Nos. 18-1498, 18-1499, 18-2170, 18-2177

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

J.K.J. AND M.J.J.,

Plaintiffs-Appellees,

v.

POLK COUNTY, WISCONSIN,

Defendant-Appellant.

Appeal from the U.S. District Court for the
Western District of Wisconsin,
No. 3:15-cv-00428-WMC

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF J.K.J. AND M.J.J. AND IN SUPPORT OF REHEARING

Marisa C. Maleck
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006-4706
(202) 737-0500
mmaleck@kslaw.com
jmitchell@kslaw.com

Counsel for Amicus Curiae

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Appellate Court No: 18-1498, 18-1499, 18-2170, 18-2177

Short Caption: J.K.J., et al. v. Polk County, et al.

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Address: 1700 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006

Phone Number: (202) 626-9117 Fax Number: (202) 626-3737

E-Mail Address: mmaleck@kslaw.com

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a nonprofit public-interest law firm committed to securing protections for individual liberty and restoring appropriate constitutional limits on government power. Through strategic litigation and outreach, the Institute works to promote the principles of limited government. The panel's decision in this case expands municipal immunity and thus erodes the public's ability to hold local government accountable.

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

The *en banc* Court should grant the petition, vacate the panel majority's decision, and affirm the district court's judgment. The panel majority's decision dealt a devasting one-two punch to the notion that a municipality will ever be held liable for violating constitutional rights. Although the Supreme Court has held that "municipal bodies sued under § 1983" are not "entitled to an absolute immunity," *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 701 (1978), the panel majority improperly expanded municipal immunity to the point that it is impossible to imagine how a municipality will ever be held liable for violating constitutional rights. Worse, the panel majority did so only by ignoring and minimizing the jury's findings in direct contravention of binding precedent holding that a jury must determine whether the municipality's decisions cause the deprivation of rights at issue. *E.g.*, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

In *Monell*, the Supreme Court recognized that a municipality may be held liable for constitutional violations when its policies cause or permit a violation of constitutional rights. Consistent with that decision, the plaintiffs in this § 1983 action—former Polk County Jail inmates

J.K.J. and M.J.J.—successfully sought and obtained a jury verdict against Polk County after they demonstrated that the County had consistently turned a blind eye to a prison culture that fostered the denigration and abuse of female inmates, which culminated in both plaintiffs being repeatedly sexually assaulted by a County jailer. The panel refused to accept that the County could be held liable under *Monell* in large part because the County has a written policy against raping inmates—even though the jury heard significant evidence that the policy was so indifferently enforced that, in truth, it constituted no policy at all. The panel's wrong decision cannot be squared with the precedents of this and the Supreme Court or other Courts of Appeals.

If left uncorrected, the panel's decision will mean that municipalities will never be held liable for their actions, and victims of governmental abuse will be unable to obtain relief. The *en banc* Court should intervene "lest [the Supreme Court's] decision that [municipalities] are subject to suit under § 1983 'be drained of meaning.'" *Monell*, 436 U.S. at 701 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974)).

ARGUMENT

I. The Panel's Decision Improperly Elevates the Importance of Unenforced Paper Policies and Conflicts with Binding Precedent and This Court's Sister Circuit's Cases.

Municipal immunity is a judicial innovation neither required by the Constitution nor rooted in any longstanding common-law tradition. *E.g.*, Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 2–3 (1924) (immunity is "a legal anachronism canonized as a legal maxim" and "brought about … by the introduction of fictions, artificial distinctions and concessions to expediency"). In *Monell*, the Supreme Court overruled a previous case, *Monroe v. Pape*, 365 U.S. 167 (1961), "insofar as it [had held] that local governments [were] *wholly* immune from suit under § 1983." 436 U.S. at 663 (emphasis added). Citing (among other things) "expressions of congressional intent" and a lack of "reliance claim[s] which can support … absolute immunity," the Supreme Court held that municipalities did *not* enjoy absolute immunity and thus could be held liable under § 1983. *Id.* at 696 & 699–701. As the Court explained, "municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest [its] decision that such bodies are subject to suit under § 1983 'be drained of meaning.'" *Id.* at 701.

The standard for when municipalities may be held liable is rigorous, but "rigorous does not mean impossible." Slip Op. at 51 (Scudder, J., dissenting). *Monell* and its progeny hold that municipalities may be held liable where the constitutional injury is based on an *unwritten* policy or custom demonstrating that municipal policymakers were deliberately indifferent to the risk of the constitutional violation. *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Along these lines, a municipality's *inaction* can function as the "equivalent of a decision by the [municipality] itself to violate the Constitution." *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part). Where a municipality chooses not to act among "various alternative[]" courses of action to respond to a constitutional violation, the decision to do nothing may be enough for liability to attach. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Stated another way, to establish *Monell* liability, the plaintiff need only show that the municipality "acted or *failed to act despite . . . knowledge of a substantial risk of serious harm*." *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004) (emphasis added).

