No. 20-427

In the
Supreme Court of the United States

POLK COUNTY, WISCONSIN,
Petitioner,
v.
J.K.J. and M.J.J.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL SHERIFFS' ASSOCIATION SUPPORTING PETITIONER

Michael J. Bentley
Counsel of Record
Stevie Farrar Rushing
BRADLEY ARANT BOULT CUMMINGS LLP
One Jackson Place
188 E. Capitol St., Ste. 1000
Jackson, Mississippi 39201
(601) 948-8000
mbentley@bradley.com
srushing@bradley.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE..................... 1

SUMMARY OF THE ARGUMENT..................... 1

ARGUMENT 3

I. Until now, the Circuits had uniformly held that the "single-incident theory" of municipal liability does not apply to failure-to-train sexual assault cases. 3

A. This Court's precedent limits municipal liability under a single-incident, failure-to-train theory to cases in which the need for training was "so obvious" that failing to provide it amounts to deliberate indifference..................................... 3

B. Four other circuits have held that the single-incident, failure-to-train theory cannot support municipal liability for an employee's criminal sexual assault. 7

II. The Seventh Circuit's outlier application of the single-incident theory imposes de facto *respondeat superior* liability on counties and municipalities.................................... 12

III. The Court should grant certiorari and restore uniformity on this issue to ensure local governments can safely and effectively operate jails..... 17

A. The Seventh Circuit's hindsight failure-to-train standard is unrealistic and unreasonable. 17

B. The opinion below imposes liability despite lack of causation. 19

C. Federalism precludes federal courts from policing municipalities................................ 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Andrews v. Fowler,
98 F.3d 1069 (8th Cir. 1996) 8

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 12

Barney v. Pulsipher,
143 F.3d 1299 (10th Cir. 1998) 9

Bd. of Comm'rs of Bryan Cty. v. Brown,
520 U.S. 397 (1997) .... *passim*

Cash v. Cty. of Erie,
654 F.3d 324 (2d Cir. 2011) 14, 15

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989) .... *passim*

City of Escondido v. Emmons,
139 S. Ct. 500 (2019) 16

Coltharp v. United States,
413 F. Supp. 3d 1182, 1190 (M.D. Al.
2019) 18

Connick v. Thompson,
563 U.S. 51 (2011)
.... *passim*

Davis v. United States,
140 S. Ct. 1060 (2020) 16

Dem. Nat'l Comm. v. Wisc. St. Legis.,
2020 WL 6275871 (U.S. Oct. 26, 2020)
(Roberts, C.J., concurring) 14

Flores v. County of Los Angeles,
758 F.3d 1154 (9th Cir. 2014) 7

Floyd v. Waiters,
133 F.3d 786 (11th Cir. 1998), *vacated on other grounds by* 525 U.S. 802 (1998), *reinstated by* 171 F.3d 1264 (11th Cir. 1999) 9

Horne v. Flores,
557 U.S. 433 (2009) 14

Hovater v. Robinson,
1 F.3d 1063 (10th Cir. 1993) 15

Monell v. Department of Social Services,
436 U.S. 658 (1978) .... *passim*

Parrish v. Ball,
594 F.3d 993 (8th Cir. 2010) 8

Pell v. Procunier,
417 U.S. 817 (1974) 18

Pembaur v. Cincinnati,
475 U.S. 469 (1986) 12

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 14

R.A. v. N.Y.C.,
206 F. Supp. 3d 799 (E.D.N.Y. 2016) 15

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 14

Sewell v. Town of Lake Hamilton,
117 F.3d 488 (11th Cir. 1997) 2, 8, 9

Walker v. City of New York,
974 F.2d 293 (2nd Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) 8

Statutes

26 U.S.C. § 501(c)(4) 1

42 U.S.C. § 1983 .... *passim*

Pub. L. No. 108-79, 117 Stat. 972 (2003) 11

Other Authorities

Nat'l PREA Resource Center, Training & Tech. Asst., https://www.prearesourcecenter.org/training-and-technical-assistance (vis. Oct. 27, 2020) 11

