No. 23-165

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

PETITIONER SHERIFF'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THIS CASE PRESENTS A CLEAR OPPORTUNITY FOR THE COURT TO REAFFIRM *HELLER* AND TO RECONCILE THE INCONSISTENT, CONTRADICTORY HOLDINGS OF THE LOWER COURTS AS TO WHEN AND HOW TO APPLY *HELLER*.

The jury in the trial of this matter found that neither of the only two deputies responsible for monitoring Reyes committed a constitutional violation. Yet, over the Sheriff's objection, and contrary to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the trial court permitted the jury to find the Sheriff liable under *Monell v. New York City Dept. of Social Svs*., 436 U.S. 658 (1978). The Eleventh Circuit, citing cases from other Circuits that are contrary to *Heller*, affirmed the trial court's error in sustaining the verdict against the Sheriff in contravention of *Heller*. This case presents a clear opportunity for the Court to reaffirm *Heller* and to reconcile the inconsistent, contradictory holdings from the Circuit Courts of Appeals on this issue.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari does not deny that there is a conflict in the reasoning of the lower courts as to application of the principle announced in *Heller*, that, where a plaintiff claims specified employees violated his constitutional rights and it has been determined that those employees did not commit an underlying constitutional violation, then there can be no 42 U.S.C. §1983 liability to the employing municipality under *Monell*. Instead, on the whole, the Brief in Response simply

argues that *Heller* does not apply to the situation at hand.

But that is exactly the problem: this case represents yet *another* end-around by a lower court of this Court's holding in *Heller*. That is the fundamental reason that the petition ought to be granted, so that this Court may reaffirm and clarify the application of *Heller* to this, and other cases. The central point in the Sheriff's Petition for Writ of Certiorari is that the lower courts, including the Eleventh Circuit in this case, have inconsistently applied the seemingly straightforward holding of *Heller*. The circuit courts have clearly struggled with how to apply *Heller*, contradicting each other – sometimes even contradicting themselves internally – on the point.

As discussed in the Petition, the Second, Third, Eighth, and Tenth Circuits have all described various circumstances in which *Heller* does not foreclose municipal *Monell* liability, even in the absence of an underlying constitutional violation by a municipal employee. Other circuits, such as the First and Seventh, follow *Heller*, without exception. Those two circuits have explicitly rejected the reasoning of the Third Circuit in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), in which the Third Circuit carved out its own unique exception to *Heller*, holding that *Monell* liability may occur absent an underlying violation specifically in substantive due process cases. That distinction in disregarding *Heller* in a specific line of constitutional torts makes no sense, as noted by the First and Seventh Circuits. *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."); *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994) (same).

The Eleventh Circuit in this case held that the Sheriff could be liable, *even when* specific employees identified by Respondent Rogers as at fault, did not commit an underlying violation. That contradicts the holding in *Crowson v. Washington County, Utah*, 983 F.3d 1166 (10th Cir. 2020), wherein the Tenth Circuit concluded that *Heller* applies to bar a municipal *Monell* liability claim in exactly the circumstance here – where the plaintiff identifies specific employees as at constitutional fault and a jury rejects that contention.

The only two employees argued by Rogers at trial to have violated Reyes' rights were Sheriff's deputies Gaddis and Bauman. The Brief in Opposition to Petition for Writ of Certiorari does not assert otherwise and indeed the transcript of the charge conference demonstrates that to have been the case. The jury found deliberate indifference by those deputies to a risk of suicide, but the jury also found that their deliberate indifference did not cause Reyes' suicide.

The principal arguments in the Brief in Opposition filed by Rogers are based on Rogers equating just one element of the cause of action of deliberate indifference with the cause of action, itself. As discussed in more detail in section II, infra, the *cause of action* of

§1983 deliberate indifference contains a constituent element of deliberate indifference and that shares the same name as the cause of action itself – both are commonly called "deliberate indifference."

