AUG 9 - 2010

No. 09-1361

In the Supreme Court of the United States

CITY OF RENO, RYAN ASHTON, AND DAVID ROBERTSON,
Petitioners,

v.

CHARLA CONN AND DUSTIN CONN,
Respondents.

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

BRIEF IN OPPOSITION

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323
keysercooper@yahoo.com

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

Blank Page

QUESTIONS PRESENTED

It is settled that the States have a duty not to deny prisoners necessary care in the face of serious medical needs. *Estelle* v. *Gamble*, 429 U.S. 97, 102-03 (1976). A state official who has actual knowledge that a detainee is at imminent risk of serious harm and *does nothing* thus violates the detainee's constitutional rights. *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994). The lower courts have uniformly held that an imminent risk of suicide constitutes a serious medical need sufficient to trigger a duty to respond by, for example, reporting the risk so that detainee may be placed on suicide watch. See, *e.g.*, *Cavalieri* v. *Shepard*, 321 F.3d 616, 622 (7th Cir. 2003); *Turney* v. *Waterbury*, 375 F.3d 756, 761 (8th Cir. 2004); *Snow* v. *City of Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005).

The questions presented are:

(1) Whether a custodial officer has actual knowledge that a detainee is at imminent risk of suicide – sufficient to trigger a duty to respond – when the officer witnesses the detainee both threaten and attempt suicide in the officer's presence.

(2) Whether, when an officer has violated a detainee's constitutional rights by failing to respond reasonably to a known suicide risk, a municipality may be held liable if the constitutional violation resulted from a municipal policy or failure to train.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
STATEMENT 1
A. Factual Background 2
B. Procedural Posture 7
REASONS FOR DENYING THE PETITION 11
I. PETITIONERS WAIVED THE QUESTIONS PRESENTED. 13
II. THE INDIVIDUAL LIABILITY HOLDING DOES NOT WARRANT REVIEW. 16
A. There Is No Circuit Conflict Concerning Individual Liability. 17
B. The Ninth Circuit's Decision Concerning Individual Liability Is Correct. 22
III. THE MUNICIPAL LIABILITY HOLDING DOES NOT WARRANT REVIEW. 25
A. There Is No Conflict Concerning Municipal Liability. 25
B. The Ninth Circuit's Decision Concerning Municipal Liability Is Correct. 32
CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

Barber v. *City of Salem*,
953 F.2d 232 (6th Cir. 1992).....27, 28, 31

Bd. of County Comm'rs v. *Brown*,
520 U.S. 397 (1997).....30

Boncher ex rel. Boncher v. *Brown County*,
272 F.3d 484 (7th Cir. 2001).....6, 29, 30, 31

Burns v. *City of Galveston*,
905 F.2d 100 (5th Cir. 1990).....25, 26, 31

Cavalieri v. *Shepard*,
321 F.3d 616 (7th Cir. 2003).....24

City of Canton v. *Harris*,
489 U.S. 378 (1989).....25, 32, 33

City of Los Angeles v. *Heller*,
475 U.S. 796 (1986).....12

Conn v. *City of Reno*,
591 F.3d 1081 (9th Cir. 2010).....21, 31

Cooper ex rel. Estate of Morton v. *County of Washtenaw*,
222 Fed. App'x 459 (6th Cir. 2007).....28

Coscia ex rel. Estate of Coscia v. *Town of Pembroke*,
__ F. Supp. 2d __, 2010 WL 2223685
(June 4, 2010).....29

Davidson v. *Cannon*,
474 U.S. 344 (1986).....22

Elliott v. *Cheshire County*,
940 F.2d 7 (1st Cir. 1991).....17, 18

TABLE OF AUTHORITIES – continued

Page(s)

Estelle v. *Gamble*,
429 U.S. 97 (1976) 16, 33

Farmer v. *Brennan*,
511 U.S. 825 (1994) ..... *passim*

Freedman v. *City of Allentown*,
853 F.2d 1111 (3d Cir. 1988) 18, 19

Hare v. *City of Corinth*,
74 F.3d 633 (5th Cir. 1996) 26

Jutzi-Johnson v. *United States*,
263 F.3d 753 (7th Cir. 2001) 6

Manarite v. *City of Springfield*,
957 F.2d 953 (1st Cir. 1992) 18, 28, 29, 31

Popham v. *City of Talladega*,
908 F.2d 1561 (11th Cir. 1990) 27, 28, 31

Simmons v. *City of Philadelphia*,
947 F.2d 1042 (3d Cir. 1991) 31

Simmons v. *Navajo County*,
__ F.3d __, 2010 WL 2509181 (9th Cir.
June 23, 2010) ..... *passim*

Snow v. *City of Citronelle*,
420 F.3d 1262 (11th Cir. 2005) 24

Turney v. *Waterbury*,
375 F.3d 756 (8th Cir. 2004) 24

Whitt v. *Stephens County*,
529 F.3d 278 (5th Cir. 2008) 27

Williams v. *Borough of West Chester*,
891 F.2d 458 (3d Cir. 1990) 19, 20

TABLE OF AUTHORITIES – continued

Page(s)

Woodward v. *Corr. Med. Serv. of Illinois, Inc.*, 368 F.3d 917 (7th Cir. 2004) 30, 31

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 16

STATUTES, RULES AND REGULATIONS

42 U.S.C. § 1983 ..... 7, 27

MISCELLANEOUS

Lindsay M. Hayes *et al.*, *National Study of Jail Suicides: Seven Years Later* (National Center on Institutions and Alternatives) (1988) 6

Large Urban Jail System with an Established Suicide Prevention Program, JAIL SUICIDE/MENTAL HEALTH UPDATE, Vol. 11, No. 3 (Fall 2002) 5

Blank Page

STATEMENT

Mischaracterizing the holding below, petitioners present questions that holding does not raise. They repeatedly assert that the court of appeals required law-enforcement officers to "diagnose and report detainees' symptoms of suicidal tendencies" and insist that, as a result, municipalities in the Ninth Circuit must now train officers to act as psychiatrists able to "diagnose and report" such symptoms. Pet. i. On at least 35 occasions, petitioners erroneously suggest that the court of appeals imposed a duty to "diagnose."

But this case is not about diagnosis; it is about whether custodial officers who personally witness a detainee threaten and attempt suicide in their presence have a duty to respond reasonably.

Here, while transporting Brenda Clustka to the local jail, the petitioner police officers saw Clustka attempt suicide by choking herself with a seatbelt in the back of the police wagon, and heard Clustka scream that she wanted to kill herself. The court below found, based on the cumulative evidence, that a jury *could* conclude, first, that the officers were subjectively aware of a serious and imminent risk Clustka would commit suicide and, second, that they acted with deliberate indifference by failing to inform subsequent custodians what they saw and heard.