Nat'l Prison Rape Elimination Comm'n, *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails*, avail. at https://www.ncjrs.gov/pdffiles1/226682.pdf (vis. Oct. 27, 2020) 11

U.S. Dep't of Justice, Nat'l Institute of Corrections, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (2013), avail. at https://nicic.gov/fifty-state-survey-criminal-laws-prohibiting-sexual-abuse-individuals-custody (vis. Oct. 27, 2020) 11

U.S. Dep't of Justice, Nat'l Institute of Corrections, State Statistics Information, available at https://nicic.gov/state-statistics-information (vis. Oct. 29, 2020) 16

INTEREST OF AMICUS CURIAE

The National Sheriffs' Association ("NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4). Since 1940, the NSA has promoted the fair and efficient administration of criminal justice throughout the United States while advancing and protecting the Office of Sheriff. The NSA has over 20,000 members and is the advocate for 3,083 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 the judicial process where the vital interests of law enforcement and its members are affected. The NSA represents the nation's sheriffs who operate more than 3,000 local correctional facilities throughout the country. Sheriffs and jail operators, as the custodians of the inmates housed within these facilities, are charged with providing a safe and secure environment for both the inmates and for their staff. These sheriffs and jail operators depend on their line officers to follow law and policy when carrying out their duties.[1]

SUMMARY OF THE ARGUMENT

The Court should grant the Petition for Writ of Certiorari filed by Polk County, Wisconsin ("Polk County" or "County") to correct the Seventh Circuit's

[1] The amicus, NSA, provided notice and obtained the consent of all parties to file this amicus curiae brief. No party or its counsel authored this brief in whole or in part. No party, counsel, or any other person except the amicus party and its counsel contributed to the cost of preparing or submitting this brief.

misapplication of this Court's "single-incident" theory of municipal liability under 42 U.S.C. § 1983.

The Polk County Jail, like most jails today, has a policy prohibiting sexual abuse or harassment of inmates. When the County discovered that one of its jail officers, Darryl L. Christensen, had violated that policy, violated state law, and engaged in egregious criminal acts that transgress all notions of acceptable conduct by sexually assaulting inmates, the County took swift action in keeping with its policies: It terminated Christensen and prosecuted him for his crimes. Christensen admitted at trial that he knew his assaults violated jail policy, was trained that his assaults were criminal, and did not require additional training to know that his actions violated the law. He committed the assaults despite it all.

The Seventh Circuit, breaking from the four other circuits that have addressed the issue, held the County liable for Christensen's single-incident violation of the inmates constitutional rights. Other circuits confronting single-incident sexual assault claims under Section 1983 have refused to hold municipalities liable for their employee's misconduct, noting the commonsense principle that the duty to refrain from sexually assaulting inmates should be "obvious to all without training or supervision." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489-90 (11th Cir. 1997). The Seventh Circuit took the opposite approach, applying a nonsensical and legally flawed assumption that the risk of sexual assault by Christensen was "so obvious" that a failure to adequately train him not to commit sexual assaults amounted to deliberate indifference by the County. This Court's single-incident, failure-to-train cases do

no support such a tenuous basis for municipal liability. The Seventh Circuit's decision should be reversed.

ARGUMENT

I. Until now, the Circuits had uniformly held that the "single-incident theory" of municipal liability does not apply to failure-to-train sexual assault cases.

Before the Seventh Circuit issued its divided decision in this case, no Circuit Court of Appeals had applied the "single-incident theory" of municipal liability to a case like this, in which the *municipality's liability* is based on a theory that a county's failure to train *caused* an employee to engage in secret, illegal, and policy-breaching sexual assault. This Court's precedents, as understood and applied by every other circuit to have addressed the question, forbid the extension of Section 1983 failure-to-train liability to a municipality under these circumstances.

A. This Court's precedent limits municipal liability under a single-incident, failure-to-train theory to cases in which the need for training was "so obvious" that failing to provide it amounts to deliberate indifference.