Moreover, even where a municipality has a written policy purporting to protect against constitutional violations from occurring, "[r]efusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988). At a minimum, a municipality must train its employees to comply with the written policy in a way that is not a mere box-checking exercise. Rather, the municipality must actually train its employees in a substantive way or risk being held liable for failing to do so if that failure leads to a constitutional violation. *Connick v. Thompson*, 563 U.S. 51, 68 (2011) ("[F]ailure-to-train liability is concerned with the substance of the training, not the particular instructional format.").

The panel majority tossed those carefully considered exceptions aside, holding that the County could not be held liable largely because the County had a written policy purporting to forbid "verbal, physical, emotional, psychological, or sexual harassment by facility staff." Slip Op. at 4. The panel downplayed, however, how the County declined to enforce its written policy. *E.g.*, *id.* at 10, 22 n.6. Indeed, the panel largely ignored that, when violations of the policy occurred, the County undertook little

or no remedial training or monitoring. *See id.* at 50 (Scudder, J., dissenting). The panel's opinion on this score cannot be squared with *Monell* and its progeny.

Setting aside how the panel's opinion conflicts with Supreme Court precedent, the panel's decision also creates conflicts in the law of this Circuit and between it and other circuits. In *Woodward v. Correctional Medical Services*, an inmate committed suicide after prison staff failed to follow written trainings and policies mandating certain suicide prevention procedures. 368 F.3d at 928–29. The municipal defendant, seeking to evade *Monell* liability, argued that the prison was not on notice because there had been no other suicides in the prison. *Id.* at 929. This Court rejected that argument, stating that an inmate suicide was the "highly predictable consequence" of the prison's custom of ignoring its own suicide prevention policies. *Id.* It rejected the idea that the prison got a "'one free suicide' pass." *Id.*

Here, contrary to *Woodward*, the panel majority went far beyond allowing "one free pass." In this case, plaintiffs pointed to a history of inappropriate contact between *another* County-employed jailer—Allen Jorgenson—and other prisoners. *See* Slip Op. at 8. The dissent pointed

out that "the Jorgenson incident showed the county that the existence of a written policy prohibiting sexual contact between guards and inmates was insufficient to prevent the sexual harassment and abuse of inmates by guards." Slip Op. at 59 (Scudder, J., dissenting). The jury easily could have concluded (and apparently did conclude) that the municipality was deliberately indifferent to the risk of constitutional violations because it provided no specialized training in the wake of that incident, which led to an environment where jailers understood that sexual assault was accepted. *Id.*

The panel majority's decision not to hold the County liable is irreconcilable with *Woodward*. Municipalities will surely read it to hold that they get, at a minimum, *two* free constitutional violations. The upshot is that the panel has set the stage for courts in this Circuit to regulate dog bites more strictly than municipalities' constitutional torts. *See, e.g.*, *Harris v. Walker*, 519 N.E.2d 917, 919 (Ill. 1988) (Illinois Animal Control Act "reduce[s] the burden on dog-bite plaintiffs by eliminating the 'one-bite rule'").

Moreover, the panel's holding that a written policy is enough to insulate a municipality from liability even if it is deliberately indifferent

to violations of that policy moves the Seventh Circuit out of line with the rest of the country. Courts have found municipal liability to attach even where a municipality had policies and conducted training that prohibited constitutional violations. *See, e.g.*, *Daskalea v. D.C.*, 227 F.3d 433, 442 (D.C. Cir. 2000); ("[A] 'paper' policy cannot insulate a municipality from liability where there is evidence . . . that the municipality was deliberately indifferent to the policy's violation."); *Ware v. Jackson Cty.*, 150 F.3d 873, 882 (8th Cir. 1998) ("[T]he existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced."); *Simmons v. City of Phila.*, 947 F.2d 1042, 1051, 1075–76 (3d Cir. 1991) (finding that *Monell* liability attached when an inmate committed suicide under the watch of a guard who believed he had *some* suicide prevention training, but no special training). These conflicts justify *en banc* rehearing. *See* Fed. R. App. P. 35(a)(1).

