Castro* court acknowledged that this Court has previously determined that subjective (*i.e.*, actual) knowledge is required in order to impose liability under a failure-to-protect claim. *Castro*, 797 F.3d at 674. The court explained, "In *Farmer*, the Court held specifically that for liability to attach based on a defendant's failure to protect a plaintiff from harm, the defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the infer-

ence." *Castro*, 797 F.3d at 674, *citing*, *Farmer*, 511 U.S. at 837.

The Ninth Circuit in *Castro* stated, "In adopting this test for deliberate-indifference claims, the Supreme Court specifically rejected an objective standard of knowledge (*i.e.*, constructive knowledge) for these claims." *Castro*, 797 F.3d at 674. The court further stated, "Even the dissent acknowledges that *Kingsley* did not overrule *Farmer* or otherwise question the existing test for deliberate-indifference claims against the individual defendants." *Castro*, 797 F.3d at 674.

In examining the subjective state of mind of a governmental entity, the *Castro* court instructed:

> *Farmer* recognized that "conceptual difficulties may attend any search for the subjective state of mind of a governmental entity," *id.* at 841, but these difficulties are not insurmountable. A plaintiff could take any of several paths to prove that a municipality had actual knowledge of a substantial risk of serious harm to inmates. For example, where, as here, there is an applicable regulation that should have put the municipality on notice of the risk, a plaintiff could offer evidence that the municipality had been notified that it was out of compliance with the regulation. Other evidence, such as meeting minutes or other records, that the regulation was discussed at planning meetings would also suffice, as would evidence that similar incidents had occurred and been brought to the municipality's attention. Regardless of its form, however, some evidence of actual knowledge is required to find that a muni-

> cipality had the requisite "consciousness of a risk" to be held deliberately indifferent.

Id. at 840. *Castro*, 797 F.3d at 674.

The Ninth Circuit explained that knowledge that an individual or an entity is deemed to have as a matter of law is, by definition, constructive knowledge. *Id.* at 675. Further, according to BLACK'S LAW DICTIONARY (10th ed. 2014) ("[C]onstructive knowledge [is] [k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."). *Castro*, 797 F.3d at 675. However, constructive knowledge is insufficient to impose liability for a failure-to-protect claim, and actual knowledge cannot, from a definitional standpoint, be imputed as a matter of law. *Id.*

In *Farmer v. Brennan*, 511 U.S. 825 (June 6, 1994), this Court explained what is required to establish deliberate indifference for a constitutional violation. This Court explained:

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does

> not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. *See* Prosser and Keeton §§ 2, 34, pp. 6, 213-214; *see also Federal Tort Claims Act*, 28 U.S.C. §§ 2671-2680; *United States v. Muniz*, 374 U.S. 150, 10 L. Ed. 2d 805, 83 S. Ct. 1850 (1963). But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer, 511 U.S. at 837-838.

This Court in *Farmer* explained that obvious risk is insufficient to establish deliberate indifference. The Court instructed:

> Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were there-

> fore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

Farmer, 511 U.S. at 844.

This Court in *Farmer* recognized that a policy maker responding reasonably to a risk is not deliberately indifferent. Specifically, the Court stated, "In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844. A prison official's duty under the Eighth Amendment is to ensure "'reasonable safety,'" *Helling*, supra, at 33; *see also Washington v. Harper*, 494 U.S. at 225; *Hudson v. Palmer*, 468 U.S. at 526-527, a standard that incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 511 U.S. at 844-845, *citing*, *Spain v. Procunier*, 600 F.2d 189, 193 (CA9 1979) (Kennedy, J.); *see also Bell v. Wolfish*, 441 U.S. 520, 547-548, 562, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979).

In the instant case, Petitioner was not deliberately indifferent to a substantial risk of harm to decedent. No other instances of suicide had occurred in the manner used by decedent. Petitioner had no actual knowledge of the risk. Further, Petitioner reasonably took actions to avert such an incident by using suicide smocks as a precaution against suicide, as well as a policy of periodic visual checks by officers of suicidal inmates. Accordingly, no evidence exists that Petitioner was deliberately indifferent to a substantial risk of suicide so no *Monell* liability can attach.

IV. MANY CIRCUITS DO NOT FOLLOW *MONELL* OR *HELLER* AND DO NOT REQUIRE AN UNDERLYING CONSTITUTIONAL VIOLATION TO FIND *MONELL* LIABILITY, BUT USUALLY ONLY WHERE PLAINTIFF SUFFERED A CONSTITUTIONAL VIOLATION THAT CANNOT BE ATTRIBUTED TO ANY INDIVIDUAL DEFENDANT'S UNCONSTITUTIONAL CONDUCT.