This Courts decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny establish a clear and stringent standard for municipal liability—one that harmonizes Section 1983's purpose of vindicating civil rights with controlling principles of federalism. Under *Monell*, a

municipality may be held liable under Section 1983 only for its own unconstitutional acts. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *accord Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for their *own* illegal acts." (emphasis in original; internal quotation marks omitted)).

To establish municipal liability under *Monell*, plaintiffs "must prove that 'action pursuant to official municipal policy' caused their injury." *Connick*, 563 U.S. at 60-61 (quoting *Monell*, 436 U.S. at 691). Liability cannot be predicated on a *respondeat superior* theory. *Id.* at 60. Instead, liability must rest on official municipal actions, typically "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61.

This single-incident case relies on the "most tenuous" theory of municipal liability—the alleged failure to train an employee on his "legal duty to avoid violating citizens' rights." *Id.* A failure-to-train claim is inherently "nebulous, and a good deal further removed from the constitutional violation, than" an identifiable policy or custom that results in a constitutional violation. *Id.* Accordingly, under a failure-to-train claim, the municipality's culpability "must amount to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.*

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* A municipality may be deemed deliberately indifferent only when the municipality

has "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." *Id.* "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id.* at 62.

The Court has identified two circumstances in which a failure to train may establish deliberate difference. The first circumstance is the more common: a "pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* The second circumstance—the one involved here—is exceedingly rare: "the Court left open the possibility that, in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Id.* at 63.

A failure-to-train claim is the weakest theory of municipal liability, and a failure-to-train claim based on a single incident stretches the theory to its outer limits. This Court has never held a municipality liable for a failure to train in the absence of a pattern of prior similar violations. App. 68. It has only hypothesized that such a circumstance could occur when the need to train is "so obvious" that the failure to do so amounts to deliberate indifference:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to

> accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Canton, 489 U.S. at 390 n.10.

Working from this extreme hypothetical, *Connick* set down three requirements for single-incident liability. *First*, the employee responsible for the constitutional violation must be "untrained." *Connick*, 563 U.S. 61-62, 67; *see also id.* at 91 (Ginsburg, J., dissenting) (agreeing with majority on this requirement). "[S]howing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Id.* at 68. *Second*, the "untrained employee" must "have no knowledge at all" of the required constitutional standards. *Id.* at 67 (finding no liability where municipality's prosecutors were not trained on *Brady* rule but were generally familiar with the rule). And *third*, whether the "untrained employee" was "equipped with the tools to interpret and apply legal principles." *Id.* at 64; *Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997). If these three requirements are established, the hallmark question from the *Canton* hypothetical comes into play: Was the need for the training "so obvious" without consideration of prior violations? *Canton*, 489 U.S. at 390 n.10.

Connick's threshold requirements are (and should be) exceedingly difficult—if not impossible—to establish in a case of criminal sexual assault by a

municipal employee. Until now, the Circuit Courts of Appeals have uniformly rejected these claims.

B. Four other circuits have held that the single-incident, failure-to-train theory cannot support municipal liability for an employee's criminal sexual assault.

Applying *Connick*'s test and common sense, four circuits have determined that the single-incident theory cannot be used to establish municipal liability for sexual assault by a municipal employee.

Most recently, in *Flores v. County of Los Angeles*, the Ninth Circuit rejected a single-incident claim based on an alleged "failure properly to train deputy sheriffs 'to ensure that Sheriff's [d]eputies do not sexually assault women that [d]eputies come in contact with.' " 758 F.3d 1154, 1156 (9th Cir. 2014). In *Flores*, the sheriff's department's policy manual did not expressly forbid sexual attacks on women, but the California penal code prohibited sexual assault. *Id.* Moreover, "[t]here is . . . every reason to assume that police academy applicants are familiar with the criminal prohibition on sexual assault, as everyone is presumed to know the law." *Id.* at 1160. If the "threat of prison" is not sufficient to deter sexual assault, then additional policies and training would not either. *Id.* Joining its sister circuits in rejecting the single-incident theory for sexual assault claims, the Ninth Circuit found "no basis from which to conclude that the unconstitutional consequences of failing to train police officers not to commit sexual assault are so patently obvious that the [county and its sheriff] were deliberately indifferent." *Id.*