However, the *cause of action* of deliberate indifference requires more than merely establishing the single element of deliberate indifference – it also requires a finding of causation of damages. Rogers' Opposition seizes on the element of deliberate indifference, and the cause of action sharing the same name, and claims that the jury's finding for Rogers as to the element of deliberate indifference is the same as finding for Rogers on the entire cause of action of the same name. That is clearly not the case and Rogers is incorrect when she asserts that the jury's finding for Rogers as to the element of deliberate indifference established that the jury found all of the elements necessary to establish a constitutional violation.[1]

Rogers argues that the jury's finding of a lack of causation as to deliberate indifference by Deputies Gaddis and Bauman did not actually have the consequence of representing a finding that Gaddis and Bauman did not violate Reyes' constitutional rights. Rogers theorizes that the jury could have found Gaddis and Bauman committed the constitutional violation of

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[1] In attempting this sleight of hand, Rogers has the temerity to accuse Sheriff Johnson of having committed "flagrant misrepresentations" when the Sheriff points to the plain legal truth that, when the jury rejected causation, it found in Gaddis' and Bauman's favor as to Rogers' §1983 deliberate indifference *cause of action* against them.

deliberate indifference and simultaneously rejected the required element of causation. Rogers then theorizes that instead the jury could in some undefined finding of moral blame lay causation (and therefore liability) at the feet of the Sheriff on the basis that the Sheriff's policies and customs, and not the acts of Gaddis and Bauman, were the cause of the death of Reyes.

First, for all the protestation that a constitutional violation can occur in the absence of causation, Rogers does not cite any authority for that proposition. To the contrary, it is well settled that causation is, in fact, a critical and necessary element of a §1983 deliberate indifference claim.

Second, the Sheriff maintained at trial that causation was an element of the constitutional tort and that causation had to be found as to Gaddis and Buman before reaching the question of *Monell* liability as to the Sheriff. Frankly, Rogers' argument on this point underscores why the Court should accept this petition: to clarify when, or even whether, a *Monell* claim can survive where there is no underlying constitutional violation (based on lack of causation or otherwise) by the Sheriff's employees, particularly where the plaintiff alleges the constitutional violation occurred through the actions or inactions of specific employees and those claims fail.

Third, Rogers acknowledges that Gaddis and Bauman did not follow the Jail's practices and customs. At trial, Rogers claimed that Gaddis and Bauman did not follow the most fundamental practice, which was to

visually monitor Reyes. That creates an obvious problem for her given the basics of *Monell* jurisprudence whereby the Sheriff is liable only if his policies or customs caused an underlying constitutional violation.

Today, Rogers tries to draw a fine line, arguing that Gaddis and Bauman did not follow the Jail's practices from the start of their shift until 9:30 a.m., but then suddenly *did* follow those Jail practices and customs specifically between 9:30 and 10:32 (Brief in Opposition, p. 3). In doing so, however, Rogers glosses over the fact that the manner of checks was not caused, in the *Monell* sense, by the Jail's practices. To the contrary, as noted by the Eleventh Circuit, throughout that morning Gaddis and Bauman fabricated a majority of the checks they claimed on paper to have made, and, in contradiction to Jail practices, performed numerous others as mere "auditory" checks.

The simple fact is that Rogers at trial claimed that the deputies did not follow Jail practices in that they failed to monitor Reyes. Her effort to cabin the entirety of her claim to the last 45 minutes, between 9:30 a.m. until 10:32 a.m., fails because the Jail's practices called for visual monitoring of Reyes, and Rogers' argument now, as it was at trial, is that Gaddis and Bauman did not actually monitor Reyes, be it at 8:00 a.m., or at 10:30 a.m.

Rogers cites the fact of partial coverings of the cell windows as evidence of an unconstitutional Jail practice. But on this point we come full circle back to *Heller*. This Court in *Heller* held that *the reason* that lack of

an underlying violation defeats *Monell* liability is because the fact that an official policy or custom may create the opportunity for a constitutional violation is "quite beside the point" if no underlying violation actually occurred. *Heller*, 475 U.S. at 799. Thus, that Rogers can generally criticize the Jail's practices and customs for monitoring suicidal inmates, such as allowing partial window coverings, is of no moment if, in fact, a jury has found that the deputies did not commit the constitutional tort of deliberate indifference.