This holding is neither novel nor incorrect. Indeed, *every* circuit to consider this issue has reached the same result. In every prison suicide case, the operative question is whether there is evidence in the record from which a jury could conclude the custodian had *actual knowledge* that the detainee was an imminent suicide risk by virtue of, for example,

witnessing recent suicide attempts or threats. If an officer has actual knowledge but fails to respond reasonably, a claim may lie. No court disagrees with the Ninth Circuit's view.

Not only is review therefore unnecessary on its face but, in the court below, petitioners waived the very arguments they now present. There, petitioners argued only, *as a matter of fact*, that they lacked actual knowledge of Clustka's serious medical need. They conceded that, if they *had* such knowledge, they failed to respond reasonably. Petitioners now sing a different tune: Their petition turns on the newly minted argument that they lack any duty to report suicide attempts because police officers have no obligation to "diagnose" suicidal tendencies. This novel argument, raised here for the first time, has been waived.

Nor is review warranted of the lower court's holding that respondents presented sufficient evidence to create triable questions of fact regarding municipal liability. The court properly applied settled law to the particular factual circumstances before it, and there is no reason to believe that other circuits would have held otherwise. The petition accordingly should be denied.

A. Factual Background

1. On March 19, 2005, Clustka was arrested for domestic battery of her mother. Pet. App. 18. Clustka's behavior and words suggested she was suicidal; prison officials accordingly placed her on suicide watch. Clustka was released on April 21, 2005. *Id.* at 18-19.

A few days later, on April 25, 2005, Clustka again became suicidal and was taken (at family

members' direction) to Washoe Medical Center, then transferred to Nevada Mental Health Institute where she was involuntarily committed. Clustka was medically evaluated and discharged the next morning. Pet. App. 19.

A few hours later, in the early afternoon of April 26, 2005, petitioners Ashton and Robertson responded to a 911 call that Clustka was passed out on a sidewalk. Pet. App. 19. When the officers arrived, Clustka was intoxicated but not stumbling, falling down, or causing a disturbance. Appellants' Excerpts of Records ("ER") 218. Ashton – who participated in Clustka's March 19 arrest – recognized her and knew of her mental health problems. A warrants check indicated Clustka was known to have "violent tendencies, [that she was] known to abuse drugs, [was an] alcoholic [and had] other mental health problems." Pet. App. 19-20 (internal quotation marks omitted). Petitioners decided to take her into civil protective custody. *Ibid.*

When petitioners told Clustka they were taking her to jail, she became agitated and uncooperative. To induce Clustka to enter the paddy wagon, Robertson told her, falsely, they were taking her home. Pet. App. 20. Petitioners did not handcuff Clustka. *Ibid.* En route to the jail, Ashton saw, via the vehicle's video monitor, that Clustka had unlatched her seatbelt and was moving about. *Id.* at 20-21. He asked Robertson if they should stop to secure Clustka, but Robertson declined. ER 151.

When Clustka saw they were approaching the jail and not her home, she became extremely agitated. Ashton watched Clustka wrap a seatbelt around her throat. He told Robertson she was "trying to choke herself." ER 149; Pet. App. 20-21. The offic-

ers stopped the vehicle. It took both officers to "remove [Clustka's] clenched fists from the seatbelt" and unwind it from around her neck. ER 159, 195.

Clustka screamed repeatedly, "Kill me or I'll kill myself." ER 150, 195; Pet. App. 21. When they arrived at the jail sally port, Clustka screamed again she "wanted to die." ER 215. The evidence indicates both officers believed she was not "joking" (ER 235, 350; Pet. App. 21), acknowledging she was "emotionally distraught" (ER 195) and "might be seriously mentally ill" (ER 235).

Ashton, who had been a police officer for only seven months, asked Robertson – an eighteen-year veteran – if they should report Clustka's suicide attempt and suicide threats. Robertson answered, "No." The officers rationalized that the threat had not been serious because Clustka could not have killed herself, as the seatbelt would have lost tension after she passed out. ER 151.

As the court below noted, however, the evidence suggests a different explanation for petitioners' failure to report Clustka's suicide attempt and threats: "Both officers believed that failing to handcuff Clustka while transporting her, and failing to fasten her into her seat belt once she unbuckled it, were violations of policy. Had they reported the incident, they would have had to report their own misconduct." Pet. App. 33; see also *id.* at 33 n.4.

Petitioners did not alert subsequent custodians to Clustka's suicide attempt and threats. Pet. App. 21. Four hours after being held at the Washoe County Jail, Clustka was released without further inquiry. *Id.* at 22. That evening, she was again taken

to the emergency room, observed for gross intoxication only, and subsequently released. *Ibid.*

The next day, on April 27, 2005, Clustka violated a restraining order by returning to the home she had shared with her mother, was arrested, and was again taken to the jail. Pet. App. 22. The nurse who screened Clustka upon her admission was unaware of Clustka's suicide attempt and suicidal statements the day before. Instead of assigning Clustka to suicide watch status, she recommended Clustka be assigned to the general inmate population. *Ibid.* Had Clustka been placed on suicide watch, the prison would not have provided a bed sheet in her cell. *Id.* at 22-23.

The morning of April 28, 2005, Clustka, visibly upset, returned to her cell following her arraignment. Pet. App. 23. After Clustka did not respond to roll call, a deputy discovered she had committed suicide by hanging herself with her bed sheet. *Ibid.*

Later that day, petitioner Ashton explained to a jail deputy that he and Robertson knew Clustka had "tried to hang herself" two days earlier (ER 74; Pet. App. 23) but that his more senior partner declined to document the "suicide attempt." Ashton stated he would now write a report and his "sergeant will be pissed." *Ibid.*

2. While tragic, what happened to Clustka is no isolated incident. Suicide has long been known to be the leading cause of death in United States jails. Goss *et al.*, *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, JAIL SUICIDE/MENTAL HEALTH UPDATE, Vol. 11, No. 3 (Fall 2002) (ER 385). Because a mentally ill person is likely to feel extreme

trauma at the point of initial incarceration, the likelihood of suicide is known to be highest in the first fourteen days of confinement. *Jutzi-Johnson* v. *United States*, 263 F.3d 753, 757 (7th Cir. 2001) (citing Lindsay M. Hayes *et al.*, *National Study of Jail Suicides: Seven Years Later* (National Center on Institutions and Alternatives) (1988)). The majority of suicide victims communicate suicidal intent before killing themselves. ER 165. The risk "is concentrated in the early days and even hours of being placed in jail, before the inmate has had a chance to adjust to his dismal new conditions." *Boncher ex rel. Boncher* v. *Brown County*, 272 F.3d 484, 486 (7th Cir. 2001).