II. The Panel Did Not Give Appropriate Deference To The Jury's Findings.

In overturning the jury's decision to hold the County liable, the panel compounded its legal error by impermissibly second-guessing the jury's findings. In the context of *Monell* liability, the Supreme Court has explicitly stated that the jury must decide whether the municipality

caused the constitutional violation at issue. *Jett*, 491 U.S. at 737 ("[I]t is for the jury to determine whether [the municipality's] decisions have caused the deprivation of rights at issue … by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity."). In evaluating whether the lower court's verdict should be disturbed, the controlling question is "whether *any rational jury* could have concluded that the combined evidence supports a finding of liability against the county." Slip Op. at 52 (Scudder, J., dissenting).

Again, the panel majority flouted prevailing law and created inter-circuit conflict. Other circuits have emphasized the importance of judicial deference to jury findings in *Monell* cases. The D.C. Circuit has expressly noted that, even in *Monell* cases, "jury awards are always given the utmost of deference and respect," explaining that that to hold otherwise would permit judicial reinvention of the facts. *Parker v. D.C.*, 850 F.2d 708, 711 (D.C. Cir. 1988) (quotation marks omitted)). Likewise, the Third Circuit has refused to overturn a jury's finding of municipal liability where the record was not "critically deficient of evidence on

which the jury reasonably could have based the conclusion" that the municipality was liable. *Simmons*, 947 F.2d at 1076.

Here, the panel failed to give the jury's findings the "utmost … deference" or any "respect" at all. *See Parker*, 850 F.2d at 711. After hearing evidence of the County's inadequate training, the culture of pejorative "tier talk" by jail officials, and the County's inaction after the Jorgenson incident, the jury acted rationally when it concluded that *Monell* liability attached. Slip Op. at 53, 54, 56 (Scudder, J., dissenting). But, in the panel majority's view, only evidence that supported its own conclusion that the County was following its policy was worth considering.

The panel majority also downplayed, dismissed, or buried in footnotes evidence that the jury could have considered to reach the opposite conclusion. For example, the panel majority—reviewing only a cold record and without seeing the testimony live—simply took a supervisor at his word that "inappropriate comments" made by Jorgenson did not "r[i]se to a level warranting discipline." Slip Op. at 22 n.6. But, of course, a jury *watching the supervisor testify* could have drawn the reasonable opposing inference that the decision not to

discipline a jailer for inappropriate comments reflected a County policy of official indifference to harassment. In sum, the record was not by any stretch "critically deficient" of evidence to support the jury's conclusion. *See Simmons*, 947 F.2d at 1076.

III. The Panel Decision Will Have Dire Consequences.

If allowed to stand, the panel decision will have perverse effects. Under the panel's expansive reading of municipal immunity, courts—and juries—will simply be unable to hold municipalities liable for unconstitutional acts so long as those municipalities can point to some regulation forbidding the acts. Slip Op. at 60 (Scudder, J., dissenting). As the dissent noted, the result is that "municipalities may conclude that there is not much to be done to stop a rogue guard from engaging in secretive and heinous conduct in violation of a bright-line policy." *Id.* If the panel's decision stands, municipalities in this Circuit will be able to skirt liability for constitutional infringements simply by promulgating policies they have no intention of ever enforcing.

Constitutional violations will become more likely as municipalities conclude that the work of monitoring and deterring violations of their paper policies is unnecessary. Prisoners under the thumbs of abusive

jailers will have less incentive to report their abuse. The public will get a skewed picture of the way its government operates, concluding that abuses stem merely from a few "bad apples" when they arise instead from a clandestine but enforced—or at least endorsed—indifference to the paper policy.

Nor will those who suffer from constitutional violations have much or any recourse. If municipalities cannot be held liable for their actions, plaintiffs will be stuck suing individual tortfeasors only. But these tortfeasors—like the jailer who sexually assaulted plaintiffs in this case—will often have no means to pay a jury verdict. *See* George A. Bermann, *Integrating Governmental & Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1190 (1977) (noting public officials' "frequent incapacity to satisfy large judgments"). Moreover, these tortfeasors often can rely on other doctrines of official immunity to insulate themselves from liability. *See* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 Brand. L. J. 319, 396 (1998) (remedy against "offending official …. may be illusory" because it may be "barred by the doctrine of official immunity"). None of this is consistent with orderly process or the rule of law.

CONCLUSION

The *en banc* Court should grant rehearing and affirm the district court's judgment.

Respectfully submitted,

/s/ *Marisa C. Maleck*

Marisa C. Maleck
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006-4706
(202) 737-0500
mmaleck@kslaw.com
jmitchell@kslaw.com

Counsel for *Amicus Curiae* Institute for Justice

Dated: July 25, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,537 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ *Marisa C. Maleck*
Marisa C. Maleck

Counsel for Amicus Curiae

Dated: July 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Marisa C. Maleck*
Marisa C. Maleck

Counsel for Amicus Curiae

Dated: July 25, 2019