No. 20-427

IN THE

Supreme Court of the United States

POLK COUNTY,

Petitioner,

v.

J.K.J. and M.J.J.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a jury's verdict, affirmed by an en banc court of appeals, holding a county liable for damages based on evidence (a) that the county deliberately decided not to implement readily available policies for reporting, detecting, and thereby preventing sexual assaults by guards in its jail and (b) that the county's deliberate indifference enabled a guard to engage in three years of repeated assaults against multiple victims.

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INTRODUCTION

Petitioner's multipage question presented has nothing to do with this case. Petitioner asks whether a government can be held liable under 42 U.S.C. § 1983 for its failure to train an employee not to commit a single, egregious constitutional violation the illegality of which would have been obvious to any reasonable individual. And every circuit, including the Seventh, agrees that that fact pattern does not support municipal liability. But that is not what happened here.

Polk County was held liable here because respondents proved at trial that the County was deliberately indifferent to the risk of sexual assault when it chose to tolerate guards in the county jail treating female inmates as sexual objects and chose not to adopt policies that would have empowered *others* in the jail to report, detect, or stop a guard's multi-year series of hundreds of sexual assaults. As to whether those decisions can support governmental liability on a Section 1983 claim, there is no division among the circuits either.

Stripped of its purported circuit split, the petition essentially reduces to a request for error correction. But there is no error to correct. The jury in this case heard several days of live testimony, including from the victims, the perpetrator, County policymakers, a state corrections official, and a jail operations expert. Those witnesses provided ample evidence to find the County liable based on the choices it made—choices that enabled a jailhouse guard to assault respondents hundreds of times.

STATEMENT OF THE CASE

It has been clear for decades that a government can be held liable for damages under 42 U.S.C. § 1983 when it is on "notice that its program will cause constitutional violations" and those violations in fact occur. *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (quoting *City of Canton v. Harris*, 489 U.S. 378, 395 (1989) (O'Connor, J., concurring in part and dissenting in part)). Here, that is exactly what happened.

A. Factual background

1. Petitioner Polk County operates the Polk County Jail, a small correctional facility in northern Wisconsin. Pet. App. 3. The jail houses up to 160 inmates and employs approximately 27 correctional officers. *Id.* The respondents, who are female, were inmates in that jail intermittently from 2011 through 2014. *Id.* During that time, respondents were repeatedly sexually assaulted by Darryl Christensen, one of the guards at the jail.

Captain Scott Nargis ran the county jail and served as the County's policymaker with respect to jailhouse operations. Pet. App. 5. Nargis knew that there was a "high risk" that guards would engage in improper sexual behavior with inmates. Tr. 23-24, ECF No. 263.[1]

Despite actual knowledge of this risk, the County provided jail staff with "no training (in any sense of the word)" on prevention or detection of sexual assault. Pet. App. 9. Nargis testified that the jail's field

[1] Citations to the trial transcript appear in the form "Tr. xx, ECF No. yyy," where "xx" refers to the page number and "yyy" refers to the Bloomberg electronic docket number.

training consisted of nothing more than new jailers shadowing current officers for eight to ten weeks. Tr. 58, ECF No. 263. Darryl Christensen, the individual defendant in this case (who is not a petitioner here), testified at trial that the jail's field training included no training on sexual assault policies. Tr. 37, ECF No. 258.

The prison staff manual had one policy, C-202, that forbade sexual jokes, sexual conversations, and physical relationships with inmates. Nargis Decl. Exh. B, at 5-6, ECF No. 55. The County nominally required officers to read a policy from their manual daily and sign a piece of paper as proof they did so. Pet. App. 9-10. However, Nargis admitted that he did not know whether Policy C-202 was even included in the ninety policies he selected as required readings. Tr. 72, ECF No. 263. Christensen testified that, "most of the time" he went "through the motions" of "signing without reviewing anything." Pet. App. 10. This failure went undetected because Nargis relied on an honor system alone for compliance. Tr. 57, ECF No. 258.

And whatever the policy on the books, the reality within the Polk County Jail was quite different. For example, correctional officers regularly engaged in sexual commentary about female inmates in the jail, which they referred to colloquially as "tier talk." Pet. App. 8; Tr. 53, ECF No. 263. Christensen repeatedly made "lewd comments over the jail intercom about female inmates' attire." Pet. App. 183. Nargis stated that he overheard these comments. *Id.* 8. There is no evidence that he ever reprimanded officers for these open and frequent violations of Policy C-202. Instead, Nargis admitted that "he too participated in tier talk." *Id.* When asked why, he stated that it was in "an effort

to be viewed as part of the group and a trusted leader of the officers." *Id.* [2]

Unsurprisingly, this environment enabled sexual misconduct. Early in 2012, shortly after the sexual assaults at issue here had begun, detainees reported seeing Polk County officer Allen Jorgenson touching another female detainee inappropriately. The reports were given to a female officer who in turn informed a male supervising sergeant. *See* Schaefer Dep. 24, 19-20, ECF No. 236.[3] This behavior was typical for Jorgenson, who frequently made sexual comments about inmates and co-workers and "leer[ed]" at the female inmates. *Id.* 18. For example, he called watching inmates in the shower a "nice show." Pet. App. 6. But the supervising sergeant downplayed Jorgensen's behavior as just "Allen being Allen." Schaefer Dep. 39, ECF No. 236.

The supervising sergeant admitted that he "was not aware of a specific policy" on how to report sexual assault. Schaefer Dep. 24, ECF No. 236. Nevertheless, he emailed the information to Nargis. *Id.* 25.

Nargis learned of allegations that Jorgensen had also ordered the inmate to show him her breasts. Tr.

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[2] The dissenting judges in the Seventh Circuit disputed the sexual nature of tier talk. Pet. App. 50. Yet, the facts of this case on appeal must be taken in the light most favorable to respondents given the jury verdict in their favor. *See Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988). During the discussion of tier talk, Nargis admitted to hearing Christensen "make inappropriate or sexual comments about females." Tr. 53, ECF No. 263. Neither the County nor Nargis himself ever disputed the sexual nature of tier talk at trial.

