No. 11-613

IN THE

Supreme Court of the United States

COUNTY OF ERIE,

Petitioner,

v.

VIKKI CASH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JOHN G. SCHMIDT JR.
Counsel of Record
TIMOTHY W. HOOVER
PHILLIPS LYTLE LLP
3400 HSBC Center
Buffalo, New York 14203
(716) 847-8400
jschmidt@phillipslytle.com

MICHAEL A. SIRAGUSA,
COUNTY ATTORNEY
ERIE COUNTY
DEPARTMENT OF LAW
95 Franklin Street
Buffalo, New York 14202
(716) 858-2200

Counsel for Petitioner

240715

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Recognizing that single-incident liability is barred by this Court's precedents, Respondent Vikki Cash argues at length that the Second Circuit's decision is a "factbound" one (Opp. 1) that did not impose single-incident liability. Respondent's efforts to create factual disputes or a basis for liability—patterned on the unsuccessful opposition to certiorari by the respondent in *Connick v. Thompson*, 131 S. Ct. 1350 (2011)—fail. There are no disputed facts. And because no prior sexual assault, or pattern of prior similar incidents, had occurred, there are no legally relevant facts to meet the stringent deliberate indifference standard of fault required to impose municipal liability, leaving the Second Circuit's decision as nothing more than the imposition of strict, vicarious, single-incident municipal liability.

The only pertinent facts are undisputed: Respondent was injured by a single incident of sexual assault; that incident was contrary to the policy and training of the County of Erie and its Sheriff; and there were no prior such incidents, let alone a pattern, to put the County on notice or establish a pattern of violations to prove deliberate indifference by a municipal policymaker to support municipal liability. The Second Circuit's decision to look to other facts that did not involve prior similar incidents is directly contrary to this Court's precedents, including *Connick*, which require a pattern of prior similar violations, known to and disregarded by the municipal decisionmaker and constituting the moving force behind plaintiff's injury, to impose failure-to-train municipal liability.

In fact, the incident that Respondent relies on so heavily—a single 1999 incident involving alleged sexual *contact*, not assault—is not a prior similar incident and did not establish a pattern, just as multiple prior unrelated *Brady* violations did not constitute a pattern in *Connick*. Still, the prior contact was fully investigated, resulted in discipline, and resulted in the Sheriff making clear to all personnel that sexual contact of any kind was strictly prohibited. Not only was there no pattern of similar unconstitutional events, there was no prior similar incident at all. Respondent's efforts to paint the question as one of disputed facts are precisely what this Court rejected in *Connick*, by both granting certiorari, and rejecting a single-incident theory. Respondent's opposition is simply a preview of her merits argument, without providing any reason to deny certiorari.

Tellingly, Respondent cites no case where liability was *ever* upheld in these circumstances. In fact, the federal courts have regularly rejected such liability and a circuit split exists, despite Respondent's attempts to distinguish the decisions of other circuits.

Finally, Respondent's efforts to cite unadopted future regulations—none of which bar opposite-sex supervision—actually confirm the national importance of the issue and the need for the Court to review the Second Circuit's decision.

The Court should grant review to consider the Second Circuit's dramatic expansion of municipal liability, made in conflict with this Court's precedent and the decisions of the other circuits, and because the Second Circuit's new rule will interfere with the effective administration and management of innumerable government facilities.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND EXPANDS AND IMPOSES SINGLE-INCIDENT MUNICIPAL LIABILITY, AS NONE OF THE FACTS RESPONDENT CITES ARE LEGALLY RELEVANT OR ESTABLISH, AS A MATTER OF LAW, A PATTERN SUFFICIENT TO IMPOSE MUNICIPAL LIABILITY

The only dispute here is over the legal principle upon which the District Court ruled as a matter of law. Respondent argues that certiorari should be denied because it would entail a review of a factbound application of the Court's precedent. Neither the petition nor the merits turns on disputed facts. Rather, the question is whether any of the other factors—none of which were prior incidents of sexual assault—have any legal relevance. They do not meet the stringent standard of fault required to establish deliberate indifference based on a municipal policy or a failure to train. The Second Circuit's decision imposed single-incident liability, plain and simple.

