No. 23-165

In The
Supreme Court of the United States

SHERIFF OF SANTA ROSA COUNTY, FLORIDA,

Petitioner,

v.

JESSICA ROGERS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the district court abused its discretion by declining to find a manifest error of law in a *Monell* plaintiff needing to show denial of a constitutional right, not recovery of damages from an individual defendant.

II. Whether the jury's verdict in this case was supported by sufficient evidence of the Sheriff's deliberate indifference to a known medical risk where, among other substantial evidence, the Sheriff's representative admitted that the Jail's practices made adequate monitoring of suicidal inmates impossible and were obviously risky.

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STATEMENT

1. Jose Francisco Escano-Reyes ("Fran") was a construction worker educated at a U.S. high school. Day 4 Tr. 13-14.[1] On January 7, 2016, traffic-stop authorities discovered that Fran, a Honduran citizen, was in violation of immigration law. Day 4 Tr. 27:18-21; Day 3 Tr. 146:25-147:14. He was detained at the Santa Rosa County Jail ("Jail").[2] *Id*. Incarcerated away from his young son for several months, his mental condition deteriorated.

On April 2, 2016, Fran was designated a suicide risk after stating that he needed to die and planned to kill himself. Day 3 Tr. 148:22-149:1. Medical staff placed Fran on a suicide watch protocol, where he remained until his death. *Id*. at 149-50. The Jail understands that known suicidal inmates have a serious medical need. *Id*. at 155:8-10.

Fran became increasingly erratic and delusional. On April 6, Fran was moved from the medical unit to the Admissions, Classification, and Release ("ACR") unit. Pl. Ex. 12 (Lewis Incident Report). The Jail assigned Fran to cell ACR-1. *Id*. ACR-1 was the only cell in ACR with a metal partition capable of securing a ligature. Day 3 Tr. 162:1-7.

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[1] Transcripts and exhibits at trial were not assigned ECF numbers and are cited here in the manner corresponding to the Record lodged with the Eleventh Circuit.

[2] "Jail" and "Sheriff" have both been used to refer to the municipal defendant.

The Jail covered the main windows of cell doors in ACR—including ACR-1—with Velcro curtains. A plastic bag obscured the bottom half of the smaller, narrower window. Day 1 Tr. 47:6-48:17. The curtain and plastic obscured all but a small portion of the cell's interior, making it impossible to view without walking to the cell door and peering through the uncovered window portion.

Late on April 6, Fran was "displaying unusual and erratic behavior" and "making delusional statements" such as "the camera is watching me" and "it will show the prophecies." Pl. Ex. 12 (Ramirez Incident Report). "His demeanor and behavior declined rapidly throughout the night. He began to scream, stating repeatedly that he needed to be killed." *Id*. A Deputy remarked Fran was "either acting or he's legitimately going crazy." Day 1 Tr. 18:12-15. The Deputy worried Fran would injure himself (*id*. at 28:19-22), so Fran was put into a restraint chair. *Id*. at 14, 29. The next morning, Deputies John Gaddis ("Gaddis") and Michelle Bauman Amos ("Bauman") took over monitoring Fran. Day 2 Tr. 151:3-6; Day 3 Tr. 16:2-13.

Under the Jail's suicide monitoring practices, one of the Deputies had to see Fran once every 15 minutes and determine he was alive and breathing. Day 3 Tr. 165:23-166:12. Although the Deputies had few other duties, the Jail's practice did not require them to stand and walk fifteen feet to confirm Fran's safety; it was perfectly acceptable for Deputies to remain seated at the ACR desk if they could see a sliver of Fran in the uncovered window portion. *Id*. at 166:13-16. Ensuring

Fran was "breathing" consisted entirely of inference. The Jail's representative explained "he had to be breathing to walk to the window." *Id*. at 203:13-204:1.