The Eighth Circuit has twice rejected the single-incident theory in this context. In *Parrish v. Ball*, a police officer who received "minimal" training in general and no specific training that sexual assault is criminal, sexually assaulted a detainee. 594 F.3d 993, 997, 1000 (8th Cir. 2010). The court held that, because "[a]n objectively reasonable officer would know that it is impermissible to touch a detainee's sexual organs by forcible compulsion," the county's failure to train the officer did not cause the sexual assault. *Id.* at 999-1000. The court also relied on prior circuit precedent, which held that that "[i]n light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women." *Id.* at 998 (quoting *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996)).

Similarly, the Eleventh Circuit has twice rejected the single-incident theory based on an officer's sexual assault. In *Sewell v. Town of Lake Hamilton*, an officer threatened a drug charge against a detainee if she did not submit to a strip search. 117 F.3d 488, 489 (11th Cir. 1997). The detainee submitted, and the officer molested her. *Id.* The court read *Canton* to require "a likelihood that the failure to train or supervise will result in the officer making the wrong decision." *Id.* at 490. But "[w]here the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise." *Id.* (quoting *Walker v. City of New York*, 974 F.2d 293, 299–300 (2nd Cir. 1992), *cert. denied*, 507 U.S. 972, 113 (1993)). The Eleventh Circuit concluded that,

even without special training, it is obviously improper to barter arrests for sexual favors. *Id.*

In *Floyd v. Waiters*, an education and orphanage security guard raped a fourteen-year-old girl. 133 F.3d 786 (11th Cir. 1998), *vacated on other grounds by* 525 U.S. 802 (1998), *reinstated by* 171 F.3d 1264 (11th Cir. 1999). In denying the single-incident claim, the court found that the security guard's actions "were clearly against the basic norms of human conduct," were criminal under Georgia law, and that the municipality "was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct." *Id.* at 796.

The Tenth Circuit, too, has rejected a single-incident claim when a jail officer sexually assaulted two inmates. In *Barney v. Pulsipher*, a jail officer separately removed two inmates from their cells, led them to an unmonitored area, and sexually assaulted them. 143 F.3d 1299 (10th Cir. 1998). The court found that the jail officer completed a training program, which instructed jail staff on the prohibition of sexual harassment and proper staff-inmate relations. *Id.* at 1308. The court explained that "[e]ven if the courses concerning gender issues and inmates' rights were less than adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates." *Id.* That is because specific training is not necessary "for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Id.*

Like the local jail operators in those cases, counties, municipalities, and local jails around the country expect their employees to understand that criminal sexual assault is forbidden on the job, just as

it is forbidden everywhere else. But Polk County did not simply rely on Wisconsin's criminal prohibition on sexual assault. It took additional reasonable steps to prevent sexual harassment and assault of inmates in its custody, as one would expect a conscientious jail operator to do.

First, Polk County adopted (what all agree are) constitutional policies that explicitly prohibited sexual contact between officers and inmates. For example, Policy C-2020 of the jail's Policy and Procedures Manual prohibits any "intimate social or physical relationship with a prisoner," informs officers that sexual contact with an inmate is a crime under Wisconsin law, and instructs that any officer who suspects such conduct has a duty to report it. App. 8-9, 40. Additionally, Policy I-100 prohibits facility staff under threat of termination from sexually, physically, verbally, or psychologically harassing inmates. App. 40. Second, the County trained new officers on both policies, and the State Department of Corrections determined that the training was adequate. App. 47-48. Third, the County swiftly investigated and punished violations of those policies. *See* App. 52-53 (investigating jail official for alleged sexual contact with inmate but could not confirm allegation; reprimanding jail official for sexually harassing co-worker). In Christensen's case, the County terminated his employment and successfully prosecuted him for his crimes.