[3] These portions of the deposition of Sergeant Steven Schaefer were provided to the jury at trial.

137, ECF No. 258. Nargis, however, took no meaningful disciplinary action. Instead, while issuing a written reprimand, Nargis reassured Jorgensen that the groping would not affect his career because it was not a "major deal" and he was a "good," "go-to" employee. Pet. App. 5. Jorgensen later resigned "after an unrelated investigation regarding his female *co-workers*." *Id.* 8.

Even in the face of the Jorgensen episode, Nargis continued to dismiss the need to prevent and detect sexual assault in the jail. The County made no changes to jail policy, trainings, or resources. Nargis knew that the Wisconsin Department of Corrections provides materials to help local jails prevent and detect sexual assault. Tr. 27, ECF No. 263. As an official from the Wisconsin Department of Corrections testified, these materials focused on informing inmates about their rights in jail and on providing secure sexual assault reporting options, as well as informing and training correctional officers how to detect sexual assaults committed by others and recognize the signs of victimization. *See id.* 77-80. The materials were repeatedly offered to Polk County in a variety of formats, including in live training that Nargis ostensibly attended. *See id.* Although Nargis was aware of these materials, *id.* 27, he apparently did not request them, *id.* 82.

Only in 2014 (three years after the assaults at issue here had begun and two years after the County had learned of Jorgensen's sexual misconduct) did the Polk County Jail conduct even a single staff meeting to discuss the standards for dealing with sexual assault in a correctional setting. *See* Tr. 29, 31, ECF No. 263. These standards had been promulgated in

2012 under the Prison Rape Elimination Act of 2003 (PREA), now codified at 34 U.S.C. § 30301 *et seq.*

Nargis acknowledged that he had earlier "revise[d] section C-202 to include the word PREA" in its title. *See* Tr. 25, ECF No. 263. At the single PREA-focused meeting, however, Nargis touched only on the "basics," which he construed to mean "[d]o not allow/condone inappropriate contact between inmates"; "[d]o not allow/condone/engage inappropriate contact between staff & inmates," and report any concern "to me," meaning Nargis. *Id.* 33. He gave these brief oral remarks without providing any additional materials. *Id.* 31. The next day, Nargis sent a staff-wide email stating that the meeting had been the result of a "tizzy," in which jail administrators across the state had felt compelled to spend time on PREA-related training—in his view, "time and attention that seemed to be misplaced." Pet. App. 11.

2. Darryl Christensen was a guard at Polk County Jail for nineteen years. Pet. App. 3. From 2011 to 2014, he repeatedly sexually assaulted several inmates at the jail, including both respondents in this case. Christensen employed a similar method for abusing his victims. First, Christensen commented on their appearances and made sexual overtures. *Id.* He progressed to physical contact by non-consensually groping and kissing the respondents before digitally penetrating them. *Id.* Finally, he would direct them to perform oral sex on him and eventually coerce them into having sexual intercourse. *Id.*

"J.K.J. could not pinpoint the total number of times Christensen assaulted her" but, by way of example, "during a two-month period in the summer of 2012, he insisted on sexual contact every time he

was on duty." Pet. App. 3. M.J.J. estimated that Christensen digitally penetrated her and ordered her to perform oral sex on him between twenty-five and seventy-five times over a two-year period—every time he had "free time" when he was on duty. Tr. 140-41, ECF No. 262.

The sexual acts were completely nonconsensual. Respondents felt compelled to submit due to Christensen's complete authority over them and because they had no safe and confidential reporting system. Tr. 62-64, 75-78, 139-40, 142, ECF No. 262. As J.K.J. testified, she perceived Christensen as a man "in a uniform with a badge that has authority to do whatever he wants to me." *Id.* 75.

Eventually, after years of abuse, a former Polk County inmate who had been assaulted by Christensen reported it—not to anyone at the Polk County Jail, but to an investigator when she was incarcerated in the Burnett County Jail. Exh. 511. That investigator immediately reported the news to the Polk County Sheriff. Tr. 10, ECF No. 262. The Sheriff initiated a criminal investigation that revealed Christensen's assaults of respondents and others. Pet. App. 4; Exh. 511. When investigators confronted Christensen about his assaults, he resigned immediately. Pet. App. 4. Christensen later pleaded guilty to criminal charges involving five inmates, including respondents here. He is currently serving a 30-year sentence. *Id.*; *see also State v. Christensen*, 909 N.W.2d 210 (Wis. Ct. App. 2017) (unpublished table decision).

B. District court proceedings

1. Respondents brought suit in the U.S. District Court for the Western District of Wisconsin against both Christensen and the County. As is relevant here, they raised claims under 42 U.S.C. § 1983, alleging Eighth and Fourteenth Amendment violations.[4]

Respondents' constitutional claim against the county alleged that the County acted with deliberate indifference to the obvious risk of female inmates being sexually assaulted by male guards. Pet. App. 2-3. Respondents claimed that the County's deliberate indifference—manifested in a failure to take sexual assault reporting, detection, and prevention seriously—caused their injuries. J.K.J. & M.J.J. C.A. Br. 1-4.

The case proceeded to a five-day trial. Pet. App. 3. The jury heard live testimony from a number of witnesses, including Nargis, Christensen, both respondents, and respondents' jail operations expert Jeffrey Eiser.

The evidence in front of the jury included the County's ostensible training program, which was "completely silent on preventing and detecting the sexual assault of female inmates." Pet. App. 10. "Beyond learning that training on sexual abuse was nearly nonexistent," the jury also heard "affirmative evidence revealing the County's dismissive attitude about preventing and detecting it." *Id.* 11. And it heard

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[4] Respondents also brought state law negligence claims against the County. Pet. App. 3. In an order on several post-trial motions, the district court set aside the jury's verdict on the state law claims, holding that the County was entitled to immunity. *Id.* 178-81. The state law claims are not relevant to the petition.

evidence about "tier talk" and about Nargis's decision not to discipline Jorgenson and to send the dismissive email about PREA training.