The Court's decision in *Connick v. Thompson*—on review after a jury verdict in favor of the plaintiff—reinforced the requirement that a pattern of similar constitutional violations is required to establish deliberate indifference. Therein, the Court refused to expand the single-incident theory of liability beyond a "narrow range of circumstances," such as the use of deadly force by a police officer hypothetical referenced in *City of Canton v. Harris*, 489 U.S. 378 (1991). The Second Circuit decision

attempts to sidestep *Connick* and to permit single-incident liability, while disclaiming that it is doing so.

Using prior unrelated incidents or legally irrelevant facts to establish a pattern—as the Second Circuit did and as Respondent reargues herein (Opp. 6-12, 21-22, 29-32)—was rejected in *Connick*. There, the district attorney's *four* prior failures to disclose exculpatory evidence were too dissimilar to the failure to disclose scientific evidence to find a prior similar pattern of conduct to support municipal liability. Even though the prior incidents were *Brady* violations, they were "not similar to the violation at issue here, [so] they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation." *Connick*, 131 S. Ct. at 1360.

That conclusion renders legally irrelevant what Respondent calls "the most critical facts" (Opp. 21) that she alleges somehow support liability—a prior, unfounded allegation involving one inmate relating to prior sexual contact. This factor is far more dissimilar to sexual assault than the repeated prior *Brady* violations were to the *Brady* violation involved in *Connick*. This single prior contact is also insufficient to constitute a pattern of unconstitutional misconduct, or notice that a policy was ineffective. The Allen complaint (Opp. 21) involved a single unsubstantiated allegation of illicit sexual contact, not assault, made by an inmate who, it is undisputed, repeatedly lied in statements to investigators, engaged in exhibitionist behavior, and seduced the guard involved. (App. 43a-44a (Jacobs, C.J., dissenting); JA 126-127, 130, 141.) Apart from being unfounded, it did not involve rape by a guard. (JA 121.) The federal courts consistently reject a pattern finding *even when* there were prior claims of

the exact same nature—let alone where there is only *one* prior incident of a different kind, as here. *See, e.g.*, *Pauls v. Green*, — F.Supp.2d —, 2011 WL 3962259, at *7, *8 (D. Idaho Sep. 7, 2011) (finding that two alleged prior instances of sexual assault were not a pattern of prior similar abuses "that would provide actual or constructive notice of the need to implement different training or supervisory practices to prevent officers from sexually assaulting inmates").

The claim that the response to the Allen complaint was somehow inadequate, in a way that has any relevance to the present matter, is inaccurate: the deputy who dealt with Allen was disciplined and suspended and the Sheriff re-affirmed that sexual contact between an inmate and deputy was barred. (JA 148.) This action by the Sheriff occurred *after* the Allen claim, and before the rape of Respondent. This forecloses any claim that there was an inadequate response to the inapposite allegation of sexual contact, or that there was any proof that a policy had proven ineffective.

This also highlights a bizarre aspect of Respondent's theory and the Second Circuit's decision that this Court should review. New York bars sexual contact between jail staff and inmates; an employee who previously was alleged to have sexual contact was disciplined; and the Sheriff thereafter emphasized and re-emphasized to all employees that any sexual contact was prohibited, consistent with New York law. Yet somehow, the Sheriff's appropriate and thorough response (App. 42a) to an unrelated incident, and in complete accord with state law, provides an unexplained basis for liability for an assault. Respondent so argues to try to prop up her core theory

which—as made clear at Opp. 8—requires that opposite-sex supervision now be deemed unconstitutional, or at least creates unfettered municipal liability. In the end, there were no ineffective policies, untrained employees, or similar prior violations, let alone a pattern of similar constitutional violations.

Second, Respondent's ex post criticism of Sheriff Gallivan (Opp. 10-11, 31-32) and argument that he engaged in an incomplete investigation of the Allen incident, or that he had an awareness of unspecified sexual assaults in other New York correctional facilities, adds nothing to nothing, given that the jury below found that the Sheriff was not negligent. (App. 13a.) As noted (Pet. 19), the pattern of conduct necessary to support municipal liability must be the direct result of the policy complained of, *not* the unsubstantiated conduct of a different organization. Respondent's reliance on other unspecified incidents at other facilities is an implicit concession that the Allen incident was not sufficient to put the County on notice that Respondent might be raped. (App. 44a. (Jacobs, C.J., dissenting).)

