No. 11-742

In The Supreme Court of the United States

RICHARD W. TROYANOS, JR.,
as personal representative of the estate of
RICHARD J. TROYANOS,

Petitioner,

vs.

JIM COATS, in his official capacity as Sheriff of the Pinellas County Sheriff's Office, RICHARD F. MILLER, D.O. and RAPHAELITA E. SIMON-ROBINSON, R.N., individually and in their official capacities as a doctor and nurse employed by the Pinellas County Sheriff's Office,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

Introduction

Despite Respondents' arguments raised in their Brief in Opposition, this case is an appropriate vehicle to decide the questions presented for three reasons:

First, the record before this Court is succinct. The Estate of Troyanos filed a complaint pursuant to section 1983 alleging that Sheriff Coats, Nurse Simon-Robinson and Dr. Miller, violated Troyanos' rights under the Fourteenth Amendment. That complaint was dismissed with prejudice. On appeal, the Eleventh Circuit issued a written opinion which conflicts with opinions of other circuits and of this Court.

Second, this Court has never considered a "suicide" case brought pursuant to section 1983. In *Estelle v. Gamble*,[1] this Court applied section 1983 in the context of deprivation of medical care. Almost twenty years later, this Court decided *Farmer v. Brennan*,[2] a prison assault case. Here, this Court is presented with a case alleging a deprivation of mental health care, which led to suicide. The number of reported "suicide" cases among the various circuits is sufficient

[1] 429 U.S. 97 (1976).

[2] 511 U.S. 825 (1994).

to reveal that suicide in detention is an issue of national importance.[3]

Third, this case provides the Court with the opportunity to decide whether the same standard for deliberate indifference applies to detainee claims under the Fourteenth Amendment as to prisoner claims under the Eighth Amendment.

I. RESPONDENTS' BRIEF IN OPPOSITION ILLUSTRATES HOW THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *FARMER V. BRENNAN*.

The fundamental question at issue is whether an inmate may properly maintain a 42 U.S.C. §1983 claim by alleging that an official had knowledge of a substantial risk of serious harm without alleging that the official had knowledge of the specific harm suffered.

Respondents' Brief in Opposition ignores this question and instead attempts to shift this Court's focus to the merits of the underlying case. It is undisputed that the Eleventh Circuit's Opinion held that Respondents Simon-Robinson and Miller are not liable under section 1983 because they "fail[ed] to foresee that Troyanos would commit suicide using the elastic in his pants." *See Appendix to the Petition for*

[3] Westlaw query January 26, 2012, " 'deliberate indifference'/10 suicide" reveals 485 reported cases.

Writ of Certiorari ("Pet. App.") at 7. This is the incorrect standard under *Farmer* and conflicts with other Circuits' application of *Farmer*.

As argued more fully in the Petition, suicide is merely the ultimate harm suffered; the mental illness gave rise to the substantial risk of harm. It is undisputed that Simon-Robinson and Miller had actual knowledge of Troyanos' mental illness and his self-injurious violent behavior while in custody. *See Pet. App.* at 3-4. The only dispute is a legal dispute concerning whether this Court's *Farmer* standard is to be applied to facts giving rise to the substantial risk of harm (i.e., mental illness and pattern of self-injury) or whether the standard is to be applied to the ultimate harm suffered (i.e., death from suicide). If the deliberate indifference standard is applied to the mental illness (and the manifested self-injurious behavior), then failing to perform a suicide risk assessment and otherwise take steps to abate the risks associated with mental illness (and self-injurious behavior) would give rise to liability under section 1983. On the other hand, if the deliberate indifference standard is applied to the specific risk of suicide, then it would place an onerous burden upon the plaintiff to prove that the officials had actual knowledge that the detainee was likely to commit suicide, notwithstanding that the officials had knowledge of a substantial risk of serious self-harm.

Respondents do not explain how the Eleventh Circuit's Opinion (holding that Simon-Robinson and Miller cannot be faulted for failing to foresee that

Troyanos would commit suicide by using the elastic in his pants) comports with this Court's Opinion in *Farmer* (holding that an official can be held liable if an official has actual knowledge that an inmate faces a substantial risk of serious harm). *Farmer* does not require that the official have knowledge of the specific harm suffered; rather, the *Farmer* standard merely requires that the official have knowledge of a substantial risk of serious harm. *Farmer*, 511 U.S. at 828. To be sure, in adopting the subjective recklessness standard, the *Farmer* court stated:

> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Id. at 842.