Washoe County Jail had witnessed frequent detainee suicides. Between January 2004 and August 2005, six detainees committed suicide while incarcerated there. Pet. App. 23-24. Clustka's suicide followed another detainee's by fewer than 30 days. *Ibid.* Despite these recurrent suicides, the record indicates the City did not provide its officers with any training on how to respond to suicide attempts or threats. ER 274. Petitioners here testified they never received such training. ER 186, 194, 228.

Less than a month after Clustka's suicide, the Reno Police Department presented a training class on how to respond to mentally ill detainees. A new suicide prevention policy was soon implemented, directing transport officers to communicate any suicidal gestures or threats they witness to jail staff. ER 166-67. This policy requires an arresting officer to answer questions about a detainee's mental health at intake, including questions that focus on suicide risk. Pet. App. 24.

B. Procedural Posture

1. Respondents, Clustka's surviving children, filed this suit under 42 U.S.C. § 1983, alleging in relevant part that Ashton and Robertson violated Clustka's Fourteenth Amendment rights "by making [the] deliberate and intentional decision to not notify Washoe County Detention facility staff of Clustka's suicide attempt and to not write an incident report documenting the attempt." ER 10. Respondents also asserted a claim against the City of Reno, alleging in relevant part that the City's "failure to properly train, supervise, control and/or discipline defendants Ashton and Robertson with respect to their obligations to report suicide attempts by detainees is the cause in fact and proximate cause of the injuries claimed." ER 11.

During discovery, respondents obtained extensive evidence concerning the individual petitioners' subjective awareness of the serious medical risk to Clustka. For example, when Ashton spoke with a jail deputy following Clustka's suicide, Ashton characterized the incident he witnessed as a "suicide attempt," adding "she tried to hang herself in the wagon." ER 74. Ashton further explained he told Robertson that Clustka "was trying to choke herself." ER 149. Responding to requests for admissions, both officers admitted Clustka "became emotional[ly] distraught," "attempted to choke herself," and "threatened to kill herself." ER 349, 359. Robertson testified that reporting the incident would have taken "five seconds." ER 215.

Additionally, respondents obtained substantial evidence concerning the serious medical risk Clustka faced. Jail health director Gail Singletary testified the officers should have let jail nurses know what

they saw and heard because there would have been "opportunity to do a more complete evaluation." ER 174. Washoe Medical Center emergency physician Guy Gansert likewise testified that police typically transport a person who threatens suicide to the emergency department where suicide threats are taken "very seriously." ER 323, 325. Finally, psychiatrist Jeffrey Caplan, who previously treated Clustka for suicidal ideation, testified it would have been "critical to get Brenda Clustka to mental health care had she made a repeat suicide threat and attempt on April 26th." ER 337.

2. Upon conclusion of discovery, petitioners moved for, and the district court granted, summary judgment. See Pet. App. 54-74. In the district court's view, although "the actions of Officers Ashton and Robertson in failing to report the seat belt incident may have been negligent conduct, such conduct does not create a triable issue of fact sufficient to support a finding of deliberate indifference." *Id.* at 67.

The court thus concluded that respondents "failed to establish sufficient facts to support a conclusion by the trier of fact that the conduct of the defendants in failing to report the seat belt incident constituted deliberate indifference to Clustka's rights, or that the conduct of the defendants was the actual cause of Clustka's harm." Pet. App. 71-72. Based on this conclusion, the court held that no claim against the municipality could lie. *Id.* at 73.

3. The Ninth Circuit reversed, finding that respondents presented sufficient evidence to raise jury questions on both individual and municipal liability.

a. Addressing the claims against the individual officers, the court explained that the deliberate indif-

ference claim has three elements: (1) objective, serious medical need; (2) deliberate indifference to that need; and (3) harm caused by the officers' indifference. Pet. App. 27. The court concluded there was sufficient evidence in the record to create triable issues of fact on each of these prongs.

First, the court found that "[a] heightened suicide risk or an attempted suicide is a serious medical need." Pet. App. 27. After reviewing the evidence, the court determined that "[a]n objective juror could certainly conclude that in light of all the circumstances Clustka's actions evidenced a serious medical need." *Id.* at 30. Petitioners' arguments to the contrary, the court concluded, "merely create a fact question for the jury to resolve." *Ibid.* Petitioners do not challenge this conclusion.

Second, turning to deliberate indifference, the court explained that this element itself has two requirements: (a) the officer was subjectively aware of the serious medical need, and (b) the officer nonetheless failed to respond reasonably. Pet. App. 30.

Addressing subjective awareness, the court found a triable issue on whether the officers were in fact subjectively aware of Clustka's suicide risk: "Clustka attempted to choke herself with a seat belt and screamed something to the effect of 'kill me or I'll kill myself'; these are warning signs that are difficult for any observer to miss." Pet. App. 32. This conclusion was bolstered by the circumstantial evidence explaining why the officers remained silent: They feared they had violated department policy. *Id.* at 33. Finally, the court reasoned, the officers' after-the-fact statements provided additional support for a factual finding that they were indeed subjectively aware of Clustka's serious medical need. *Id.* at 33-34.

"[C]umulatively," the court concluded, this "evidence is sufficient to create a material issue of fact on the question of the subjective awareness of both officers. * * * We must leave the question of subjective awareness to the jury." *Id.* at 35 (internal quotation marks omitted).

Turning to the reasonableness of the officers' response, the court specifically observed that petitioners did not challenge the legal rule that they now contest here. They *never* argued that they lacked a duty to respond reasonably to Clustka's serious medical need – they assumed they had such a duty. They argued only that the *facts* were insufficient to establish actual knowledge: "The defendants do not argue that, if we find that the officers *were* subjectively aware of Clustka's serious medical need, they nonetheless responded appropriately." Pet. App. 35.

Third, while acknowledging that the "question of causation is closer," the court was "satisfied * * * that the [respondents] presented sufficient evidence of actual and proximate causation to defeat summary judgment and give rise to a jury question whether the officers' omissions caused Clustka's eventual suicide." Pet. App. 35-36. In the court's view, "[a] jury could reasonably find that the defendants' failure to report critical information rendered the subsequent medical evaluations ineffectual." *Id.* at 40. That said, the court also noted that, "[w]hen presented to the jury," petitioners' arguments that their conduct did not cause Clustka's suicide "may well succeed." *Id.* at 39. Again, petitioners do not challenge this holding.