Third, and for the same reason, Respondent's reliance on the "[u]nrebutted [e]xpert [t]estimony" is also legally irrelevant, as it came from a retired "Pennsylvania prison warden" (Opp. 11) and was unconnected to any actual prior sexual assaults or showing that any policy was ineffective or constitutionally deficient. The Pennsylvania warden's hypothetical opinion that opposite-sex supervision is not preferable was without factual, legal or constitutional significance in the absence of a pattern of prior unconstitutional acts and given the County's prior diligence regarding the one prior unrelated allegation.

Respondent's true criticism of the County (Opp. 8), following the Second Circuit, is that opposite-sex supervision is unconstitutional, despite her denials to the contrary. But liability on that basis is foreclosed, given the lack of a pattern, by *Connick*. The Second Circuit's decision improperly eliminates the need for the municipal policy to be the moving force behind the injury, and overwrites the rigorous standards of culpability and causation that this Court's precedents require. This is remarkably troublesome as the failure-to-train theory "is particularly tenuous because so many courts have held that no training is required to teach employees not to commit sexual assaults." *Pauls v. Green*, — F. Supp.2d —, 2011 WL 3962259, at *7, *8 (D. Idaho Sep. 7, 2011) (citing *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir.1998); *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir.1996); *Campbell v. Anderson County*, 695 F. Supp. 2d 764, 774 (E.D. Tenn. 2010); *Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1009 (D. Ariz. 2009)).

In the end, the Second Circuit disregarded *Connick* and this Court's municipal liability jurisprudence in favor of strict, vicarious liability premised solely on opposite-sex supervision. That decision calls for review by this Court, because the Second Circuit's decision "is unbounded: It combines an ever-present risk with an inferred 'proactive responsibility,' in a way that constitutes strict (and vicarious liability). And nothing limits the opinion to conduct by guards, or to sexual conduct." (App. 44a-45a (Jacobs, C.J., dissenting).)[1] Respondent's opposition to

1. Contrary to Respondent's implication, that there was a jury verdict in the District Court presents no basis to decline review and does not make the matter "factbound." First, the Court regularly accepts municipal liability cases for review even

certiorari is simply a preview of her response on the merits, and provides no basis to deny review.

II. THE SECOND CIRCUIT'S ALLOWANCE OF SINGLE-INCIDENT LIABILITY FOR A ONE-TIME SEXUAL ASSAULT CREATES A CIRCUIT SPLIT

Respondent fails to cite a single instance where liability against a municipality has been upheld in these circumstances, because there are none. Her attempts to deny the existence of a circuit split fail as well, for the other circuits have rejected liability in similar circumstances.

In *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993), while the appeal was by the sheriff from a denial of qualified immunity, the board of county commissioners was a defendant, plaintiff's claim included a due process claim,[2] and the only potential basis for liability was whether "a

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where there was a district court verdict for plaintiff. *See e.g.*, *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (jury verdict for plaintiff); *City of Canton v. Harris*, 489 U.S. 378 (1989) (jury verdict for plaintiff). Second, the District Court granted judgment as a matter of law in favor of the County. (App. 59a.) Third, review of that decision is *de novo*. (App. 14a.) Finally, the legally erroneous jury verdict was also a product of the District Court's erroneous jury instruction, and the District Court would have granted a new trial, as "the jury instruction . . . allowed the jury to find liability merely by finding that defendant's policy was a proximate cause of the violation of plaintiff's constitutional rights." (App. 55a.; *contra* App. 32a n.8 (Second Circuit's footnote rejecting such finding).)

2. The federal courts "have often applied the Eighth Amendment deliberate indifference test to pre-trial detainees bringing actions under the Due Process Clause of the Fourteenth Amendment." *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000).

male guard having sole custody of a female inmate creates such a risk to her safety that it constitutes a violation of the Eighth Amendment's cruel and unusual punishment clause." *Id.* at 1066. The Tenth Circuit's holding that there could be no such liability based upon the mere existence of a policy allowing opposite-sex supervision is of no less significance because of the procedural posture therein. It is also in direct contradiction to the Second Circuit majority's decision here, which predicated liability based upon the Sheriff's policy of allowing unmonitored opposite-sex supervision. (App. 29a.). In fact, Chief Judge Jacobs recognized in his dissent that the majority was unable to reconcile its decision with its otherwise favorable citation of *Hovater*. (App. 42a n.1 (referencing App. 21a).)