Even if Polk County had not made these efforts, it still was entitled to expect its jail employees to understand the obvious: sexual assault of anyone is inappropriate, illegal, and immoral. As every circuit other than the Seventh Circuit has held, no jail officer

today should need elaborate on-the-job training to understand this. Eliminating sexual abuse in prisons and jails is, quite literally, a national priority. Since Congress enacted the Prison Rape Elimination Act ("PREA") in 2003, the federal government has pursued the Act's express purpose "to make prevention of prison rape a top priority in every prison system." Prison Rape Elimination Act of 2003, Public Law 108-79, 117 Stat. 972. The National Prison Rape Elimination Commission has developed and promoted national standards for preventing sexual assault in prisons and jails.[2] All 50 states have criminal laws prohibiting sexual abuse of persons in custody.[3] The NSA and other organizations have developed standards and training targeted at preventing sexual contact and abuse in jails and detention centers.[4]

Polk County adopted a clear no-tolerance policy against sexual harassment, Wisconsin criminalized

---

[2] *See* Nat'l Prison Rape Elimination Comm'n, *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails*, avail. at https://www.ncjrs.gov/pdffiles1/226682.pdf (vis. Oct. 27, 2020).

[3] *See* U.S. Dep't of Justice, Nat'l Institute of Corrections, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (2013), avail. at https://nicic.gov/fifty-state-survey-criminal-laws-prohibiting-sexual-abuse-individuals-custody (vis. Oct. 27, 2020).

[4] *See* Nat'l PREA Resource Center, Training & Tech. Asst., https://www.prearesourcecenter.org/training-and-technical-assistance (vis. Oct. 27, 2020). The National PREA Resource Center is a collaborative effort of corrections, law enforcement, and sexual assault prevention and response organizations to promote PREA's zero tolerance policy and provide free training and assistance to all types of confinement facilities.

sexual assault, and PREA has fostered a national culture that condemns Christensen's conduct. Christensen ignored it all. And, as Christensen himself admitted, no amount of additional training would have changed his illegal conduct. App. 47, 105. Under these circumstances, the need to *better* train Christensen on the well-known, uniform prohibitions on sexual assault is not "so obvious" that it can be said to have caused Christensen to violate the plaintiff-inmates' constitutional rights. Under this Court's precedents, as faithfully applied by four other circuits, the claims against Polk County should be dismissed as a matter of law.

II. The Seventh Circuit's outlier application of the single-incident theory imposes de facto *respondeat superior* liability on counties and municipalities.

For both individual and municipal defendants, this Court has consistently rejected the imposition of section 1983 liability based on *respondeat superior*. *See, e.g.*, *Connick*, 563 U.S. at 60 (citing *Bryan Cty.*, 520 U.S. at 403; *City of Canton*, 489 U.S. at 392; *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986); *Monell*, 436 U.S. at 665-83); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The deliberate indifference standard, *see* s*upra*, Section I(A), incorporates this important limitation on liability, and "a less stringent standard of fault for a failure-to-train claim would result in *de facto respondeat superior* liability on municipalities." *Connick*, 563 U.S. at 63 (emphasis in original; internal quotation marks and citation omitted).

Other circuits that have confronted the issue have uniformly rejected municipal liability for an employee's secret violation of municipal policy as upending this settled prohibition on *respondeat superior* liability. *See* Pet. 22-26. Rightly so. Holding the County liable for Christensen's criminal sexual assault reduces what should be a stringent deliberate indifference, meant to ferret out decisions by County policymakers, to one of ordinary negligence, which holds the County liable for unforeseen and unsanctioned acts of a rogue employee. *See Bryan Cty.*, 520 U.S. at 407 ("A showing of simple or even heightened negligence will not suffice."); *accord Connick*, 563 U.S. at 70 (rejecting standard that would cause "municipal liability under § 1983 [to] collapse into *respondeat superior*").

The Seventh Circuit's decision results in this very thing. Under its outlier formulation of single-incident liability, even where a municipal employee admits "he knew . . . his conduct not only violated prison policy but was criminal," the municipality is nonetheless liable for his actions. App. 14, App. 35-36. This is the very vicarious liability this Court rejected in *Monell*. App. 43 (Easterbrook, J., dissenting).