The Deputies failed to comply with the Jail's monitoring practices for a period preceding Fran's death. As Fran slept, the Deputies couldn't see him from the desk. Rather than get up, Gaddis falsified five imaginary checks conducted about 15 minutes apart. Pl. Ex. 5; Day 3 Tr. 27:1-20. Upon waking, Fran screamed for about an hour (8:15-9:25 am). Contemporaneously, Gaddis recorded Fran's screaming without seeing him. *Id*. at 30:17-24; Pl. Ex. 5.

For purposes of Fran's death, however, the critical time-period was between 9:30 and 10:32 am on April 7, 2016. And during ***that*** period, the Deputies scrupulously complied with the Jail's monitoring practices. A videotape shows events in the cell. Fran had tied his smock[3] into a noose, secured by ACR-1's metal partition. Day 2 Tr. 61:8-21; Pl. Exs. 9, 10. During those 62 minutes, Fran repeatedly attempted to hang himself and failed. He became agitated and paced. *Id*. His pacing revealed flashes of movement in the window

[3] The Jail issued Fran a suicide prevention garment, or suicide smock. At purchase, smocks are impossible to roll up and manipulate, but they become more pliable over time. Day 3 Tr. 151:12-152:5. Fran's smock was old enough that it could be fashioned into a knot. *Id*. It was obviously unsuitable and shouldn't have been used. Day 2 Tr. 132:20-25. Anyone inspecting it would know it wasn't serviceable. *Id*. at 133:1-11. Nobody checked Fran's smock; the Jail's policies delegated to Aramark, a laundry contractor, the safety-critical task of judging serviceability. Day 3 Tr. 179:16-180:6.

fragment seen from the Deputies' seated position, where they chatted with each other and passersby. *Id*. The Jail's monitoring practices counted those flashes as "checking" on Fran, even though any glance into his cell would have revealed an openly displayed noose.

Deputy Gaddis performed close watch checks at 9:32, 9:45, and 10:00 am, seeing Fran at the window. Pl. Ex. 5. Between 10:00 and 10:32 am, Bauman performed twelve checks seeing Fran at the window. Day 2 Tr. 163:11-13.

Fran attempted suicide by inserting his head into the noose ***nine times*** over that hour-long period. Pl. Exs. 9, 10. On the tenth, Fran succeeded. Had the Deputies been required to look into Fran's cell even once at any point after 9:30 am, it is 100% certain they would have realized the danger. Day 3 Tr. 32:1-4. But the Jail didn't require it, and the Deputies never looked. At 10:45, an inmate worker happened by, peered through the exposed portion of Fran's window, and announced, "that guy's hanging." Day 2 Tr. 230:20-232:18.

2. a. Plaintiff Jessica Rogers ("Rogers") sued on behalf of Fran's child, including claims against the Deputies individually under 42 U.S.C. §1983, a *Monell* claim, and various state-law claims. The Deputies and Sheriff unsuccessfully sought summary judgment. The Deputies appealed the denial of qualified immunity but lost. *Rogers* v. *Santa Rosa County Sheriff's Office*, 856 Fed. Appx. 251 (11th Cir. 2021).

Judge Wetherell conducted trial from October 4-13, 2021. For the *Monell* claim, the primary issue was the constitutional adequacy of the Jail's suicide-prevention practices. The Jail's written policies required that Fran, as an inmate known to be suicidal, be under direct continuous observation. But the Jail customarily didn't follow its written policy, and it knew that. Day 3 Tr. at 165:12-19. As Sheriff Johnson stated, "[d]espite the written policies, the Jail did not follow the policy requiring 24-hour direct and continuous observation of inmates on suicide watch." Pl. Ex. 24, ¶ 5.

Because the Jail abandoned its written policies, what was actually done amounted to a mishmash of practices and customs ("practices") ratified through instructions to Deputies and repeated use. Plaintiff's case focused on three: housing suicidal inmates in ACR-1, covering the windows of cells housing suicidal inmates, and the laxity of the monitoring practices that were used in lieu of "direct continuous observation." The Jail admitted to all three.