Finally, the court rejected petitioners' argument for qualified immunity: "When a detainee attempts or threatens suicide en route to jail, it is obvious that the transporting officers must report the incident to

those who will next be responsible for her custody and safety. Thus, the constitutional right at issue here has been clearly established." Pet. App. 45.

b. Addressing municipal liability, the court found that respondents presented triable questions of fact here, too. Respondents offered evidence that the City "fail[ed] to train its officers in suicide prevention and the identification of suicide risks" (Pet. App. 47); that this "failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue" (*id.* at 48); and that, had petitioners "been trained in suicide prevention, there is a reasonable probability that they would have responded differently and reported to the jail that Clustka was at risk of suicide, or taken her directly to the hospital" (*ibid.*). The court thus concluded that respondents "presented sufficient evidence to establish a genuine issue of fact with respect to municipal liability for failure to train." *Ibid.*

Likewise, the court determined that a jury could find the City liable due to its failure to adopt a suicide prevention policy. Pet. App. 49-51. The court rejected two other municipal liability theories asserted by respondents. *Id.* at 51-52.

4. The court voted to deny rehearing en banc. Chief Judge Kozinski, joined by six others, dissented. See Pet. App. 3-16.

REASONS FOR DENYING THE PETITION

Further review of this case is not warranted for several reasons. *First*, petitioners have waived the central argument they present here. The individual officers argued below, not (as a matter of *law*) that

they lacked a duty to report assuming they had actual knowledge of an imminent risk of suicidal harm, but only (as a matter of *fact*) that they *lacked actual knowledge*. Perhaps recognizing the factbound nature of the arguments pressed below, petitioners assert for the first time that, even if they *did* have actual knowledge, they lacked a duty to report. That argument, having been waived, provides no basis for granting the petition.

Second, even if the issue had been properly preserved it would not warrant this Court's attention. There should be no dispute that, if an officer has *actual* knowledge of a detainee's risk of suicide, the officer must respond reasonably. A reasonable response includes reporting this information to subsequent custodians. No circuit has held otherwise.

Third, municipal liability turns, in the first instance, on whether a constitutional violation occurred.[1] Where an official has violated an individual's constitutional rights by failing to respond reasonably to a known risk of suicide, inquiry may then turn to whether a municipal policy or failure to train caused the constitutional deprivation. That is what the Ninth Circuit did here. There is no reason to think any other circuit would reach a different conclusion.

---

[1] In addressing municipal liability first, petitioners place the municipal cart before the constitutional horse. This Court has long held that a successful claim for municipal liability is predicated upon an independent, underlying constitutional violation. See *City of Los Angeles* v. *Heller*, 475 U.S. 796, 799 (1986). Accordingly, the analysis must begin with the question whether the individual officers violated Clustka's constitutional rights.

I. PETITIONERS WAIVED THE QUESTIONS PRESENTED.

To begin with, petitioners never argued before the court below that, as a legal matter, they *lacked a duty to report* suicide risks. Instead, they argued only that, as a matter of fact, they lacked subjective knowledge sufficient to *trigger* that duty. Petitioners have therefore waived review of the questions presented in the petition.

A Fourteenth Amendment claim for failure to provide a pre-trial detainee adequate medical treatment turns on the long-established deliberate indifference standard. The Ninth Circuit's application of that standard to the unique facts of this case involved no innovation. On the contrary, the court merely concluded that summary judgment was not appropriate because respondents adduced evidence from which a jury *could* conclude:

(1) that Clustka had a "serious medical need" that, if not treated, "could result in further significant injury" (Pet. App. 27);

(2) that the officers were "deliberately indifferent" to that serious medical need, which requires proof the officers were subjectively aware of the serious risk to Clustka's safety and failed adequately to respond to this risk (*id.* at 30); and

(3) that the officers' deliberate indifference actually and proximately caused Clustka's injury (*id.* at 35-36).

Petitioners do not challenge this framework. Nor do petitioners contest the lower court's decision concern-

ing the first and third elements of the deliberate indifference inquiry.

Rather, petitioners' argument – addressing both individual and municipal liability – turns exclusively on their contention that they were not deliberately indifferent. As the court below explained, "deliberate indifference" has two distinct parts: "that the officers were (a) *subjectively aware* of the serious medical need and (b) failed to adequately respond." Pet. App. 30 (citing *Farmer*, 511 U.S. at 828).

Before the court below, petitioners argued only that Clustka's evidence was insufficient to prove the first prong of the deliberate indifference analysis. They contended respondents could not establish deliberate indifference because, *as a matter of fact*, they lacked subjective awareness of the medical risk Clustka faced. They did *not* argue the second prong – that, as a matter of law, they lacked a duty to "report," "share," or "communicate" information suggesting a serious risk of suicide (assuming they had actual knowledge of that risk). See Appellees' Answering Br. at 30-38. Petitioners' briefing below focused *solely* on the sufficiency of respondents' factual showing. See, *e.g. id.* at 31 ("[Respondents] were required to present sufficient evidence that would allow a trier of fact to conclude the officers knew Clustka was suicidal."); *id.* at 32 ("[Respondents] produced no evidence that either officer actually knew Clustka was at substantial risk of serious harm."); *id.* at 33 ("The facts referenced by [respondents] do not provide evidence of actual knowledge."); *id.* at 35 (Respondents did not "establish[] sufficient evidence to demonstrate a genuine issue of fact regarding either officers' state of mind"); *id.* at 38 ("[Respondents] failed to show there was sufficient

evidence to raise a genuine issue of material fact regarding the officers' knowledge of a substantial risk of serious harm to Clustka.").

That is how the Ninth Circuit saw it, too: "The defendants do not argue that, if we find that the officers *were* subjectively aware of Clustka's serious medical need, they nonetheless responded appropriately." Pet. App. 35 (emphasis in original). Thus, the question presented to the lower court was purely factual – whether respondents offered sufficient evidence for a jury to conclude that the individual petitioners were subjectively aware of Clustka's serious medical need. Petitioners never argued that, if they had such actual knowledge, they were not required to report this information to subsequent custodians.[2]

Perhaps cognizant that such a purely fact-bound question would not warrant this Court's attention, petitioners have now taken an about-face, arguing that, even if they *were* subjectively aware of Clustka's serious medical need, they nonetheless acted reasonably because they had no duty to report the information. See, *e.g.*, Pet. i (presenting question whether "law-enforcement officers [must] diagnose and report detainees' symptoms of suicidal tenden-

---

[2] Presaging the waiver problem, petitioners hint that the dissent from denial of rehearing en banc demonstrates that the legal issues raised for the first time in the petition were, in fact, presented below. Pet. 40. But that is not so. In fact, the petition for rehearing beat precisely the same drum as the merits briefing, arguing exclusively that the officers lacked subjective knowledge of Clustka's medical need. See Pet. for Reh'g En Banc, at 11 ("No reasonable jury could find that the officers were aware of an excessive risk that Clustka would commit suicide by not reporting her intoxicated conduct without having information about her history regarding suicidal threats.").

cies"); *id.* at 3 ("whether law-enforcement officers must diagnose and communicate detainees' symptoms of suicidal tendencies"); *id.* at 16 (whether "the Due Process Clause requires law-enforcement officers to diagnose and report symptoms of mental illness"); *id.* at 29 (whether "failure to diagnose and share medical information could amount to deliberate indifference"). This is precisely the argument the lower court noted was waived below.