In *North v. Cuyahoga Cty.*, 754 Fed. Appx. 380, 754 Fed. Appx. 380 (6th Cir. November 5, 2018), the court examined a case where plaintiff challenged the dismissal of his *Monell* claim against defendant county, arguing that the county's policies, customs, and failure to train its employees deprived him of his right to constitutionally adequate medical care while he was a prisoner.

In *North*, the court stated that there must be a constitutional violation for a § 1983 claim against a municipality to succeed—if the plaintiff has suffered no constitutional injury, his *Monell* claim fails. *North*, 754 Fed. Appx. at 389, *citing*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986) (per curiam). A court's finding that an individual defendant is not liable because of qualified immunity, however, does not necessarily foreclose municipal liability, according to the court. *North*, 754 Fed. Appx. at 389, *citing*, *Garner*, 8 F.3d at 365; *see also Richko v. Wayne County*, 819 F.3d 907, 920 (6th Cir. 2016) (rejecting the argument that a county cannot be held liable because the individual defendants are not liable as "unsound"). The *North* court provided, "Whether and under what circumstances a municipality can be liable when the plaintiff suffered a constitutional violation but cannot attribute it to any individual defendant's unconstitutional conduct is a more

complicated question—one that this court recently noted in *Winkler*, 893 F.3d at 899-900." *North*, 754 Fed. Appx. at 389.

The North court explained that *Winkler* acknowledged the broad statement in *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001), that, without a constitutional violation by an individual defendant, municipal defendants cannot be held liable. *North*, 754 Fed. Appx. at 389. The court also noted, however, that other cases from the Sixth Circuit have indicated that this principle might have a narrower application. *North*, 754 Fed. Appx. at 389.

In *North*, the court listed several other circuits who have interpreted *Heller* to permit municipal liability in certain circumstances where no individual liability is shown, including, *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) ("If a plaintiff establishes he suffered a constitutional injury by the City, the fact that individual officers are exonerated is immaterial to [municipal] liability under § 1983."); *Speer v. City of Wynne*, 276 F.3d 980, 985-86 (8th Cir. 2002) ("Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. . . . The appropriate question under *Heller* is whether a verdict or decision exonerating the individual governmental actors can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors."); *Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir. 2001) ("*Heller*

should not, of course, be applied indiscriminately. For example, where alleged injuries are not solely attributable to the actions of named individual defendants, municipal liability may still be found." (citing *Barrett v. Orange Cty. Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir. 1999))); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) (holding that, in certain circumstances, "an underlying constitutional tort can still exist even if no individual police officer violated the Constitution"); *see also Daniel v. Cook County*, 833 F.3d 728, 734 (7th Cir. 2016) (permitting the plaintiff to pursue a *Monell* claim where widespread, systemic, gross deficiencies in the jail's medical recordkeeping and scheduling systems resulted in the denial of medical care, even though no individual medical provider could be held responsible). *North*, 754 Fed. Appx. at 389-390.

The Sixth Circuit in *North* found that in many cases, a finding that no individual defendant violated the plaintiff's constitutional rights will also mean that the plaintiff has suffered no constitutional violation. *North*, 754 Fed. Appx. at 390. In a subset of § 1983 cases, however, the fact that no individual defendant committed a constitutional violation—*e.g.*, acted with deliberate indifference to an inmate's serious medical need—might not necessarily "require a finding that no constitutional harm has been inflicted upon the victim, nor that the municipality is not responsible for that constitutional harm." *North*, 754 Fed. Appx. at 390, *citing*, *Epps*, 45 F. App'x at 334 (Cole, J., concurring).

Based on the above holdings, some courts have found that *Monell* liability can apply where a policy or custom directs unconstitutional conduct generally, across an entire agency. In such cases, *Monell* liability

against the agency may apply. That is not the situation in the instant case. In the instant case, the *Monell* claim was grounded on the actions of individual deputies who were found to have not violated decedent's constitutional rights. Accordingly, *Monell* liability cannot apply against Petitioner.

V. ACTION IS NEEDED BY THIS COURT DUE TO A SPLIT IN THE CIRCUITS.

As can be seen by the above enumerated cases, this Court's direction is needed by circuit courts to define exactly how *Monell* and *Heller* are to be interpreted. Specifically, is an underlying constitutional violation by an employee of a governmental entity needed to find *Monell* liability against the governmental entity. If not, what factors must be considered in finding *Monell* liability where no governmental employee violates a constitutional right.

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 bases *Monell* liability on the actions of specific employees, but those employees did not commit 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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