The jury also heard Eiser testify about "the inadequacy of Polk County's policies and training." Pet. App. 11. In particular, Eiser testified that a widely accepted standard for jails is to institute a "zero-tolerance policy on sexual abuse and harassment." *Id.* 12. Eiser also testified about the importance of ensuring that inmates understand what counts as "sexual harassment or sexual abuse." Tr. 21, ECF No. 264. He explained that inmates may come from backgrounds where they have been exposed or subjected to abuse and might think such behavior is not "abnormal" or prohibited. *Id.* They may not realize, unless the jail takes the "responsibility" to inform them, that they have the "right as an inmate to be free of this." *Id.* 22.

Eiser also explained how the County's failures led to respondents' continued abuse. Eiser testified that a small jail like Polk County's would have been expected to detect the sexual assaults at some point during the three years of ongoing abuse had it trained officers and inmates to recognize the behavioral signs of victimization. Tr. 17-24, ECF No. 264. These signs could include, "dramatic[] changes in [victims'] behavior, in their appearance, [and] in their hygiene." *Id.* 20. Eiser explained this kind of training is particularly effective in small jails like the County's because "you see the same inmates over again and so you kind of know what's normal" for any particular inmate. *Id.* 21.

Eiser also highlighted the need to create mechanisms for inmates to report abuse

"confidentially without fear of retaliation." Tr. 29, ECF No. 264. Eiser testified that the general grievance process at the jail—where inmates were required to report issues directly to jail staff—"never works for things as sensitive as sexual assault." *Id.* 24. He explained that the recommended standard for reporting sexual abuse in correctional facilities is the virtually cost-free option of providing a lockbox for inmates to report to an office outside of the jail itself, beyond the tightknit "chain of command." *Id.* 22-24.

Respondents testified that they felt unsafe reporting the assaults to jail staff because they felt the jail staff "were all friends." Tr. 105, ECF No. 262. Indeed, M.J.J. did not even feel safe reporting the assault to her probation officer because she knew that the officer was dating Nargis. *Id.* 142.

2. The district court instructed the jury first to determine whether Christensen had violated any of respondents' constitutional rights by sexually assaulting them. It then instructed the jury that if it found that either respondent had "proved her claim against defendant Christensen," it should "consider separately whether Polk County is also liable." Tr. 17, ECF No. 259.

The court emphasized that "[t]he County is not responsible simply because it employed Darryl Christensen." Tr. 17, ECF No. 259. It told the jury that one precondition to any liability for the County was that a "policy-making official or officials were deliberately indifferent to the need for more or different training, supervision, and/or adoption of policies to avoid likely sexual assault of an inmate by an officer." *Id.* 18.

The district court told the jury, at Polk County's request, that it could "consider" evidence of local and federal standards for correctional institutions in its deliberations on the question of deliberate indifference. Pet. App. 189 (citation omitted). But it admonished the jurors that they were being asked to decide "whether the County was deliberately indifferent to plaintiffs' constitutional rights, not whether the County failed to comply with Wisconsin regulations, PREA or any other set of standards." *Id.* And it reminded them that PREA standards "are not mandatory for county jails, nor is the failure to comply by itself a basis to find the County liable." *Id.* 189-90.

Finally, the court directed the jury to decide whether "Polk County's failure to provide adequate training, supervision, and/or adoption of policies caused [respondents'] injuries." Tr. 18, ECF No. 259.

3. The jury returned a verdict for respondents against both Christensen and the County. Pet. App. 176. It awarded each respondent $2,000,000 in compensatory damages, as well as an additional $3,750,000 in punitive damages against Christensen alone. *Id.*[5]

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[5] The County twice insists that it has never sought to "disturb" the damages that the jury awarded to the plaintiffs. Pet. 1, 7. Those statements are disingenuous at best: The County is no doubt aware that its insurer succeeded in disclaiming its duty to defend or to indemnify Christensen. *See* Opinion and Order at 13 (Nov. 28, 2016), ECF 108. Given that Christensen is now serving a thirty-year sentence and is certainly judgment proof, any remedy must come from petitioner or not at all. The County's feigned magnanimity is an empty gesture. Disturbing the jury's award of damages is precisely what its petition is designed to do.

In response to post-judgment motions, the court explained, with respect to the claim against Polk County, that the evidence of "a sexualized culture in the jail" was probative "of the County's awareness of a substantial risk of harm." Pet. App. 191. The court also held that the evidence overall was sufficient for the jury to find "that Nargis and others within the County Jail administration had knowledge of the substantial risks of sexual assaults of jailers on inmates, but acted with deliberate indifference to the need for better training, supervision and policies." *Id.* 183. The court also found sufficient evidentiary support for the jury to find that "if the County had provided adequate notice and training to correctional officers *and* inmates on what constitutes sexual harassment and abuse, and how to report it, plaintiffs may not have been sexually assaulted and harassed." *Id.*

C. Seventh Circuit proceedings

Both the County and Christensen appealed the jury's verdict. Pet. App. 111-12. A panel of the Seventh Circuit affirmed the judgment against Christensen, but on a divided vote reversed the judgment against the County. *Id.*

After granting respondents' petition for rehearing en banc, the full Seventh Circuit affirmed the jury's verdicts against both Christensen and the County. Pet. App. 2. The vote was 7-4 with respect to the County's liability. The majority opinion was written by Judge Scudder, and joined by Chief Judge Wood, and Judges Kanne, Rovner, Hamilton, Barrett, and St. Eve.

The majority held that the jury could reasonably have found that the risk of sexual assault in Polk

County Jail was "undeniable." Pet. App. 27. "Risk that started as obvious" in the confinement setting "was fully on display (following the Jorgenson incident) within an institution that scoffed at PREA, denigrated female inmates, and devoted not a word of its policies or a minute of any training session to concrete measures to prevent, detect, and respond to sexual assault." *Id.* 31. "The jury stood on solid evidentiary ground seeing the County's dormancy as more than oversight, but instead as deliberate inaction." *Id.* The court explained that the jury "easily could have found" that the tier talk "bespoke volumes about" the jail's "denigrating culture" and "amounted to sexually inappropriate banter—in a word, harassment." *Id.* 27. And the majority emphasized that "[i]t took no imagination for the jury to see parallels between Jorgenson's escalating actions, cut short as they were, and Christensen's early abuse of J.K.J. and M.J.J." *Id.* 28. "That Jorgenson's grooming of [one inmate] did not end with rape is no liability shield; it was good fortune." *Id.* The treatment of Jorgensen "confirm[ed] the jail's broken culture." *Id.* 30.

"And with red lights flashing, Polk County chose the one unavailable option—doing nothing." Pet. App. 29. First, the court considered the evidence regarding the County's policy, holding that the jury had sufficient evidence to find it "fell far short on prevention and detection," *id.* 19, and that "any number of policy measures could have filled the gaps at little or no cost to Polk County," *id.* 20. By way of example, the court highlighted the "County's policy deficiency" regarding "the need to detect sexual abuse." *Id.* A "safe and confidential reporting channel" for such abuse is essential. *Id.* Yet, "[u]nder the

County's policy, an inmate seeking to report abuse is left to inform one of 27 employees in a small jail that she suffered a sexual assault at the hands of his coworker." *Id.* The court held the jury had enough evidence to find "that Polk County's policy deficiency affirmatively deterred the reporting and detection of sexual abuse of female inmates." *Id.*

Regarding the County's presentation at trial of its "training program," the court held that the "bottom line" was "plain: the jury could have found that Polk County's sexual abuse prevention program was entirely lacking" and that the "jury could have tallied these gaps as part of finding the conscious, deliberate municipal inaction upon which to rest *Monell* liability." Pet. App. 21. The court highlighted that the jury heard no evidence of Polk County "informing guards of the inherent vulnerability the confinement setting presents to female inmates, educating jailers on the symptoms of an inmate suffering from the trauma of abuse, requiring officers to report each other's misconduct, or taking any time to otherwise instruct guards on matters of prevention and detection." *Id.*

The court then held that the evidence "paved multiple roads for the jury to travel to find that Polk County's inaction" in response to the "glaring risk" was the "moving force behind" respondents' injuries. Pet. App. 32-33. That "[t]he assaults did not end until Christensen was reported" gave "rise to an eminently reasonable inference that if the County had put in place" any of the standard policies and training to "detect sexual abuse, Christensen's conduct would have been exposed sooner." *Id.* 33.

The en banc court also rejected the County's argument that it should not be held liable because Christensen's sexual abuse of the respondents was "so patently wrong and so plainly prohibited by Wisconsin law and the jail's policy" that "no amount of training, no policy, no monitoring—nothing, literally nothing—could have prevented or detected what he did to J.K.J. and M.J.J." Pet. App. 34. "The County's narrow fixation on Christensen exposes its error." *Id.* The court explained that the County's liability did not "hinge on predictions about whether *Christensen* would have brought himself to stop abusing J.K.J. and M.J.J." *Id.* (emphasis added). Rather, it rested on the County's failure to take any number of actions that would "have resulted in another correctional officer, an inmate, or even J.K.J. and M.J.J. taking some step to stop Christensen's sexual assaults." *Id.* 34-35.

Four judges dissented with respect to the County's liability. Judge Easterbrook wrote a solo dissent. Pet. App. 38-43. Judge Brennan wrote a dissent that Judges Bauer and Sykes joined. *Id.* 44-110. The core of each dissent's disagreement with the majority was its view that this case involved one "miscreant" guard and that there was "no evidence that Christensen made the decision to assault plaintiffs for any reason related to inadequate training or policies." *Id.* 88 (Brennan, J., dissenting); *see id.* 42 (Easterbrook, J., dissenting).

REASONS FOR DENYING THE WRIT

This case presents no issue that warrants this Court's intervention. With respect to the question presented by the petition, the Seventh Circuit is entirely aligned with other courts of appeals. They all hold that a plaintiff cannot win a failure-to-train-the-

perpetrator claim by pointing to a single egregious violation whose unconstitutionality would have been obvious even without training.

But this case does not implicate that question. The basis for liability here was not failure to train Darryl Christensen, but rather several decisions to forgo effective policies for ensuring that *other* individuals—both officers and inmates—could report, detect, and prevent ongoing sexual assaults within the county jail. The question whether those decisions constitute deliberate indifference or whether that indifference enabled Christensen to violate repeatedly respondents' constitutional rights is entirely factbound. Answering it would provide no guidance in other situations. And in any event, the Seventh Circuit was correct. There was sufficient evidence before the jury to conclude both that Polk County was deliberately indifferent and that its indifference was a "moving force" behind the violations of respondents' constitutional rights, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

I. Petitioner's purported split does not exist.

Polk County's argument for certiorari rests on the assertion that the decision below is inconsistent with decisions from six other circuits. Pet. 22-26. The County is wrong. Just like those circuits, the Seventh Circuit has "repeatedly rejected efforts to use the single-incident theory to fault a municipality for failing to prevent an employee from committing flagrant crimes." *Id.* 22.

What is more, neither the jury nor the Seventh Circuit imposed liability on that theory. The basis for liability here was not a simple failure to train one

perpetrator not to commit one constitutional violation. Rather, the basis for liability was Polk County's decision not to implement reporting and detection policies directed at *other* actors, including both employees and inmates, who could have stopped the series of hundreds of constitutional violations years earlier. And there is no disagreement among the circuits on this issue either.

A. The Seventh Circuit's position on failure-to-train-the-perpetrator claims involving a "single incident" is identical to the position taken by other circuits.

1. The seven principal cases cited in the petition's allegation of a circuit conflict all share two features: (a) the plaintiff's claim arose out of a single episode of assault by a government employee; and (b) the plaintiff argued that the government was liable for that single assault due to its failure to train the perpetrator.

Some of the cases involved a plaintiff subjected to a single sexual assault. *Parrish v. Ball*, 594 F.3d 993, 996 (8th Cir. 2010) (discussed at Pet. 24); *Flores v. County of Los Angeles*, 758 F.3d 1154, 1156 (9th Cir. 2014) (discussed at Pet. 22-23); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 765 (10th Cir. 2013) (discussed at Pet. 24-25); *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 488-89 (11th Cir. 1997) (discussed at Pet. 24). Others involved a plaintiff subjected to a single non-sexual assault. *Estate of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 663-64 (4th Cir. 2020) (discussed at Pet. 25); *Peña v. City of Rio Grande City*, 879 F.3d 613, 616 (5th Cir. 2018) (discussed at Pet. 25); *Waller v. City of Denver*,

932 F.3d 1277, 1280-81 (10th Cir. 2019) (discussed at Pet. 23).

In four of those cases, the courts of appeals thought that failing to train the perpetrator neither bespoke deliberate indifference to the plaintiff's constitutional rights nor caused the constitutional violation. The courts of appeals explained that the government was entitled to assume that, even in the absence of any training, common sense and the penal code would have deterred the perpetrator from committing the "flagrant" constitutional violation at issue. Pet. 23. This rationale explains the result in *Parrish*, *see* 594 F.3d at 999, in *Flores*, *see* 758 F.3d at 1160-61, in *Waller*, *see* 932 F.3d at 1288, and in *Sewell*, *see* 117 F.3d at 489-90.

In the other three cases, the courts of appeals rejected the failure-to-train-the-perpetrator theory because the government had in fact offered some training to the perpetrator regarding the conduct at issue. *See* Pet. 24-26. That training undercut the plaintiff's claim of deliberate indifference because no prior episode had put the government on notice that its training was inadequate. This analysis defeated liability in *Jones*, *see* 961 F.3d at 672, in *Peña*, *see* 879 F.3d at 624, and in *Schneider*, *see* 717 F.3d at 774.

2. The Seventh Circuit's caselaw is entirely in accord. Like the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits, the Seventh Circuit also forecloses liability where the plaintiff claims the government failed to adequately train the perpetrator of a single egregious constitutional violation. In fact, the Seventh Circuit has rejected governmental liability in both of the scenarios described above.

In cases involving a first instance of flagrant illegality, the Seventh Circuit has long rejected single-incident failure-to-train claims even in the absence of any training at all. In *Roach v. City of Evansville*, 111 F.3d 544 (7th Cir. 1997), for example, a police officer extorted the plaintiff, demanding $100,000 in exchange for hiding evidence seized in a search of the plaintiff's home. *Id.* at 546. The court held that "[n]o rational jury could conclude" that the City "was deliberately indifferent" to the risk that officers would extort suspects "because the City failed to tell its police officers to refrain from attempting extortion." *Id.* at 550. The Seventh Circuit doubled down in *Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006), where it held that, as a categorical matter, failing to include a particular prohibition in a manual is not enough to establish liability for failure to train the perpetrator of a single incident. *Id.* at 557.

In a second set of cases, the Seventh Circuit has rejected "single-incident claims" that "seek to hold a municipality [liable] for blatantly criminal conduct that it *did* train employees was prohibited," Pet. 24. In *Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007), for example, the Seventh Circuit rejected a failure-to-train claim in a case where a police officer fired into a moving vehicle and killed a man. Milwaukee had provided "training bulletins for approaching and exercising deadly force on suspects in vehicles." *Id.* at 487. The court rejected the plaintiff's claim because, even if the shooting at issue had been unconstitutional, there was insufficient evidence that "the need for further training" was "plainly obvious." *Id.* at 493 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)); *see also Lenard v. Argento*, 699

F.2d 874, 886 (7th Cir. 1983) (reaching same conclusion with respect to "physical restraint of prisoners"). Unless a municipality has prior reason to know that its training was plainly inadequate, the Seventh Circuit will not uphold *Monell* liability for a single incident where the plaintiff brings a failure-to-train-the-perpetrator claim.

Simply put, all of the circuits are in accord with respect to cases where the constitutional violation involves a "single incident" whose unconstitutionality is obvious and the plaintiff claims that the government is liable for having failed to train the perpetrator. The Seventh Circuit, like its sister circuits, does not hold governments liable "for the actions of misfit employees" alone. *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 599 (7th Cir. 2019).

B. The decision here does not conflict with the cases cited in the petition because the basis for liability was not failure to train the perpetrator.

1. This case involves a basis for governmental liability that is entirely distinct from the single-incident, failure-to-train-the-perpetrator theory at issue in the cases that the petition identifies. In all the cases cited in the petition, the constitutional violation at issue was the first and only occurrence. Of necessity, plaintiffs injured in those circumstances must argue that the government failed to train the perpetrator because there is no basis for thinking that other actors could have prevented the constitutional violation. In particular, a reporting and detection system could *not* have stopped the constitutional violation—by definition, reporting and detection are

only possible *after* the first incident has already occurred.

Here, Christensen assaulted both respondents and other victims scores of times over the course of several years. And from the outset, respondents have argued that the County is liable not because it failed to train Christensen, but because it chose to operate its jail in a way that "caused and/or permitted *the continuation* of Defendant Christensen's sexual misconduct." J.K.J. 2d Amd. Compl. ¶¶ 81, 90, ECF No. 41 (emphasis added); M.J.J. 2d Amd. Compl. ¶¶ 71, 80, ECF No. 42 (same). Polk County's fixation on whether it adequately trained Christensen—*see, e.g.*, Pet. 18, 26-27, 29—betrays its fundamental mischaracterization of respondents' case. Respondents have been clear at every stage of the litigation that the County's failings went far beyond failing to train Christensen and that it was those failings that supported holding the County liable.

The en banc Seventh Circuit affirmed the jury's verdict on that basis. It held that the jury had "ample evidence" of "Polk County's policy failures" with respect to implementing effective reporting, detection, and prevention mechanisms. Pet. App. 25. It further held that given the "obvious *and* known risk that its male guards would sexually assault female inmates," the jury could conclude that the County's policy failures reflected deliberate indifference. *Id.* Finally, it held that the jury had sufficient evidence to find that Christensen's conduct would have been exposed and stopped "sooner" had the county not been deliberately indifferent. *Id.* 33. None of those holdings involve a "'single-incident' theory of *Monell* liability" for a failure to train, Pet. i.

The petition's purported split is thus based on cases wholly irrelevant to the jury's verdict here. The case against the County is not—and has never been—about whether some form of training would have dissuaded *Christensen* from committing his assaults. The verdict in this case was based on a much broader constellation of "policy failures," involving "prevention and detection gaps" in the plural, Pet. App. 25.

2. There is no split among the circuits on whether deliberate indifference can be established by the kind of evidence presented in this case.

The petition cites only one other case where a plaintiff advanced a claim for liability that resembles respondents': *Cash v. County of Erie*, 654 F.3d 324 (2d Cir. 2011), *cert. denied*, 565 U.S. 1259 (2012) (discussed at Pet. 30 n.3). And in that case, the Second Circuit, just like the Seventh Circuit here, upheld a jury verdict against a county.

Like respondents, the plaintiff in *Cash* did not assert that the county was liable for failing to train the perpetrator. *Cash*, 654 F.3d at 336. Polk County indeed acknowledges this. Pet. 30 n.3. Instead, Cash targeted a constellation of other acts and policies that emboldened the perpetrator to sexually assault her. Like the respondents here, Cash pointed to officials' "token response" to lesser offenses in the past, uncontradicted expert testimony showing the inadequacy of the county's existing policies, and the common sense reality that jails present a high risk for sexual assault (acknowledged by a New York statute "which pronounces prisoners categorically incapable of consenting to any sexual activity with guards," similar to Wisconsin's, Wis. Stat. Ann. § 940.225(2)(h)). *Cash*, 654 F.3d at 334-39. In light of such a factual record,

the Second Circuit concluded—just as the Seventh Circuit did here—that the jury reasonably found the county liable for its failure to take any "proactive steps." *Id.* at 339.

Polk County had every incentive to find a case that looks like respondents' but comes out differently. It is telling that it could not. There is no reason for this Court to grant review.

II. This case is an inappropriate vehicle for answering the question presented in the petition.

The question presented in the petition is directed at a "so-called 'single-incident' claim" involving a "failure to train." Pet i. Even if there were a conflict among the courts of appeals on how to analyze such claims—and there is not, *see supra* pp. 17-20—this case would be the wrong vehicle for addressing that question because it is not presented here. Moreover, because the liability in this case was grounded on a rarely occurring and unusual constellation of facts, granting review would not provide the Court with an opportunity to provide useful guidance for other governmental liability cases. Granting certiorari here to review the jury verdict would result in nothing more than the kind of sufficiency-of-the-evidence review this Court routinely declines to perform.

1. For much the same reason that this case does not actually implicate the question the County presents for review, this case would be a poor vehicle for providing guidance on that question.

First, this case does not involve a "single incident." The classic single-incident case—like the classic tragedy—involves a unity of time, place, and

action. This case, by contrast, involves hundreds of constitutional violations against two individuals over a three-year period. And during the same period, the same guard was also victimizing at least three other women. *See supra* p. 5. If this Court is inclined to give more guidance on single-incident cases, it should wait for a lawsuit that involves one.

Second, the County's liability here does not rest on a "failure to train" an "employee [who] committ[ed] crimes." Pet. i, ii. The County was not found liable simply because it failed to train Christensen. The failures here were far broader. They involved a decision not to adopt reporting mechanisms for inmates that could have stopped Christensen far sooner, a decision not to train other employees to detect the telltale signs of sexual abuse that could have prompted a timely investigation, and a decision to permit a sexualized atmosphere within the Polk County Jail that produced express examples for the jury of the County's deliberate indifference.

In light of this framework, the evidence regarding the failure to train Christensen was just one piece of evidence reinforcing the conclusion that the County was deliberately indifferent to the risk of sexual assault. The failure to train Christensen was not the linchpin on which liability turned.

If this Court thinks it is necessary to clarify the preconditions for a failure-to-train claim, it should await a case where that is the basis for liability. There are plenty of cases raising that question. *See, e.g.*, Pet. 22-25.

2. Nor does this case provide an opportunity to provide guidance on any other important questions regarding governmental liability.

The particular constellation of facts that led the jury to find, and the Seventh Circuit to affirm, liability here are uncommon. As respondents' expert testified, other small jails generally implement low-cost techniques that detect and prevent precisely what happened to respondents. *See* Tr. 23-24, ECF No. 264; Eiser R. 5-7, ECF No. 84. And when it comes to state-level correctional facilities, federal law requires governors to certify their compliance with specific policies for detecting and preventing sexual assault or lose some of their federal funding. *See* 34 U.S.C. § 30307(e)(2). So there is no need for this Court's intervention to provide more detailed guidance on how to assess when a county should be held responsible for sexual assaults within its jail.

Without any reason to issue broad guidance to the lower courts, this Court can do no more than potentially review this unique case for error. This Court often emphasizes it is "not, and for well over a century [has] not been, a court of error correction." *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part). Furthermore, highly factbound cases, where questions presented turn "entirely on an interpretation of the record in one particular case," are a "quintessential example of the kind" of case that this Court will "almost never review." *Taylor v. Riojas*, 2020 WL 6385693, at *2 (U.S. Nov. 2, 2020) (No. 19-1261) (Alito, J., concurring in the judgment).

III. The Seventh Circuit's decision is correct.

The Seventh Circuit was right: respondents provided the jury with more than enough evidence to find that the County should be held liable for the sexual assaults against respondents that occurred in its jail.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that a jury can hold a government entity liable for a constitutional violation when (1) the entity had some "policy or custom" (2) that was "the moving force" behind the constitutional violation complained of. *Id.* at 694-95. Sometimes, as in *Monell* itself, that burden is met because an official policy is itself unconstitutional and directly inflicts the injury. (There, the city required pregnant employees to take medically unnecessary unpaid leaves.) In addition, this Court long ago recognized that liability is appropriate when a government acts with "deliberate indifference" to the "obvious" risk that its "facially lawful" policies will cause constitutional violations and that indifference "led directly" to the "predictable" constitutional violation. *Bryan County v. Brown*, 520 U.S. 397, 407, 409-10 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

This case is a paradigmatic example of the latter form of liability. The jury found that Polk County was deliberately indifferent to the risk that sexual assault would go undetected and unreported, and the County's indifference meant that no one stopped the repeated assaults endured by respondents. Those conclusions are both firmly grounded in the extensive record before the jury and fully consistent with this Court's jurisprudence.

A. The jury reasonably found that in the way the County operated its jail, the County was deliberately indifferent to respondents' constitutional rights.

As the district court recognized, there are two elements to proving deliberate indifference. First, the plaintiff has to show that there was a "plainly obvious" risk of harm. Tr. 19, ECF No. 259; *accord City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Second, the plaintiff has to show that policymakers "consciously disregarded this risk by failing to make reasonable measures to deal with it." Tr. 19, ECF No. 259; *accord Connick v. Thompson*, 563 U.S. 51, 62 (2011). In this case, the Seventh Circuit properly held that the jury had a sufficient basis to find both of those elements.

1. The Seventh Circuit correctly recognized that the jury had ample evidence before it that the need for a policy for detecting and preventing sexual assault was "obvious" to Polk County's policymaker, Captain Scott Nargis. Not only is it "common sense" that guards may assault inmates in a "tinderbox for sexual abuse" like a jail, Pet. App. 26, but PREA "owes its very existence" to the "obvious" "risks to female inmates in the confinement setting," *id.* 31. Years before the assaults at issue here, Congress found that correctional staff were often not "adequately trained or prepared to prevent, report, or treat inmate sexual assaults," and "rape often goes unreported" in correctional facilities. 34 U.S.C. §§ 30301(5)-(6). And Nargis admitted at trial that he was fully aware of that risk. Tr. 24, ECF No. 263.

Nor was the risk merely abstract. The County's belief that one of its guards, Allen Jorgenson, had

groped a female inmate gave it additional reason to know that its existing policies were not enough to prevent sexual abuse in its own jail. *See* Pet. App. 26-32. Moreover, the ongoing sexualized "tier talk" about inmates—talk of which Nargis was aware and in which he intentionally participated—provided support for the conclusion that the County enabled "a culture that condoned the sexual objectification of the women in its custody" and posed a risk that guards might feel emboldened to treat the inmates as sexual objects and use their power to commit sexual assault against them. *Id.* 31.

Polk County tries to argue that not even the combination of Nargis's admitted knowledge of the risk of jailhouse sexual assault, of a federal statute, and of episodes and activities in its own jail is enough to provide notice that a guard might sexually assault an inmate. According to Polk County, all of that evidence is outweighed by the fact that, to its knowledge, no other guard had ever actually *raped* an inmate before Christensen began his series of assaults. *See* Pet. 9.

Polk County's argument is as specious as it is callous. As the Seventh Circuit explained, that Jorgenson's escalating molestation "did not end with rape is no liability shield; it was good fortune." Pet. App. 28. Furthermore, Polk County's argument implies that because Christensen raped inmates and Jorgenson "only" molested them, the County cannot be held liable. That simply cannot be right. The Jorgenson incident and ongoing tier talk "reinforced" the already obvious: sexual assault happens in confinement and was already happening in Polk County Jail. Pet. App. 31.

2. Respondents also showed that county policymakers consciously disregarded the obvious risk of sexual assault. Contrary to the petition, the disregard here involves the County's "*own*" actions, Pet. 29 (citation omitted).

Polk County had multiple opportunities to change its sexual assault policies but declined to act each time. The County could have used some of the materials or adopted some of the recommendations that Wisconsin offers all jails. It did not. Instead, it requested none of those free training materials, posters, and suggested policies. *See* Tr. 28-29, 36, 82, 121-22, ECF No. 263; *see also* Pet. App. 27, 31-36, 77-80. It could have adopted any of the practices that other jails frequently use, such as installing anonymous reporting lockboxes or other confidential reporting mechanisms. It did not. Instead, the County, "with red lights flashing," "chose the one unavailable option—doing nothing." Pet. App. 29. The County could have disciplined Jorgenson and used that discipline to communicate a zero-tolerance policy. It did not. Instead, it let Jorgenson off with a slap on the wrist and told him that touching a female inmate sexually just was "not a big deal." Pet. App. 30. And in a staff-wide email, it ridiculed training on preventing sexual assault and called implementing PREA a waste of time. Tr. 32-34, ECF No. 263. That the County both repeatedly downplayed the gravity of sexual assault and repeatedly declined to change its policies and take a stand on sexual assault is more than enough for a jury to conclude that Polk County chose not to care.

B. The jury was entitled to find that the County's deliberate indifference caused respondents' injuries.

As this Court has explained, a government can be held liable where a plaintiff's injury was a "plainly obvious consequence of" its decisions. *Bryan County*, 520 U.S. at 411. Here, the jury heard evidence that the County did not teach guards or inmates how to spot the signs of sexual assault, the County failed to create a confidential reporting system, and a County policymaker condoned a sexualized culture within its jail. Unsurprisingly, unreported sexual assaults were exactly what happened here. The Seventh Circuit correctly held that respondents met their burden of proving causation.

First, guards and other inmates could have been trained to better recognize signs of abuse. As respondents' expert witness explained at trial, victims of sexual assault often exhibit "dramatic[] changes in their behavior, in their appearance, [and] in their hygiene." Tr. 20-21, ECF No. 264. These indicators are all the more readily spotted in a small jail, where "you see the same inmates over again and so you kind of know what's normal" for a particular inmate. *Id.* 21. It was therefore perfectly reasonable for a jury to find that proper training could have enabled others see the tell-tale signs of abuse. Instead, the lack of training enabled rape to go undetected.[6]

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[6] Judge Easterbrook argued that this Court "sees knowledge as the proper goal of training" and accuses respondents of confusing a "want of compliance" for a "want of comprehension." Pet. App. 39-40 (emphasis omitted). But just as "a policy such as

Second, Polk County's failure to create a confidential reporting system necessarily prevented the County from learning of sexual assaults and thereby acting to prevent further violations. That the County was in the dark therefore does not shield it from liability. It is part of the evidence that supports liability because of the County's deliberate choices ensuring that it would stay in the dark.

The way Christensen's assaults came to light reinforces the conclusion that Polk County's policies were a moving force behind respondents' repeated injuries. Christensen's assaults *were* reported and as a result, *were* stopped . . . but only after one of his victims reported his conduct while she was incarcerated in a *different* county's jail where she felt secure her complaint would be heard and acted upon. Pet. App. 4; Exh. 511. Indeed, that other county did promptly refer this information to the Polk County sheriff, whose criminal investigation resulted in Christensen's immediate resignation. This chain of events shows just how woefully inadequate the Polk County Jail's reporting system was. If any of Christensen's victims had felt empowered, while they were in Polk County's custody, to report Christensen,

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'comply with the Fourth Amendment' is useless to non-lawyers," *id.* at 39, a policy such as "keep an eye out for rape" is useless to untrained guards who do not know what to look for. Without providing its guards any training on how to identify signs of sexual assault, petitioner's policies are little more than window dressing because petitioner "fail[ed] to equip [its employees] with specific tools to understand what the Constitution commands." Pet. 28 (quoting *Bryan County v. Brown*, 520 U.S. 397, 409 (1997)).

all of this could have happened years earlier, thereby preventing countless assaults of the respondents.

Rather than address the jail's systemic failures, Polk County argues that Christensen's malevolence breaks the causal chain because there was simply nothing it could have done to train him not to sexually assault inmates. But the County overlooks the obvious: *others could have stopped Christensen*. Because the County failed to train its other employees to spot signs of sexual abuse and failed to create a confidential reporting system, respondents endured three years of repeated rapes. There was more than enough evidence for the jury to find here that the County's failure to stop a guard from assaulting inmates hundreds of times was not because of a glitch in the system. Instead, it was "the very consequence that was so predictable." *Bryan County*, 520 U.S. at 410. Polk County's "narrow fixation on Christensen," Pet. App. 34, blinds it to the ways its deliberate indifference enabled his crimes.

C. The Seventh Circuit's decision does not break new ground, open municipalities to *respondeat superior* liability, or otherwise disturb the balance between federal, state, and local governments.

1. Eager to invoke the specter of federal overreach, the County claims that denying review of this case would open the floodgates to federal meddling by imposing de facto *respondeat superior* liability. Pet. 31-34. Not so. The jury instructions here were absolutely clear that the County could not be held liable "simply because it employed Darryl Christensen," Tr. 17, ECF No. 259—that is, on a

theory of *respondeat superior*. Rather, the instructions told the jury that it could hold the County liable only if the respondents proved the harm was a result of *the County's* deliberate indifference. *Id.* 17-19.

The jury—and the Seventh Circuit—found the County liable not because it employed a rapist, but because the way it operated its jail manifested a deliberate indifference toward sexual assault and that deliberate indifference enabled a rapist to elude detection for years. In other words, the jury did exactly what this Court has authorized: it imposed liability on the County because the County's "*own* actions violate[d] the Constitution," Pet. 34.

2. The County also argues that the Seventh Circuit's decision constitutionally compels correctional facilities "to adopt policies that neither Congress nor state legislatures have seen fit to impose," namely, the federal Prison Rape Elimination Act (PREA). Pet. 32-33. Wrong again. Neither respondents, the district judge, nor the Seventh Circuit ever characterized adoption of PREA as the *only* means by which Polk County could comply with its constitutional obligations. Respondents instead referred to PREA simply to illustrate widely accepted, effective options that are "very commonly" used by correctional facilities. Tr. 23, ECF No. 264. Respondents consistently argued in proceedings below that "[a] jail would also be free to devise another method" other than PREA standards in order to address sexual assaults in jails. J.K.J. & M.J.J. C.A. Br. 10; *see also* Tr. 22-24, ECF No. 264.

When this issue was presented to the jury, the district judge took care to highlight that "the question you are being asked to decide is whether the County

was deliberately indifferent to plaintiffs' constitutional rights, not whether the County failed to comply with Wisconsin regulations, PREA, or any other set of standards." Tr. 19-20, ECF No. 259. The judge also admonished the jury that "the failure to comply *by itself* with PREA" is not "a basis to find the County liable." *Id.* 20 (emphasis added). The County never claimed that the jury was improperly instructed. In fact, the County asked for this instruction in the first place. Pet. App. 189-90.

Contrary to Polk County's assertions, the Seventh Circuit's lopsided en banc decision merely affirms a basic and limited principle that runs through this Court's *Monell* caselaw. Where a municipality is confronted with the obvious risk that its failure to act will result in its causing constitutional violations, the municipality cannot do what Polk County did here: "deliberately choose to stand still," Pet. App. 29, and let constitutional violations occur.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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