The rule on waiver is well-settled: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (internal quotation marks omitted). Such a glaring defect is, of itself, sufficient reason to deny review here.

II. THE INDIVIDUAL LIABILITY HOLDING DOES NOT WARRANT REVIEW.

It is hardly surprising that petitioners waived this argument below. This Court has long held that the state is obligated to provide prisoners necessary care in the face of a serious medical need. *Estelle* v. *Gamble*, 429 U.S. 97, 102-03 (1976). Likewise, the Court has explained that an official who subjectively knows a detainee is at imminent risk of serious harm but does nothing violates the detainee's constitutional rights. *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994).

The Ninth Circuit's ruling merely applied the tried-and-true deliberate indifference standard to the facts of a case where officers both watched the detainee attempt and heard her threaten suicide. The court correctly held that, when a custodial officer has actual knowledge that a detainee is an imminent

suicide risk, the officer has a duty to respond reasonably. Remaining silent and failing to communicate this information to anyone – including subsequent custodial officers – is not a reasonable response. No court of appeals has reached a contrary conclusion.

A. There Is No Circuit Conflict Concerning Individual Liability.

All circuits to consider deliberate indifference in the jail suicide context agree on the controlling standard: If a law-enforcement officer possesses *actual knowledge* that a detainee in his or her custody has recently attempted to commit suicide or expressly threatened to do so, the officer must take reasonable precautions. While, unsurprisingly, courts sometimes find liability and sometimes not, these different outcomes turn on application of this same legal standard to differing factual situations.

1. Petitioners are incorrect to assert that the holdings of two circuits are in conflict on this point with the ruling below. Pet. 30.[3] In *Elliott* v. *Cheshire County*, 940 F.2d 7 (1st Cir. 1991), the First Circuit concluded "there can be no deliberate indifference if the defendants are unaware that the detainee poses a risk of harm to himself." *Id.* at 11. Thus, where "there was no evidence that the corrections personnel had actual notice of [the detainee's] need for protection from himself," no claim could lie. *Ibid.*

---

[3] Each of the decisions purportedly in conflict with the holding below predates this Court's 1994 decision in *Farmer*, which announced the now-prevailing deliberate indifference standard. If the decisions cited by petitioners were in tension with the holding below – and as demonstrated in text, they are not – there would be reason to doubt they survive *Farmer*.

Petitioners concede the facts of *Elliott* "are not identical" to the circumstances here. Pet. 31. There, an eighteen-year-old boy committed suicide after spending some days in detention. The court found the officer who arrested and transported the boy – Trooper Ranhoff – not liable because it was "undisputed that [he] did not know of [the detainee's] previous suicide attempts." *Elliott*, 940 F.2d at 12. Because Ranhoff had no knowledge of any recent suicide attempts or threats, he breached no duty.

The court, however, *reversed* the district court's grant of summary judgment favoring various corrections personnel. Two inmates alleged they heard the boy threaten suicide while in custody and "reported the suicide threat to corrections officers." *Elliott*, 940 F.2d at 11. The court concluded – in accord with the decision below – that, if the corrections officers had actual knowledge of the boy's suicide threat yet failed to respond reasonably, they could be found liable. *Id.* at 11-12.

In *Manarite* v. *City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992), the First Circuit confirmed this view of the proper legal standard, explaining that "when liability for serious harm or death, including suicide, is at issue, a plaintiff must demonstrate 'deliberate indifference' by showing, (1) an unusually serious risk of harm (self-inflicted harm, in a suicide case), (2) defendant's *actual knowledge* of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk" (emphasis added). The Ninth Circuit here applied the same standard.

Nor does the Third Circuit apply a contrary rule. In *Freedman* v. *City of Allentown*, 853 F.2d 1111, 1115 (3d Cir. 1988) – decided over 20 years ago – the

court held that a claim lies "[w]hen facts have been pled which * * * demonstrate that the prison officials *actually knew* of the suicidal tendencies of a particular prisoner, and ignored their responsibility to take reasonable precautions" (emphasis added). There, a young man, Freedman, committed suicide after being detained. *Id.* at 1113. Among the defendants were officer Balliet, who detained Freedman, and probation officer Kroboth, who knew Freedman had previously exhibited suicidal tendencies. *Ibid.*

The court affirmed dismissal of the complaint against Balliet because the plaintiffs did "not allege" he possessed "actual knowledge * * * of Freedman's suicidal tendencies." *Freedman*, 853 F.3d at 1115. At most, plaintiffs' evidence showed "mere negligence * * * in failing to recognize Freedman's suicidal tendencies from the scars that were readily apparent." *Id.* at 1116. The court emphasized that, if Balliet *did* have actual knowledge, he could have been found liable.

The court also affirmed dismissal of the claim against Kroboth. *Freedman*, 853 F.3d at 1117. Kroboth allegedly knew Freedman had attempted suicide in the past. *Ibid.* Kroboth, however, had neither custodial responsibility for Freedman nor knowledge of *recent* suicide attempts or threats suggesting an *imminent* suicide risk.

Williams v. *Borough of West Chester*, 891 F.2d 458 (3d Cir. 1990), decided a year later, is no different. In *Williams*, the court again considered whether custodial officers had actual knowledge of a detainee's recent suicide attempts or threats. In that case, Williams committed suicide while in police custody. Years before his suicide, he had made other suicide attempts and threats. *Id.* at 462-63. Because there

was "no direct evidence" the custodial officers "actually knew" of those prior incidents, the court found the officers could not have been deliberately indifferent. *Id.* at 465. But the court emphasized that, if those officers *did* have actual knowledge, they could have been found liable. *Id.* at 461. The court also dismissed a claim against a police dispatcher, McBride, who knew the detainee had in the past "threatened to jump from a bridge." *Id.* at 463. As a civilian dispatcher, McBride "had no custodial responsibility for prisoners." *Id.* at 462 & 466-67. Moreover, the bridge incident occurred seventeen months earlier, giving no basis to believe Williams was in *imminent* danger. *Id.* at 463. There is simply no basis to conclude that the Third Circuit's decisions in those decades-old, pre-*Farmer* cases conflict with the holding here.

2. A recent decision of the Ninth Circuit – issued after the petition in this case was filed – forecloses any suggestion that the Ninth Circuit applies a legal rule at odds with other courts of appeals.

Simmons v. *Navajo County*, __ F.3d __, 2010 WL 2509181 (9th Cir. June 23, 2010), involved a seventeen-year-old boy who, after one week in custody, told an officer "he had tried to kill himself by cutting his left wrist with a razor." *Id.* at *1. The boy was placed on suicide watch and evaluated frequently throughout the next month. *Id.* at *1-2. Over a month later, the boy committed suicide. *Id.* at *2. The district court granted jail personnel summary judgment, and – relying heavily on its decision in this case – the Ninth Circuit affirmed. *Ibid.*

Writing for a unanimous panel, Judge O'Scannlain found that jail nurse Jones, who treated the boy for his initial suicide attempt, could not be

liable because "over a month had elapsed since his suicide attempt with the razor, during which time [the boy] received counseling, took antidepressants, and by all accounts, was doing better." *Simmons*, 2010 WL 2509181, at *4. No evidence supported the inference that Jones knew the boy "'was at *acute* risk of harm' at the time he killed himself." *Ibid.* (quoting *Conn* v. *City of Reno*, 591 F.3d 1081, 1097 (9th Cir. 2010)). For a similar reason, the court found a second nurse not liable. *Id.* at *6.

The Ninth Circuit also found not liable the officer on duty when the boy committed suicide, noting, "[i]t is uncontested that [the officer] did not know about [the boy's] previous suicide attempt." *Simmons*, 2010 WL 2509181, at *6. That the boy was on Level II suicide watch did not give the officer knowledge of his immediate danger because that designation "is designed for emotionally unstable, rather than imminently suicidal, detainees." *Ibid.* Invoking language from this case, the court explained: "While [the boy's] suicide watch status may have alerted [the officer] to the possibility of suicide, we cannot say that the magnitude of the risk was 'so obvious that [he] *must* have been subjectively aware of it.'" *Id.* at *7 (quoting *Conn*, 591 F.3d at 1097).

Simmons demonstrates the baselessness of petitioners' fanciful warning that the holding below "obligates officers to make nuanced psychiatric diagnoses." Pet. 3. Nothing about the lower court's decision requires a law-enforcement officer to play psychiatrist. Rather, the opinion simply obligates a custodial officer to report obvious suicide attempts and threats to subsequent custodians. That holding is wholly unexceptional.

B. The Ninth Circuit's Decision Concerning Individual Liability Is Correct.

The decision below is not only consistent with those by other courts of appeals, it is also correct. Law-enforcement officers have a duty to report suicide attempts or threats they personally witness and, because this duty is clearly established, there can be no qualified immunity here.

1. Arguing that "law-enforcement officers' mere failure to communicate falls well short of deliberate indifference" (Pet. 33), petitioners rely heavily on *Davidson* v. *Cannon*, 474 U.S. 344 (1986).[4] That reliance is misplaced. Davidson (an inmate) wrote a note relating a threatening comment by a fellow prisoner and, subsequently, the prisoner attacked Davidson. Finding Cannon (a prison official who read the note) not liable for Davidson's injury, this Court focused on whether Cannon had actual knowledge of an *imminent* threat and concluded he did not: "Cannon mistakenly believed that the situation was not particularly serious." *Id.* at 348. Davidson himself "testified that he did not foresee an attack, and that he wrote the note to exonerate himself in the event [the other prisoner] started another fight." *Id.* at 346. Davidson also conceded that Cannon was at most negligent. *Id.* at 347.

Thus, consistent with the decisions described above, *Davidson* stands for the principle that an official's duty turns on whether, as a subjective matter, he or she has actual knowledge of a detainee's serious risk of harm. In *Davidson*, where the official

---

[4] Petitioners never cited *Davidson* below, further demonstrating they have waived this argument.

had no subjective knowledge of that risk, no duty attached. But *Davidson* assuredly does not stand for the very different rule that, if an official has *actual knowledge* a detainee is at imminent risk of harm, the official is free to do nothing.

Any confusion over the correct rule to apply in these deliberate indifference cases was settled eight years later in *Farmer* v. *Brennan*, 511 U.S. 825 (1994). There, the Court explained that, to be held deliberately indifferent, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Actual knowledge may be demonstrated by circumstantial evidence that the risk was obvious:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from the circumstantial evidence, * * * and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id. at 842 (internal quotation marks omitted). Once an official has this requisite awareness, he has a duty to respond reasonably under the circumstances. *Id.* at 837-38, 844-45.

The court below correctly applied this controlling law in deciding respondents presented sufficient evidence to create triable factual questions on deliberate indifference. It evaluated the entire record and concluded that, because the officers witnessed Clustka both attempt and threaten suicide, a reasonable jury could conclude the individual officers had sub-

jective awareness of her serious medical need. Pet. App. 31-35. Pointedly, the officers' after-the-fact admissions present strong additional evidence supporting respondents' claim.

Once an official has subjective knowledge of a serious medical risk, he or she must "respond[] reasonably to the risk." *Farmer*, 511 U.S. at 844. If an official "act[s] reasonably," no liability may lie. *Id.* at 845. As the court below concluded, if the individual officers had subjective knowledge of Clustka's serious medical need, they obviously breached their duty to respond reasonably because they did nothing whatsoever. See Pet. App. 35. It was for good reason that petitioners did not argue below that they "responded adequately to the situation presented." *Ibid.*

Petitioners' argument that "their single instance of not passing along Clustka's threats to prison guards may perhaps have been negligent" but "[fell] far short of deliberate indifference" (Pet. 34-35) is entirely untethered from the well-established deliberate indifference standard. If the officers had *actual knowledge* of Clustka's serious medical need yet failed reasonably to respond, the jury could find them deliberately indifferent.

2. Because these legal standards have been clearly established for decades, petitioners' invocation of qualified immunity is unpersuasive. In fact, numerous decisions have held that officers have a duty to report information relating to suicide attempts or threats. See, *e.g.*, *Cavalieri* v. *Shepard*, 321 F.3d 616, 622 (7th Cir. 2003); *Turney* v. *Waterbury*, 375 F.3d 756, 761 (8th Cir. 2004); *Snow* v. *City of Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005).

III. THE MUNICIPAL LIABILITY HOLDING DOES NOT WARRANT REVIEW.

A. There Is No Conflict Concerning Municipal Liability.

Petitioners get no further with their claim of a conflict in the circuits on the scope of municipal liability. Pet. 17-23. In making this argument, petitioners point to decisions holding only that there can be no municipal liability absent an underlying constitutional violation by individual officers. But those decisions do *not* stand for the much broader proposition that municipalities *never* may be held liable "for failing to train law-enforcement officers" on how to respond to threats of suicide. *Id.* at 18. In fact, petitioners do not identify a single case in which a court held that a jury could *not* find municipal liability for failure to train where the plaintiff was able to establish a constitutional deprivation by municipal officials.[5]

1. In *Burns* v. *City of Galveston*, 905 F.2d 100 (5th Cir. 1990) (cited at Pet. 19, 23), the Fifth Circuit readily acknowledged that "municipal liability *may* be premised on a policy or custom that fairly may be said to have been the cause of or a significant contri-

---

[5] Petitioners' municipal liability argument focuses solely on the Ninth Circuit's holding on the failure-to-train claim. Pet. 17-28. But the court below also held municipal liability could stem from the city's failure to adopt a suicide prevention policy. Pet. App. 49-51. Petitioners entirely ignore this alternative theory of liability. Thus, even if petitioners were correct in their contention that "*Harris* does not open municipalities to liability for failure to train officers to diagnose detainees' suicidal tendencies" (Pet. 24), the "failure to adopt and implement policies" claim would remain on remand. Review is inappropriate on this basis alone.

buting factor to a suicide." *Burns*, 905 F.2d at 103 (emphasis added). According to that court, a municipality *does* have an obligation "to train its police officers to recognize and not ignore obvious medical needs of detainees with known, demonstrable, and serious mental disorders." *Id.* at 104. The court concluded, however, that the defendant municipality could not be held liable in that case, *not* because municipalities may *never* be liable for failure to train officers to recognize signs of imminent suicide, but because there was no underlying constitutional violation that could give rise to municipal liability in the first place. As the court explained, the evidence before it did not establish that particular officials had actual, subjective knowledge of the decedent's suicidal intentions. Although the decedent's cellmate testified that the decedent had threatened to kill himself, the officers did not hear the threat. *Id.* at 101-02. The decedent's mother also gave the officers "no reason to believe [the decedent] had any mental problems or suicidal tendencies." *Id.* at 102.

Subsequent Fifth Circuit law agrees. Sitting en banc, that court held in *Hare* v. *City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996), that municipal liability *could* lie in an inmate suicide case if it were shown that a municipal policy or custom caused an underlying constitutional violation. And quite recently, the Fifth Circuit affirmed that municipalities do indeed have an obligation to train custodial officers to respond to suicide risks of which they have *actual* knowledge:

> In the specific context of prison suicide prevention, municipalities must provide custodial officials with minimal training to detect *obvious* medical needs of detainees with

> *known, demonstrable,* and serious medical disorders, but a failure to train custodial officials in screening procedures to detect *latent* suicidal tendencies does not rise to the level of a constitutional violation.

Whitt v. *Stephens County*, 529 F.3d 278, 284 (5th Cir. 2008) (internal quotation marks omitted). That is precisely the holding here.

2. Similarly, in *Popham* v. *City of Talladega*, 908 F.2d 1561 (11th Cir. 1990) (cited at Pet. 19), the Eleventh Circuit found no underlying constitutional violation to justify potential municipal liability. The court held "the facts in [that] case [did] not rise to a level sufficient to support the constitutional standard of deliberate indifference" by the individual officers. *Id.* at 1564. Specifically, those officers "did not *know* [the decedent had] threatened suicide from his jail cell." *Ibid.* (emphasis added). Only a neighboring inmate had overheard the decedent's suicide threat, and "[h]e made no attempt to notify authorities." *Ibid.*

Thus, consistent with the Fifth Circuit, the Eleventh Circuit in *Popham* rejected the plaintiff's failure-to-train claim, not because such claims are categorically unsustainable – to the contrary, the court recognized that "inadequate police training may provide a basis for section 1983 liability * * * where failure to train amounts to deliberate indifference" (908 F.2d at 1564–65) – but because the officers lacked the crucial "knowledge of a detainee's suicidal tendencies." *Id.* at 1564.

3. The Sixth Circuit's decision in *Barber* v. *City of Salem*, 953 F.2d 232 (6th Cir. 1992) (cited at Pet. 20, 23), is no different. In *Barber*, the court

"adopt[ed] the Eleventh Circuit's holding in *Popham*" and further explained that, under *Popham*, a municipality *may* be held liable for failure to train when "the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference." *Id.* at 239–40. There again, the court rejected municipal liability for purely factual reasons: the decedent's actions in that case "could not be considered abnormal and would not alert the jail authorities to a strong likelihood that [he] would commit suicide." *Id.* at 240. The court correctly noted that, "where no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides." *Ibid.*

More recently, the Sixth Circuit confirmed that municipalities *may* be held liable for detainee suicides where the facts suggest an underlying constitutional violation caused by a municipality's failure to take adequate precautions. In *Cooper ex rel. Estate of Morton* v. *County of Washtenaw*, 222 Fed. App'x 459, 469, 473 (6th Cir. 2007), the court found that an officer's conduct "arguably constitute[d] [a] constitutional violation" because he "was on notice" that a detainee was a suicide risk. The court reversed dismissal favoring the municipality and remanded for a factual determination whether the officer's "deficient behavior can be fairly characterized as a 'city policy.'" *Id.* at 473. The Sixth Circuit is thus firmly in accord with the holding of the court below.

4. The First Circuit follows exactly the same approach. In *Manarite*, 957 F.2d at 959 (cited at Pet. 21, 23), that court held, not that municipalities may

never be held liable for failure to train officers to respond to acute suicide risks, but that there was no evidence the particular officers "ha[d] been willfully blind not to have noticed[] that the decedent posed a strong risk of suicide," as "the decedent exhibited no manifestations of suicidal tendencies." Moreover, entirely unlike the facts here, the municipality in *Manarite* had "implemented guidelines and procedures to prevent persons held in protective custody from inflicting harm on themselves." *Ibid.* On the presumption that municipalities *could* be held liable under appropriate circumstances but that the city *had* appropriately trained its officers, the court saw "no basis here for finding that the decedent's suicide is closely related to the failure of the [city] to train its officers in suicide prevention." *Ibid.* Nothing in *Manarite* is inconsistent with the result in this case.

Citing both *Manarite* and the decision below, a district court in the First Circuit recently denied a municipality's motion to dismiss a detainee suicide claim. *Coscia ex rel. Estate of Coscia* v. *Town of Pembroke*, __ F. Supp. 2d __, 2010 WL 2223685 (June 4, 2010). That court expressly distinguished *Manarite* on the factual basis that there was "no information about what the municipality taught officers regarding potentially suicidal detainees and whether that teaching comported with applicable state laws." *Id.* at *12.

5. So too, the Seventh Circuit's decision in *Boncher ex rel. Boncher* v. *Brown County*, 272 F.3d 484 (7th Cir. 2001) (cited at Pet. 20), has adopted the same approach to municipal liability. Although the detainee in that case had made a generalized suicide threat, he did so in a joking manner and, when questioned about it, expressly denied being a suicide risk.