The Seventh Circuit's decision also holds the County and all municipalities to an impossible standard. To avoid section 1983 liability, not only must municipalities divine that their employees might criminally and willfully break state law and municipal policy, they must also adopt whatever programs or standards federal judges could later determine "could have filled the gaps." App. 20.

Across contexts, this Court has recognized that such federal judicial micromanagement of states and localities impinges on the substantial autonomy our federal system accords them. *See, e.g.*, *Dem. Nat'l Comm. v. Wisc. St. Legis.*, 2020 WL 6275871, at *1 (U.S. Oct. 26, 2020) (Roberts, C.J., concurring) (election law); *Horne v. Flores*, 557 U.S. 433, 452 (2009) (modification of injunction); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (abstention doctrines); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (sovereign immunity).

Section 1983 liability is no different. Under this Court's decisions in *Monell*, *City of Canton*, and *Connick*, municipal liability under section 1983 is circumscribed. Municipalities are not responsible for their employees' secret and knowing violations of municipal policy—let alone state criminal law. *Connick*, 563 U.S. at 70; *see also id.* at 78 (Scalia, J., concurring) ("[A] bad-faith, knowing violation, c[an] not possibly be attributed to lack of training.").

The Second Circuit's decision in *Cash v. Cty. of Erie* is not to the contrary. 654 F.3d 324 (2d Cir. 2011). There, the court concluded a prior report indicating a guard sexually assaulted an inmate permitted the jury to find the municipality liable for a subsequent assault. Here, by contrast, the Seventh Circuit recognized that respondents adduced no "proof of a prior pattern of similar constitutional violations." App. 22. *Cash*, moreover, was by its own terms not a failure-to-train case. *Id.* at 336 ("[T]he deliberate indifference concern in this case . . . is not with a failure to train prison guards to distinguish between

permissible and impermissible sexual contact with prisoners. Nor is it with providing sufficient supervision to ensure that guards make correct choices in this respect.").[5]

The Seventh Circuit decision stretches *Cash* far beyond the Second Circuit's actual holding. App. 102-03 & n.14 (Easterbrook, J., dissenting). Since *Cash*, numerous district courts within the Second Circuit have concluded that, in the words of one, a municipal employee's "conscious decision . . . to commit sexual assault" is not the sort of "difficult choice" that "further training would prevent," barring municipal liability. *R.A. v. N.Y.C.*, 206 F. Supp. 3d 799, 803 (E.D.N.Y. 2016); *see* App. 102-03 n.14 (Easterbrook, J., dissenting) (collecting cases).

The Seventh Circuit's misapplication of this Court's precedent and creation of a circuit split warrants immediate review and correction by this Court. The Seventh Circuit is not likely to correct itself; the *en banc* court has spoken on this important issue of Section 1983 liability. If not corrected, the Seventh Circuit's decision will subject hundreds of county sheriffs and local jails to liability based on an employee's secret and knowing violation of state laws

---

[5] *Cash* also rejects the Seventh Circuit's unfounded theory that sexual assault is inevitable based on the mere fact that a male jail officer is assigned to guard female inmates. *Compare Cash*, 654 F.3d at 336 (rejecting theory that "every male guard is a risk to the bodily integrity of a female inmate") (quoting *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993)), *with* App. 26, 31.

against sexual assault and jail policies prohibiting sexual assault.[6]

This Court should grant certiorari to review the Seventh Circuit's decision, just as it has granted other petitions to correct plainly incorrect, entrenched positions maintained by a single circuit. *Compare* Pet. at 16, *Davis v. United States*, 140 S. Ct. 1060 (2020) (No. 19–5421) (presenting question of one circuit's plain-error rule conflicting with that of nine others), *with Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam) (granting certiorari and rejecting that circuit's "outlier practice"). The Seventh Circuit's *en banc* decision to reject settled limitations on Section 1983 liability underscores the need for this Court's immediate review. *Compare* Pet. at 22-26, 35, *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (No. 17–1660) (presenting question of one circuit's denial of qualified immunity contrary to this Court's decisions), *with City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (granting certiorari and noting "the Court of Appeals contravened . . . settled principles" of section 1983 liability this Court had "explained many times").