Rogers urges that the only remedy that would have been available to the Sheriff below was entitlement to a new trial premised on trying to resolve any perceived inconsistency as between the §1983 verdict for the deputies but against the Sheriff when the jury was still empaneled. She argues that the Sheriff did not seek to reconcile these inconsistent verdicts at trial, waiving the issue. (Brief in Opposition, pp. 28-29, 32-33).

In assessing this argument, the Court should be careful to examine what, exactly, is claimed to have been waived. Rogers contends it is inconsistent verdicts as between the §1983 claims against the deputies versus the §1983 claim against the Sheriff (which would seem, by the way, a confession by Rogers that the finding in favor of the deputies on the §1983 claim foreclosed liability against the Sheriff on the same claim).

The Sheriff in the trial court correctly and repeatedly argued in the charge conference that a finding of

no §1983 liability against the deputies would necessarily mean that the Sheriff prevailed on the *Monell* claim. That the trial court rejected that argument and instructed the jury in the wrong manner in allowing *Monell* liability, even in the absence of an underlying violation by Gaddis and Bauman, does not waive the natural legal consequence under *Heller* of the jury's finding in favor of Gaddis and Bauman. The jury's conclusion that there was no underlying constitutional violation by Gaddis and Bauman meant, as a matter of law, that Rogers could not prevail against the Sheriff on the *Monell* claim.

The waiver argument as to inconsistent verdicts is a meritless distraction because, once the jury found no underlying constitutional violation by Gaddis and Bauman, that affirmatively precluded *Monell* liability against the Sheriff, just as the lack of an underlying constitutional violation by a defendant officer precluded liability against the City of Los Angeles in *Heller*. That a new trial was not a suitable remedy does not in any way, shape, or form, justify or excuse leaving the Sheriff on the judgment when he should be removed from the judgment under Fed.R.Civ.P. 59(e).

This Court should grant the petition to reaffirm the holding in *Heller*, and reverse the judgment below so as to remove the Sheriff from that judgment.

II. CAUSATION IS AN ESSENTIAL ELEMENT OF A §1983 DELIBERATE INDIFFERENCE CLAIM, AND WHEN THE JURY FOUND THAT DELIBERATE INDIFFERENCE BY GADDIS AND BAUMAN DID NOT CAUSE REYES' DEATH, THE UNDERLYING CLAIM OF A CONSTITUTIONAL VIOLATION NECESSARILY FAILED.

The jury explicitly found no causation as between any deliberate indifference by Gaddis and Bauman and the death of Reyes. The jury was correctly told on the verdict form, itself, that such a finding meant that they were ruling in favor of the deputies on the §1983 deliberate indifference claims against them. The jury so found, and so ruled. The parties and the trial court all agreed that the jury's finding meant Gaddis and Bauman prevailed on the §1983 deliberate indifference claims asserted against them. They prevailed because Rogers failed to establish all of the necessary elements of a §1983 deliberate indifference claim against them. Thus, the jury verdict established that no constitutional violation was committed by either deputy.

In her Brief in Opposition, Rogers glosses over this inescapable legal reality by contending that, while the jury may not have found a constitutional violation by Gaddis and Bauman in the form of deliberate indifference and causation, the jury in some manner must have morally blamed the Sheriff for causation of Reyes' death based on the Jail's practices.[2]

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[2] Moral blame is not an element of a *Monell* claim.

First, that ignores Rogers' *own case* at trial that Gaddis and Bauman did not in fact follow the Jails' practices to actually get up and visually check on Reyes. As noted by the Eleventh Circuit below, Gaddis admitted that he entirely falsified five of the fifteen close watch entries on the form used to track checks and that five others were auditory checks, which were not permitted by the Sheriff or the Jail's practices. (Petition for Writ of Certiorari, Appendix, pp. 7-8.) That 10 of the 15 checks did not actually follow Jail practices is meaningful here.