On those facts, the court concluded there was not "any doubt that the intake officers believed that he was joking * * * and that he was not a serious suicide risk." *Id.* at 487. The court distinguished other Seventh Circuit precedent on that ground, concluding: "The defendants simply were not alerted to the likelihood that Boncher was a genuine suicide risk." *Id.* at 488. In analyzing the facts before it, the court in *Boncher* acknowledged that municipalities that fail to take appropriate "precautions against the possibility of inmate suicide * * * would be guilty of deliberate indifference in the relevant sense" if, for example, officers were confronted with "evidence of profound mental disturbance" and a statement from the decedent that he "was suicidal" and yet did nothing. *Id.* at 486–87.

Subsequent Seventh Circuit authority demonstrates how municipal liability turns on the specific factual circumstances. In *Woodward* v. *Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 927 (7th Cir. 2004), the court affirmed a judgment against a private contractor that provided medical and health services to a prison. Applying the standard municipal-liability framework, the court concluded, based on the evidence before it, that the contractor's "actual policy and practice caused its employees to be deliberately indifferent to [the decedent's] serious" risk of suicidal harm. *Id.* at 928. Given an underlying constitutional violation, the critical question for the court was whether "the violation was a 'highly predictable consequence' of the municipality's failure to act." *Id.* at 929 (quoting *Bd. of County Comm'rs* v. *Brown*, 520 U.S. 397, 409 (1997)).

That is precisely the question the court below posed before finding a triable issue on municipal liability. Pet. App. 47-48. *Woodward* thus demonstrates the principle applied by every circuit: When an individual state official is found to have violated a detainee's constitutional rights by failing to respond to an acute risk of suicidal harm, the municipality *may* be held liable for failure to train.

6. The consistency of the decision below with *Burns*, *Popham*, *Barber*, *Manarite*, and *Boncher* was recently confirmed by the Ninth Circuit's decision in *Simmons*. Relying on the decision below for the governing legal standards, Judge O'Scannlain's decision for the court distinguished the facts in this case from those then before it: In this case "official[s] knew a pretrial detainee was actively suicidal but failed to ensure that precautionary measures were undertaken," but in *Simmons* "the evidence [did not] support[] the inference that Nurse Jones knew [the decedent] 'was at acute risk of harm' at the time he killed himself." 2010 WL 2509181, at *4–*5 (quoting, *Conn*, 591 F.3d at 1097). The court focused on whether the jailors in *Simmons* had subjective knowledge of an acute risk of suicide. Because there was no evidence to establish an "underlying constitutional violation," the plaintiff there "[could] not maintain a claim for municipal liability." *Id.* at *7. The law of the Ninth Circuit is in complete accord with that of all other courts of appeals.[6]

---

[6] Petitioners' reliance for their claim of a conflict (Pet. 22-23) on the Third Circuit's judgment in *Simmons* v. *City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), is inapposite. In that fractured decision, there was a judgment against only the municipality, which the court reviewed under a "highly deferential standard" subject to the municipality's waiver of the "know-

B. The Ninth Circuit's Decision Concerning Municipal Liability Is Correct.

The decision below in this case is a straightforward and correct application of settled law to unique facts. In *City of Canton* v. *Harris*, 489 U.S. 378, 390 (1989), this Court held municipal liability appropriate when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

Here, the court below properly applied this standard in holding that unresolved factual questions exist that will determine whether municipal liability is appropriate. In addition to the sharply disputed factual question whether the individual petitioners committed a constitutional violation in the first place, the court found that municipal liability under a failure-to-train theory also turns on several additional questions of fact: (1) whether "the City did, in fact, fail to train its officers in suicide prevention and the identification of suicide risks" (Pet. App. 47); (2) whether "[t]he failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue" (*id.* at 48); and (3) whether, "had the City trained its officers, the violations of Clustka's constitutional rights could have been avoided" (*ibid.*). In addressing these ques-

---

ledge" requirement. *Id.* at 1072 n.30. Writing for himself, Judge Becker appeared to suggest that a municipality could be liable even absent a constitutional violation by an individual officer. *Id.* at 1049-50. But that was not the holding of the court in this case.

tions, the court properly concluded that respondents "presented sufficient evidence to establish a genuine issue of fact" and that "a reasonable jury *could* find" the City liable. *Ibid.* (emphasis added).

Petitioners nevertheless assert that taking action in response to a "detainees' suicidal tendencies" is not "within the scope of police officers' duties." Pet. 24. But that blunderbuss contention misstates well-established law. This Court has long held that "deliberate indifference to serious medical needs of prisoners" is a constitutional violation. *Estelle*, 429 U.S. at 104. There is no doubt that an imminent risk a prisoner will commit suicide constitutes such a "serious medical need." Thus, if an official has actual knowledge that a detainee is at imminent risk of suicide, the official must respond reasonably. As the courts of appeals have uniformly held, this is one of the "tasks * * * officers must perform." See *Harris*, 489 U.S. at 390.

On this point, it bears emphasis that petitioners, their *amicus*, and Chief Judge Kozinski in his dissent from denial of rehearing all vastly overstate the scope and practical implications of the holding below. It is plain on the face of the Ninth Circuit's decision that it does *not* impose "costly psychiatric-training duties" on municipalities, "obligate[] officers to make nuanced psychiatric diagnoses," (Pet. 3, 37-39), or "transform * * * police officers into suicide prevention experts." Pet. App. 5. And it certainly does not direct judges to "micromanage the police" or oblige municipalities "to run [their] suicide prevention program[s] in whatever manner unelected federal judges think best" (*id.* at 8) – much less "create[] novel duties to train and report information that

bear no relationship to the fact of incarceration." *Id.* at 4.

Instead, so far as municipal liability is concerned, *all* the court below held is that a jury might find deliberate indifference when a municipality did *nothing* to train officers or adopt suicide prevention policies, in circumstances where the local jail had been the scene of repeated recent suicides. Pet. App. 47-48, 50. There is no hint in the court's holding of any requirement that municipalities train police officers in psychiatry or to be suicide prevention "experts." The only question in this case, after all, is whether officers should be educated to report to subsequent custodians when they see a person in their custody threaten, and actually attempt, suicide. The Ninth Circuit said nothing about what such training or policies might encompass. And the court of appeals' answer to the question here is unexceptional: Reporting known facts indicating serious, imminent risk to persons in custody has long been among the *most basic* of police duties. Given the pre-trial posture of this case and the incomplete record, nothing here warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES*
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

* *Admitted in New York only; admission to the District of Columbia pending.*

Counsel for Respondents

AUGUST 2010

Blank Page