---

[6] There are over 250 jails in the three states within the Seventh Circuit: Illinois (92), Indiana (92), and Wisconsin (76). *See* U.S. Dep't of Justice, Nat'l Institute of Corrections, State Statistics Information, available at https://nicic.gov/state-statistics-information (vis. Oct. 29, 2020).

III. The Court should grant certiorari and restore uniformity on this issue to ensure local governments can safely and effectively operate jails.

This Court should grant the petition, reverse the Seventh Circuit's outlier decision, and restore uniformity to the application of *Monell* liability in a case of secret and knowing criminal sexual assault by a municipal employee. If left undisturbed, the decision will (a) subject hundreds of local sheriffs, counties, and municipalities to Section 1983 liability based on hindsight judgments about possible improvements to training and policy, (b) gut *Monell*'s strict causation requirement for municipal liability, and (c) lead federal courts into the impermissible realm of dictating local corrections policies.

A. The Seventh Circuit's hindsight failure-to-train standard is unrealistic and unreasonable.

The Seventh Circuit agreed that Polk County maintained an unambiguous policy prohibiting sexual contact with inmates and making clear that such contact violated both its policies and state law. In fact, Christensen testified that no further training was necessary for him to understand that his conduct was criminal. App. 14 (majority opinion discussing Christensen's testimony and knowledge); *accord* App. 47 (dissent discussing same). And common sense dictates that no amount of additional training is needed to underscore that sexually assaulting someone is wicked, wrong, and illegal.

Even so, a majority of the Seventh Circuit decided that Polk County could still be liable for Christensen's conduct under the single-incident theory. Doing exactly what this Court has warned against, the Seventh Circuit relied on an expert's hindsight analysis of the County's policies and training, and accepted his predictable opinion that those policies could have been improved. Post-event examination by a court or expert will inevitably find some policy, procedure, or training that could have been better implemented. *See City of Canton*, 489 U.S. at 392. But local governments do not have the benefit of hindsight when drafting a policy or procedure. Rather, they undertake that exercise in real time, for unique circumstances, using finite resources.

For this reason, courts generally acknowledge that local officials are in the best position to decide what policies and procedures will best serve the entity and its unique challenges. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 827 (1974) ("[inmate visitation] considerations are peculiarly within the province and professional expertise of corrections officials"); *Coltharp v. United States*, 413 F. Supp. 3d 1182, 1190 (M.D. Ala. 2019) ("VA staff is in the best position to determine which policies to promulgate regarding patient behavior and the way to enforce those policies while maintaining their overall policy objectives.").

Section 1983 liability is no exception: This Court warned in *City of Canton* that if *respondeat superior* liability were to creep into Section 1983, then the liability determination would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs . . . an

exercise we believe the federal courts are ill suited to undertake." *Canton*, 489 U.S. at 392. This exercise has now begun in the Seventh Circuit. To avoid liability under the single-incident, failure-to-train theory—which should be the "most tenuous" path to liability—every sheriff and jail operator in Illinois, Indiana, and Wisconsin must now engage in the impossible task of drafting and implementing perfect training policies that will satisfy the hindsight review of a plaintiff-inmate's expert.

B. The opinion below imposes liability despite lack of causation.

At trial, Christensen admitted he had been trained that his conduct was both criminal and a violation of jail policy, and that he did not need any more training to understand that what he was doing was illegal and wrong. App. 14, 47. Respondents' own expert "conceded at trial that no proof exists that better or more training could have dissuaded Christensen from his predatory and assaultive behavior." App. 105.

In short, it was undisputed that any changes in Polk County's training would not have changed Christenson's conduct. Ignoring this lack of causation, the Seventh Circuit decided that more could have been done to impact the conduct of others, specifically with respect to prevention and detection by third parties. App. 21.