Respondents argue that Simon-Robinson and Miller did not have knowledge of Troyanos' suicidal tendencies because they never conducted a suicide risk-assessment. *Respondent's Brief in Opposition ("BIO")* at 1-2, 7-8, 12. This argument *illustrates* the conflict. Respondents (and the Eleventh Circuit) focus on the suicide as the risk of serious harm and then work backward to determine if the officials had knowledge of the suicidal tendencies. *Farmer* looks at whether the officials had knowledge of a substantial risk of serious harm and then proceeds forward to determine what actions the officials took to abate

that risk of harm. *Farmer* at 844 ("prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.") Indeed, *Farmer* made clear that a prisoner need not wait until he is actually harmed to seek relief but could seek prospective relief in the form of an injunction. *Id.* at 845. In addition, *Farmer* explained that the focus is on the risk of harm, not the specific harm, as it does not matter that the prison officials could not foresee who would attack whom or how. *See id.* at 843-44.

Here, the risk of harm faced by Troyanos emanated from his mental illness. Simon-Robinson and Miller had knowledge of the risk of serious injury that Troyanos faced because they had knowledge that Troyanos violently bashed his skull against the wall of his cell and was experiencing an altered mental state and psychosis. The suicide was the ultimate harm that Troyanos suffered as a result of his mental illness and self-injurious behavior (of which the officials had knowledge). Applying the deliberate indifference standard to the suicide (as opposed to the mental illness) leads to absurd results. For example, if Troyanos did not intentionally commit suicide but instead died as a result of a brain hemorrhage caused by violently bashing his skull against the wall, Respondents' theory would find no liability if Simon-Robinson and Miller did not know that Troyanos would likely die from his self-injurious behavior. This is not and cannot be the proper standard. Under a

proper application of *Farmer*, Simon-Robinson and Miller need not have acted or failed to act believing that the specific harm suffered would actually befall Troyanos; it is enough that they had knowledge that Troyanos faced a substantial risk of serious harm.

The *Farmer* standard makes clear that officials cannot just let nature take its course.[4] When an official recognizes a risk of serious harm, that official is duty-bound to take reasonable steps to abate the harm. *Id*. at 844-45. Here, Simon-Robinson and Miller recognized that Troyanos was in an altered mental state, suffered from a psychotic disorder, and was a danger to himself. *Pet*. *App*. at 3-4. At that point, it was incumbent upon Simon-Robinson and Miller to take reasonable steps to abate the harm.

Farmer does not specifically set forth what "standard of care" is owed to a prisoner once it is shown that the official had knowledge of a substantial risk of serious harm. *Farmer* merely points out that if the official took "reasonable" steps to abate the harm, there can be no liability. *Farmer*, 511 U.S. at 844-45. The Model Penal Code, from which the *Farmer* Court quoted in adopting the subjective reckless standard, indicates:

> The risk must be of such a nature and degree that, considering the nature and purpose of

[4] *Id.* at 833 ("[O]fficials are not free to let the state of nature take its course.").

> the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

American Law Institute, Model Penal Code §2.02(c).

Based on this, it is apparent that the "standard of care" is an objective standard and the fact-finder can determine whether the official acted reasonably or grossly fell below the standard of care based on an objectively set standard. The facts as alleged in the complaint (and taken in the light most favorable to Troyanos) illustrate that Simon-Robinson and Miller grossly deviated from the standard of reasonable care and had actual knowledge that Troyanos posed a substantial risk of danger to himself. *Pet. App.* at 34-43, 58, 63.

According to Respondents' argument (and the Eleventh Circuit), the only way liability would attach in a suicide case, is if the medical professional *ignored* a strong likelihood that the inmate *would commit suicide*.[5] Obviously, *Farmer* does not predicate liability upon an official completely ignoring a known risk. An official has a duty, under *Farmer*, to abate known risks. If the official merely takes the easiest and least efficacious route, the official may still be found liable under the *Farmer* standard. *See Estelle*, 429 U.S. at 97 (finding that deliberate indifference

[5] *Pet. App.* at 7.

can be manifested by prison doctors in their response to the prisoners' needs).

II. CONTRARY TO THE RESPONDENTS' CONTENTION, THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH THE NINTH CIRCUIT'S OPINION IN *GIBSON V. COUNTY OF WASHOE*.

As argued more fully in the Petition, the Eleventh Circuit's opinion conflicts with the Ninth Circuit's Opinion in *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002). Respondents argue that Simon-Robinson and Miller did not know that Troyanos would commit suicide because they failed to perform a suicide risk assessment. *BIO* at 1-2, 7-8, 12. This argument misses the point. Under *Farmer*, Simon-Robinson and Miller merely had to know that Troyanos posed a substantial risk of harm to himself; they did not have to know or foresee the specific harm that he would ultimately inflict on himself. The Complaint alleges that Troyanos "had a right to receive medical treatment for illness and injuries, which encompasses a right to psychiatric and mental health care, and a right to be protected from self-inflicted injuries including suicide." *Pet. App.* at 58, 63. The Complaint also alleges that Simon-Robinson and Miller breached the duty of care owed to Troyanos and were deliberately indifferent to Troyanos' constitutional rights by failing to perform an adequate and appropriate suicide screening and suicide risk assessment.

Clearly, if the focus of the "deliberate indifference" standard is on Troyanos' mental illness as indicated by his pattern of self-injury (as alleged in the Complaint) and the breach of the standard of care is based on (among other things) the failure to perform a suicide risk assessment, then Troyanos sets forth a claim under section 1983. Respondents argue that the focus of the deliberate indifference standard should be on the suicide (rather than the mental illness). *BIO* at 10-11. Respondents then argue that by failing to perform a suicide risk assessment, there can be no liability because the officials had no knowledge of Troyanos' suicidal tendencies. *Id.* at 10-12. This application of the deliberate indifference standard is contrary to, and in conflict with, both *Farmer* and *Gibson*.

The "eggshell skull" doctrine best illustrates the conflict. This doctrine holds actors liable for harm that is foreseeably attributed to their conduct as well as for unforeseen harm that is attributable to their conduct. W. Page Keeton et al., *Prosser and Keaton on The Law of Torts* §43 at 291 (5th ed. 1984). Even if it is assumed that Troyanos' suicide was an unforeseen consequence of Simon-Robinson and Miller's deliberate indifference toward Troyanos' mental health condition, liability should still be imposed so long as serious self-harm was foreseen. In the Ninth Circuit, an "eggshell skull" analysis is available as shown by the *Gibson* decision. In the Eleventh Circuit, a plaintiff is prevented from arguing "eggshell skull" because if the defendant did not foresee the specific harm that

ultimately befell the detainee (the very definition of "eggshell skull"), the Plaintiff loses.

Respondents argue at great length that the "eggshell skull" doctrine is not applicable in this case because the Complaint alleged that Simon-Robinson and Miller did not perform a suicide risk assessment. *BIO* at 18-20. Once again, Respondents' argument misses the point. Troyanos' known mental health condition and violent acts of self-injury render Simon-Robinson and Miller liable for even unforeseen consequences of their deliberate indifference.

III. RESPONDENTS' ATTEMPT AT DISTINGUISHING THE CASES SHOWING CONFLICT SOLELY ON THE FACTS FAILS.

In their Brief in Opposition, Respondents attempt to "easily distinguish" the First Circuit's *Figueroa-Torres* case, the D.C. Circuit's *Smith* case, and the Tenth Circuit's *Martinez* decision based solely on the facts of those cases.[6] *BIO* at 2, 19. These cases were cited in the Petition for Writ of Certiorari for their analysis and application of the *Farmer* standard, and cannot be dismissed merely because their facts – a lacerated spleen, a shooting of a youth, and a heart attack – differ from Troyanos' suicide.

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[6] *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270 (1st Cir. 2000); *Smith v. District of Columbia*, 413 F.3d 86 (D.C. Cir. 2005); *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009).