Second, the claim that the jury blamed the Sheriff for the death of Reyes, despite the absence of causation as to Gaddis and Bauman and despite its finding that neither violated Reyes' constitutional rights, is necessarily legally wrong. Rogers does not respond to Petitioner Sheriff's point that causation was a necessary element of the §1983 deliberate indifference claim against the deputies. She cites no authority for the proposition that the constituent element of deliberate indifference standing alone, without the companion element of causation, is nonetheless a constitutional violation. The law is overwhelmingly to the contrary.

In addition to the authorities cited on this point in the Sheriff's Petition for Writ of Certiorari, consider these other authorities: *Hunter v. Mueske*, 73 F.4th 561, 567-68 (7th Cir. 2023) (in deliberate indifference case, §1983 plaintiff must prove both causation in-fact and proximate causation); *Stockton v. Milwaukee County*, 44 F.4th 605, 614 (7th Cir. 2022) (causation is an essential element of a claim of deliberate indifference to a

serious medical need); *Kuklica v. City of Cleveland*, 803 F.2d 720 * 6 (6th Cir. 1986) (causation is "an essential element" of a claim of deliberate indifference caused by a municipal policy); *Johnson v. Marlar*, 807 Fed.Appx. 791, 795 n. 3 (10th Cir. 2020) (plaintiff's claim failed "for lack of causation, which is a necessary element of a § 1983 deliberate indifference claim") (citing *Daniels v. Gilbreath*, 668 F.2d 477, 480 (10th Cir. 1982)).

There is simply no authority for the notion that a constitutional violation may occur in the absence of establishing the element of causation, especially a claim for deliberate indifference. Rogers' suggestion that this is somehow the jury simply assigning moral blame for causation on the Sheriff is entirely speculative, would erase causation as an essential element of such a claim against the deputies, and is directly contrary to *Heller* and established law regarding deliberate indifference claims, all in hopes that the jury might be so put off by a jail's practices as to overlook causation as an element of the underlying tort.

It bears repeating that the jury was told on the verdict form[3] that the legal consequence of finding a

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[3] Rogers argues that the Sheriff's pretrial proposed jury instructions and verdict form, based on the circuit's pattern instructions, "invited" error in the form of the verdict here, precluding review. (Brief in Opposition, pp. 30-32). First, the proposed instruction read that the Sheriff may be liable *only* if there was an underlying violation by Gaddis and Bauman. (Brief in Opposition, p. 31). Second, this argument is premised on Rogers' incorrect position that Gaddis and Bauman committed an underlying constitutional violation even in the absence of causation. Third, at trial the Sheriff squarely argued against submission of a verdict form

lack of causation between the actions (or inaction) of Gaddis and Bauman and Reyes' death was that they were finding in favor of the deputies on the claim that the deputies committed a constitutional violation. When that happened, this case became legally indistinguishable from the scenario in *Heller* in that a jury found no underlying constitutional violation by the Sheriff's employees. At that point, as in *Heller*, *Monell* liability against the Sheriff was foreclosed as a matter of law.

CONCLUSION

The Court should grant certiorari review of this case and reaffirm *Heller*, instructing the lower courts that, where a plaintiff identifies specific municipal employees as having violated a persons' rights, but a jury determines that the employees did not commit an underlying constitutional violation, then there can be no *Monell* liability against their municipal employer. As a consequence, the Court should hold that in this case

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which allowed the jury to find for the deputies on the §1983 claims against them, but against the Sheriff on the *Monell* claim. The Sheriff did not invite error here: he repeatedly warned against it. Under *Heller*, the answer to the causation question in favor of the deputies in turn foreclosed *Monell* liability against the Sheriff. That result is compelled by *Heller*. That has always the Sheriff's position in this case.

Monell liability against the Sheriff cannot lie, ordering that the Sheriff be removed the judgment below.

Respectfully submitted,

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