This holding skips the relevant causation requirement. A municipality may be deemed deliberately indifferent only when the municipality has "actual or constructive notice that a particular

omission in their training program causes city employees to violate citizens' constitutional rights." *Connick*, 563 U.S. at 60-61. The constitutional violation here is Christenson's sexual assault of Respondents. And the evidence is undisputed—no different or additional training would have changed Christenson's conscious decision to act as he did.

Holding Polk County liable—and subjecting hundreds of other sheriffs and jail operators to liability—under these circumstances eliminates what this Court has insisted must be a stringent causation standard. Rather than relying on their employees to obey clear law and follow clear policies against sexual assault, municipalities must now assume that their employees will ignore these no-tolerance policies and, on that assumption, attempt to "fill[] in the gaps", App. 20, that will ensure detection of a rogue employee hiding his knowing violation of those laws and policies. If the municipality is unsuccessful, then even a single incident of sexual assault by an employee will subject it to Section 1983 liability. That is de facto *respondeat superior* liability, to be sure.

C. Federalism precludes federal courts from policing municipalities.

At bottom, the Seventh Circuit's decision rests on a belief that Polk County, a municipality, was not doing enough with respect to its local prison. In reaching that conclusion, the majority opinion looked to federal law, specifically PREA, to identify perceived shortcomings. Indeed, the majority highlighted Polk County's failure to put in place various policies established through PREA, such as "designat[ing] a PREA coordinator," "train[ing] staff on what to look

for and how to report abuse as well as how to make inmates feel comfortable coming forward," or "provid[ing] a safe, confidential way for inmates to report abuse (through, for example, the use of a locked drop-box), instead of putting inmates in the position of having to hand a grievance to an officer who may be friends with the abuser." App. 12. The majority determined "that the county was or should have been aware that . . . PREA sets the norm" for correctional institutions. App. 130.

PREA, however, is a federal statute that does not govern state or local correctional facilities, and Wisconsin has chosen not to require its correctional facilities to implement it. *See* App. 11-12, 19-21. Thus, the Seventh Circuit now requires sheriffs, counties, and municipalities within the circuit to adopt non-binding federal law when setting policies and procedures for its local jails. The failure to do so may subject these local governments to Section 1983 liability.

This type of judicial overreach is the very thing the Court sought to avoid when it imposed the stringent failure-to-train standard. Failure-to-train claims "implicate serious questions of federalism." *Canton*, 489 U.S. at 392. As recognized in *Monell*, "Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights." *Bryan Cty.*, 520 U.S. at 415. Allowing cases to advance based "on a lesser standard of fault would result in de facto *respondeat superior* liability on municipalities—a result [] rejected in *Monell*." *Canton*, 489 U.S. at 392. The Court warned that

respondeat superior liability would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs . . . an exercise we believe the federal courts are ill suited to undertake." *Id.* And "it risks constitutionalizing particular . . . requirements that States have themselves elected not to impose." *Bryan Cty.*, 520 U.S. at 415. As stated in *Connick*, "[Section 1983] does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States." 536 U.S. at 68.

The Seventh Circuit has effectively done what Congress elected not to do when enacting PREA—mandate its adoption by local jails and detention facilities as a necessary step to avoid liability for federal civil rights violations. In so doing, the Seventh Circuit ignored the decisions of this Court and the policy decisions of the State of Wisconsin. *Monell* liability was never intended to reach this far into the policies, training, and operations of local jails. The Court should grant certiorari and reverse the Seventh Circuit's decision.

CONCLUSION

The NSA requests that this Court grant Polk County's Petition for Writ of Certiorari.

Respectfully submitted,

Michael J. Bentley
Counsel of Record
Stevie Farrar Rushing
BRADLEY ARANT BOULT
CUMMINGS LLP
One Jackson Place
188 E. Capitol St., Ste. 1000
Jackson, Mississippi 39201
(601) 948-8000
mbentley@bradley.com
srushing@bradley.com

Counsel for Amicus Curiae

November 2, 2020