Respondent's efforts to distinguish *Lewis v. Pugh*, 289 Fed. Appx. 767 (5th Cir. 2008) and *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996) are simply an outgrowth of Respondent's flawed argument that there was evidence of a pattern of unconstitutional prior acts here. To the contrary, and just as in *Andrews* and *Fowler*, there were no prior acts of sexual assault, or any legally relevant prior act, to establish deliberate indifference here.

III. THE PROPOSED, UNENACTED REGULATIONS UNDER THE PRISON RAPE ELIMINATION ACT PROVIDE NO REASON TO DENY REVIEW, AND ACTUALLY CONFIRM THE NATIONAL IMPACT OF THE SECOND CIRCUIT'S DECISION ON STATE AND LOCAL GOVERNMENTS AND THE NEED FOR REVIEW

Respondent does not directly deny that the Second Circuit's decision will have a devastating financial impact on states and municipalities as they adjust their

protocols to bar opposite-sex supervision. Rather, in implicitly recognizing that the petition is worthy of this Court's review, she argues that the potential adoption of regulations (76 Fed. Reg. 6248-01) under the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609, may, at some unknown point in the future, blunt or eliminate the impact of the Second Circuit's decision. But the non-binding, not-yet-adopted regulations will not displace this Court's 42 U.S.C. § 1983 jurisprudence and do not provide a basis to decline review. In fact, they affirm the national scope and cost impact of the Second Circuit's expansion of municipal liability.

First, the regulations have not been adopted, despite having been published for almost 13 months, and may never be adopted, given that PREA was passed in 2003. Indeed, the time by which the Department of Justice indicated it would adopt a final rule (the end of 2011) has already passed (Opp. 5).

Second, and more fundamentally, the "national standards" are far from that; rather, they represent an effort to induce voluntary adoption through a future small reduction of federal assistance to states that do not voluntarily comply. 42 U.S.C. § 15607(c)(2). Apart from not applying to facilities that do not adopt them, the proposed regulations would not apply to the many prisons and jails which hold 500 or fewer inmates.

Third, Respondent cites to nothing in the proposed regulations to establish her overconfident and unwarranted belief that, if adopted, the regulations will automatically establish the standard for whether municipal liability exists under Section 1983. (Opp. 24.) Instead, for

those institutions that voluntarily choose to adopt the regulations, it will be the courts' duty to interpret the regulations, and determine what effect, if any, the regulations will have on determining municipal liability that stems from purported constitutional violations. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution in a case or controversy remains in the Judiciary").

Finally, it is doubtful that the not-yet-adopted prison regulations would have any impact in a case where municipal liability is not grounded in a pattern of prior violations, but instead relies on a policy that does not bar opposite-sex supervision. That is because the proposed regulations do not bar opposite-sex supervision (Opp. 25 n.9). Indeed, the proposed regulations note that "cross-gender supervision, in general, can prove beneficial in certain confinement settings" and in no way proposes a bar to such practice. 76 Fed. Reg. 6248-01 at 6253. The only proposed limitation on opposite-sex supervision relates to certain types of cross-gender viewing and searches, which are not at issue here. *Id.* at 6253.

Respondent's attempts to ward off review by citing the proposed regulations confirm two things. First, the scope of municipal liability for sexual assault by correctional staff is an issue of great national importance. Second, the proposed regulations bring into sharp contrast the undeniable scope and costs of the Second Circuit's decision for jail administrators. The proposed regulations themselves (even without mandating same-sex supervision) will impose a huge cost on those who volunteer to comply.

Regardless of the proposed regulations, neither they, nor Respondent, address the unbounded application of the Second Circuit's decision to other state and municipal facilities—schools, nursing homes, hospitals and the like—where opposite-sex supervision is a regular, normal and accepted practice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. SCHMIDT JR.
Counsel of Record
TIMOTHY W. HOOVER
PHILLIPS LYTLE LLP
3400 HSBC Center
Buffalo, New York 14203
(716) 847-8400
jschmidt@phillipslytle.com

MICHAEL A. SIRAGUSA,
COUNTY ATTORNEY
ERIE COUNTY
DEPARTMENT OF LAW
95 Franklin Street
Buffalo, New York 14202
(716) 858-2200

Counsel for Petitioner