The first practice was housing suicidal inmates in ACR-1. Day 3 Tr. 161:19-25. There were two problems. First, ACR-1 was the only ACR cell with a metal partition suitable for tying a noose. *Id*. at 162:1-7. Second, the viewing angle into the cell is so oblique that someone sitting at the booking desk cannot see fully into the cell even without window obstructions. Day 3 Tr. 162:8-10. Gaddis testified that, based on his seated angle-of-view, Fran could have held a weapon at the window and Gaddis couldn't see it. Day 3 Tr. 46:7-15; *see also id*. at 45:5-7.

The second practice was permitting plastic obstructions—shades and bags—to cover windows housing suicidal inmates. Day 3 Tr. 161:3-11. The Jail conceded this impedes monitoring. *Id*. at 161:12-18.

The third practice was the monitoring itself. This was ***not*** a challenge to the frequency or quantity of the checks, just their cursory nature. The practice was getting a visual every 15 minutes. Day 3 Tr. 165:23-166:3. A check was valid if a seated guard could see just a sliver of the inmate. *Id*. at 166:13-16. "Valid" checks merely needed to confirm the inmate was alive. *Id*. at 181:18-19. There was no requirement to confirm the inmate was ***safe***; indeed, the Jail's designated representative conceded an inmate could be facing mortal peril during the check, yet a check failing to detect that peril would nevertheless be valid. Day 3 Tr. 166:10-22. The Jail's checks were not designed to prevent harm that takes place outside the direct line of a Deputy's sight. *Id*. at 182:25-183:10.

Plaintiff's case concerned the Jail's suicide prevention practices viewed as a whole; the jury was asked to determine whether those practices ***in the aggregate*** were constitutionally sufficient. And although Plaintiff identified three individual practices, those practices interacted in pernicious ways. For example, it is highly reckless to use cells where a noose could be tied. But it becomes a hundredfold worse to cover the windows so the noose can be seen only by standing directly in front of the cell and peering in. It virtually ensures an adverse result if Deputies are then allowed to "monitor" without walking to the window.

The Jail understood the interaction. The Jail's representative conceded that, given the poor sightlines into ACR-1 and window coverings, adequate monitoring was impossible from the ACR desk. Day 3 Tr. 165:4-8; see also *id*. at 164:2-25. Yet the Jail accepted the practice—admittedly inadequate—of visual monitoring from the ACR desk. *Id*. at 166:13-16. The Jail's representative ultimately conceded that its monitoring practices were obviously risky. *Id*. at 165:9-11.

Plaintiff's expert, James Upchurch, had an impressive forty-five-year corrections career, Day 2 Tr. 30:18-22, culminating as Florida's Assistant Secretary of Institutions. *Id*. at 30:14-17. He is naturally sympathetic to correctional challenges, and 85% of his testimony is for defendants. *Id*. at 33:7-16. Nevertheless, Upchurch explained why the Jail's practices were constitutionally inadequate, individually and collectively. For example, in his entire career, he'd ***never*** seen suicidal inmates housed in cells containing places to tie nooses. *Id*. at 68:21-69:5. Given that, and the oblique sightlines, housing suicidal inmates in ACR-1 and covering its windows did not show adequate regard for human life. *Id*. at 69:6-10; 69:23-71:9. Upchurch also explained why the quality of the checks was unconstitutional. *Id*. at 96:21-97:9. The Jail's checks were not designed to detect or remedy the dangers to suicidal inmates. The checks didn't ***prevent*** suicide; they only served to establish the time of death. *Id*. at 55:14-24.

The Jail was unable to produce at trial any expert willing to testify its practices were constitutional.

Upchurch's testimony of constitutionally inadequate practices was unrebutted.

Jail employees did testify it had never occurred to anyone that a suicidal inmate might try hanging-by-smock. But the jury also heard Chief Tucker vitiate this claim with testimony about the "cut-down tool" kept at the ACR desk for emergencies. A cut-down tool is available for Deputies to cut through something if a person is hanging themselves. Day 6 Tr. 67:14-18. