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

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The decision below employed the "single-incident" theory to conclude that a municipality may be held liable under §1983 for failing to do more to prevent an employee from knowingly committing crimes that were expressly forbidden by municipal policy and the law. In doing so, the decision works a radical expansion of a narrow exception to the ordinary pattern-or-practice rule for *Monell* claims that this Court has hypothesized, but has never found satisfied. As this Court's cases make clear (and every other circuit has recognized), the single-incident theory is supposed to be reserved for the rare case in which a municipality consciously declines to provide specialized training that is essential for employees *to know how* to do their job in a way that does not violate constitutional rights. When, as here, there is no dispute that the employee who committed the constitutional violations knew full well that his conduct was prohibited, there is no work for the single-incident theory to do. Perhaps on the right facts there may be a pattern-or-practice claim in such a situation, and in some jurisdictions there may well be state-law claims. But §1983 does not permit single-incident claims premised on the notion that it should have been "obvious" to a municipality that it needed to "do more" to prevent a rogue employee from knowingly engaging in criminal acts. By sanctioning that amorphous theory, the decision below distorts the hypothetical single-incident exception beyond recognition.

Rather than meaningfully confront those glaring problems, respondents repeatedly emphasize that the Seventh Circuit faulted Polk County for failing to do

more to train *others* to *detect* Darryl Christensen's abhorrent criminal conduct, not for failing to train Christensen that his conduct was prohibited. Agreed. That is precisely the problem. Every other court confronted with a claim like this has recognized that a municipality simply cannot be said to have caused an employee to violate the Constitution when the employee obviously knew that the conduct in question was prohibited. Couching the problem as a failure to detect, rather than to prevent, the unconstitutional conduct does not solve that problem; if anything, it just makes any claimed causal connection between the municipality's acts (or alleged failures to act) and the constitutional violation that much more attenuated.

The decision below thus does indeed conflict with the many decisions rejecting single-incident claims that are not materially different from this one—not to mention with this Court's repeated admonitions that municipalities may be held liable under §1983 only for their *own* unconstitutional acts. And it embraces an expansive conception of the single-incident theory that could be employed in virtually any case that involves egregious conduct by an employee who serves in any kind of position of power. This case thus provides an excellent opportunity for the Court to provide much-needed guidance on the contours of the hypothetical single-incident theory and ensure that it does not become an exception that swallows the ordinary rule that municipalities may be held liable only for their own unconstitutional acts.

I. The Court Should Grant Review To Address The Seventh Circuit's Boundless Expansion Of *Monell* Liability.

Time and again, this Court has held that "local governments are responsible only for 'their *own* illegal acts,'" *Connick v. Thompson*, 563 U.S. 51, 60 (2011), and so "can be found liable under §1983 only where the municipality *itself* causes the constitutional violation," *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). The Court has left open "the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under §1983 without proof of a pre-existing pattern of violations." *Connick*, 563 U.S. at 64. But it has made abundantly clear that this so-called "single-incident" theory is reserved for the "rare" case in which a municipality fails to equip its employees with any "knowledge at all of the constitutional limits" that govern their conduct in situations that they are all but certain to encounter, even though "there is no reason to assume" that they possess that knowledge on their own. *Id.* at 62, 64, 67.

The decision below distorts the narrow single-incident theory beyond recognition. That is clear from respondents' effort to defend it. Respondents do not and cannot fault the County for any purported failure to train Christensen that sexually assaulting inmates is prohibited by both the County and the law. They instead fault the County for failing "to adopt policies that would have empowered *others* in the jail to report, detect, or stop" his repeated sexual assaults. BIO.1. But the single-incident theory is not a vehicle for subjecting municipalities to negligence-style liability

based on their employees' knowing violations of county policy and law. It is (at most) a vehicle for holding municipalities liable for the constitutional violations of their employees when those violations were the virtually inevitable result of a failure to provide some specialized training that was obviously necessary for employees *to know how* to do their jobs without committing constitutional violations. *See* Pet.App.40-43 (Easterbrook, J., dissenting in part). When there is no dispute that the employee *knew* that the conduct at issue was prohibited (indeed, criminal), the single-incident theory has no work to do.

Indeed, the notion that it is "patently obvious" that municipalities have a constitutional obligation to do more to detect knowing violations of crystal-clear policies is antithetical to the entire *Monell* doctrine. After all, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the" violation. *Canton*, 489 U.S. at 392. That is nowhere more true than when it comes to egregiously criminal acts, as the unfortunate reality is that there is no perfect system for identifying in advance the rare employee who simply does not care what the law commands. If the bare reality that it is "obvious" that some miniscule number of those who obtain positions of power will abuse them were enough to obviate the need to identify "a pattern of similar constitutional violations" putting a municipality on notice of some deficiency in its policies before it can be held liable for those criminal acts, then §1983 would give federal "courts carte blanche to micromanage local governments throughout the United States." *Connick*,

563 U.S. at 62, 68. That is why lower courts have repeatedly rejected efforts to use the single-incident theory to hold municipalities liable for the knowingly criminal conduct of their employees, and have allowed such claims to go forward (if it all) only upon a showing of some pattern or practice putting the municipality on notice of some actual *deficiency* in its policies or training. *See* Pet.22-26.

Respondents protest that those cases involved efforts to hold a municipality liability for failure to train employees that sexual assault is prohibited, not for failure to adopt better policies for detecting it. BIO.18. But those courts did not reject those claims because the plaintiff failed to identify "something more" that the municipality could have done to help deter or detect assault. They rejected them because the risk that an employee will commit a flagrantly criminal assault is not so "obvious" that the failure to provide training to prevent it is akin to condoning it. In other words, they rejected the very notion that such cases fit the single-incident mold, because they were "not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates" given the reality that everyone knows sexual assault is a crime. *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1288 (10th Cir. 2019) (quoting *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998)); *see also, e.g.*, *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1160 (9th Cir. 2014); *Parrish v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010). Those holdings are impossible to reconcile with the Seventh Circuit's insistence that it is so "obvious" that "male guards would sexually assault female inmates," Pet.App.25-26, that the failure to embrace what a jury deems best

policies for reporting and detecting assault is akin to "hav[ing] deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62.

Respondents claim that those cases involved "a first instance of flagrant illegality," whereas "Christensen assaulted both respondents and other victims scores of times over the course of several years." BIO.19-21. But the claims in those cases were not single-incident claims because they involved only one incident; in fact, several involved perpetrators who committed multiple offenses against multiple victims. *See, e.g.*, *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 765 (10th Cir. 2013); Br. of Appellant 9-11, *S.J. v. Kan. City Mo. Pub. Sch. Dist.*, 294 F.3d 1025 (8th Cir. Jan. 18, 2002) (No. 01-3608); *Andrews v. Fowler*, 98 F.3d 1069, 1073-74 (8th Cir. 1996); *Barney*, 143 F.3d at 1304-05; *Floyd v. Waiters*, 133 F.3d 786, 788 & nn.1-2 (11th Cir. 1998), *vacated on other grounds by* 525 U.S. 802 (1988), *reinstated by* 171 F.3d 1264 (11th Cir. 1999). They were single-incident cases because (most) involved the "first instance of flagrant illegality" of which the defendant was *aware*. *That* is the difference between a pattern-or-practice claim and a single-incident claim. In the former, the requisite "notice that a course of training is deficient" comes from "[a] pattern of similar constitutional violations." *Connick*, 563 U.S. at 62. In the latter, it comes from the fact that "the unconstitutional consequences of failing to train" are "patently obvious." *Id.* at 64. Whether the allegedly unconstitutional conduct here is understood as allowing any assault to occur, or as "caus[ing] and/or permitt[ing] *the continuation* of Defendant

Christensen's sexual misconduct," BIO.21, thus has no bearing on the single-incident inquiry, for the County concededly had no knowledge of Christensen's actions until they were reported, at which point it took immediate action. Pet.App.4.

Respondents suggest that materially different conduct by a *different* corrections officer sufficed to put the County on notice "that its existing policies were not enough to prevent sexual abuse." BIO.28. But while the Seventh Circuit was sharply divided on many things, it was unanimous on one: No pattern or practice of past conduct put the County on notice of any deficiency in its sexual abuse policies. *See* Pet.App.21-22, 181-82. Instead, all agreed that respondents' only possible "path to show Polk County had the requisite notice" for a *Monell* claim was the single-incident "door the Supreme Court opened in [*Canton*]." Pet.App.22. And the Seventh Circuit grounded that notice not in any pattern or practice of constitutional violations, but in the court's view that it "was as obvious as obvious could be" that "[t]he confinement setting is a tinderbox for sexual abuse." Pet.App.26. That likely explains why district courts have uniformly understood this as a single-incident case, not a pattern-or-practice case. *See, e.g.*, *Streater v. Dart*, 2020 WL 5518477, at *2 (N.D. Ill. Sept. 14, 2020); *Watson v. Ind. Dep't of Corr.*, 2020 WL 5815051, at *5 (S.D. Ind. Sept. 30, 2020).[1]

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[1] It also readily distinguishes *Cash v. County of Erie*, 654 F.3d 324 (2d Cir. 2011), which actually did not "resemble" this case at all in its legal reasoning, BIO.22, as *Cash* was neither a single-incident nor even a failure-to-train case. *See* 654 F.3d at 336.