Petitioner relies on *Figueroa-Torres* to further show that an application of the "eggshell skull" doctrine can be appropriate to find liability on the part of prison officials under the *Farmer* standard, where officers' conduct during an arrest contributed to the risk of harm facing the arrestee. Although the arresting officers obviously did not have actual knowledge of the decedent's preexisting medical condition (enlarged and diseased spleen), that lack of knowledge did not insulate them from liability for his death. *Figueroa-Torres*, 232 F.3d at 275-76.

Similarly, Petitioner relies on the *Smith* case from the D.C. Circuit, to again show that a lack of knowledge of the ultimate harm suffered by a detainee is not enough to absolve officials of liability for the harm. As stated in *Smith*, it is enough to show that the officials had knowledge of a substantial *risk* of serious harm. If the official is deliberately indifferent to the substantial risk of serious harm, then the official is liable for both the foreseeable *and* unforeseeable harm that ensues, unless such unforeseeable harm is "highly extraordinary." *Smith*, 413 F.3d at 103.

Finally, Petitioner points to the *Martinez v. Beggs* decision of the Tenth Circuit to illustrate the conflict in analysis and application of *Farmer*. *Martinez* held that the section 1983 claim was not cognizable because "the defendants must subjectively disregard the risk of the claimed harm-death, and heart attack, and not merely the risks of intoxication." *Martinez*, 563 F.3d at 1089-90. This holding permits an official to

escape liability by simply alleging that the official did not foresee the specific type of harm ultimately suffered by the inmate. While the Eleventh Circuit's opinion is consistent with *Martinez*, the First, Ninth and D.C. Circuits, allow for liability where an official was deliberately indifferent to a substantial risk of serious harm, even if the ultimate harm suffered was different or greater than the harm foreseen. Respondents wholly fail to address these points and do not offer any case law that would seemingly harmonize these cases. Instead, Respondents rely solely on their arguments that the facts of these cases are "easily distinguishable" and that this Court has already denied certiorari in *Martinez*, a fact which is irrelevant given that the *Martinez* Petition for Writ of Certiorari was limited to the municipal liability issue.

IV. THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH OTHER CIRCUITS ON THE ISSUE OF MUNICIPALITY LIABILITY.

The Eleventh Circuit held that:

> Troyanos's complaint also fails to allege that Coats was deliberately indifferent because he did not properly train, supervise, or discipline his staff. We are not required to inquire about Coats's customs or policies for treating mentally ill inmates because the complaint failed to state a claim that jail officials violated Troyanos's constitutional rights.

Pet. App. at 8.

Gibson held:

> [A] municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity, a constitutional violation might still have occurred. . . . Or, a municipality may be liable even if liability cannot be ascribed to a single officer.

Gibson, 290 F.3d 1175, 1186, fn7 (internal citation omitted).

Clearly, there is a conflict.

Admittedly, this Court declined to review the Tenth Circuit's opinion in *Martinez* on this issue. As Respondents concede the only issue raised in the Petition for Writ of Certiorari in *Martinez* was this single issue. *BIO* at 22. Importantly, the Petition in *Martinez* did not raise the issue of whether the deliberate indifference standard is met even if the official does not foresee the exact form of harm that ultimately befell a detainee.

V. CERTIORARI SHOULD BE GRANTED ON THE ISSUE OF WHETHER THE SAME "DELIBERATE INDIFFERENCE" STANDARD APPLIES TO CLAIMS BROUGHT BY PRETRIAL DETAINEES UNDER THE FOURTEENTH AMENDMENT AS TO CLAIMS BROUGHT BY PRISONERS UNDER THE EIGHTH AMENDMENT.

Although there is admittedly a lack of direct conflict on the issue, it is imperative that this Court answer this question in order to analyze the remaining issues. For this reason, the issue was raised as a question presented so that it could be squarely before the Court and fully briefed by the parties. Lastly, the issue was not waived because it was passed upon by the Eleventh Circuit.[7]

[7] *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (holding Supreme Court may consider argument not pressed below so long as it has been passed upon).

CONCLUSION

For the reasons stated above and in Petitioner's Writ of Certiorari, Petitioner respectfully requests that the Petition be GRANTED.

Respectfully submitted,

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