Moreover, the evidence to which respondents point in trying to resuscitate their pattern-or-practice claim could not have put the County on notice of what they insist caused the constitutional violation—*i.e.*, the failure "to adopt policies that would have empowered *others* in the jail to report, detect, or stop" sexual assault, BIO.1—as none of that evidence had anything to do with any known *reporting* or *detection* failings. *See* BIO.27-28. In that respect, respondents' brief confirms the wisdom of *Connick*'s caution that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train" since a purported "'policy' of 'inadequate training'" is inherently "nebulous, and a good deal further removed from the constitutional violation, than" an identifiable policy. 563 U.S. at 61. Here, it is not even clear what the purported failure to train was, as respondents focus sometimes on an alleged failure to train employees to detect sexual abuse, BIO.30, other times on an alleged failure to embrace the exact same policies as other jurisdictions, BIO.29, and still other times on an alleged tolerance of a "sexualized" culture, BIO.28.

While that approach may suffice for a negligence claim, *Monell* claims demand something more: They require proof "that 'action pursuant to official municipal policy' caused the[] injury." *Connick*, 563 U.S. at 60-61 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). To be sure, that policy may be a "decision *not* to train certain employees about their legal duty to avoid violating citizens' rights" when it is clear that such training is necessary. *Id.* at 61 (emphasis added). But there still must be *something* that can be understood as the municipality

having "deliberately chosen a [course of action] that will cause violations of constitutional rights." *Id.* at 62. Amorphous claims that it should have been obvious to a municipality that it could do some ill-defined "something more" to prevent a rogue employee from knowingly committing egregiously criminal acts simply do not suffice to prove that "the municipality *itself* cause[d] the constitutional violation." *Canton*, 489 U.S. at 385. By sanctioning liability on such a sweeping theory—and in the single-incident context, no less—the decision below embraces exactly the kinds of "lesser standards of fault and causation" that this Court has warned "would open municipalities to unprecedented liability under §1983." *Id* at 391.

II. This Case Is An Excellent Vehicle To Resolve An Exceptionally Important Question.

By distorting the single-incident theory beyond recognition, the decision below works a radical expansion of *Monell* liability. The Court need not take the County's word on that; virtually every municipal group in the country and several states have urged the Court to grant certiorari, warning of the catastrophic consequences the decision below portends. *See* Br. of *Amici Curiae* Nat'l Ass'n of Ctys., Nat'l League of Cities, U.S. Conf. of Mayors, Int'l City/Cty. Mgmt. Ass'n, & Int'l Mun. Lawyers Ass'n 1-17; Br. of *Amicus Curiae* Nat'l Sheriffs' Ass'n 12-22; Br. of *Amici Curiae* Louisiana et al. 1-17. Simply put, left standing, the decision below "will upend the balance of power between the States and the federal government." Br. of *Amici Curiae* Louisiana et al. 12-17.

Respondents insist that this is an inappropriate vehicle for answering the question presented "because

the liability in this case was grounded on a rarely occurring and unusual constellation of facts." BIO.23. But as the amicus briefs and the cases with which the decision below conflicts confirm, given the sheer number of municipalities throughout the country, and the reality that there is no perfect mechanism for identifying those who have no qualms about flouting the law, cases of egregious criminal conduct by municipal employees are unfortunately not as rare or unusual as all would hope. Indeed, the very premise of respondents' claims is that the risk that corrections officers will repeatedly sexual assault inmates is so "obvious" that municipalities have a constitutional obligation to put in place the federal government's preferred measures for reporting and detecting it. Wholly apart from whether that claim is legally viable, respondents cannot defend the Seventh Circuit's decision on the theory that cases of repeated sexual assault are so rare as to be essentially unique when they successfully defended the jury's verdict on the theory that it should be obvious to every jail that there is always a serious risk that guards will repeatedly and covertly assault inmates.

Moreover, respondents cannot explain why the reasoning employed here could not be employed to hold a municipality liable for virtually any criminal act of any employee. After all, "a §1983 plaintiff will be able to point to something the city 'could have done' to prevent" a violation of constitutional rights. *Canton*, 489 U.S. at 392. The decision below thus provides a roadmap not just to negligence claims, but ultimately to *respondeat superior* liability in any case where it can be said that the risk of abuse of power should have been "obvious"—which is to say virtually

every case involving a corrections officer, or a police officer, or a teacher, or a social worker, or any of the myriad other municipal employees entrusted with roles of power. The Court should grant certiorari and prevent the single-incident theory from being converted into an exception that swallows the rule that "local governments are responsible only for 'their *own* illegal acts.'" *Connick*, 563 U.S. at 60.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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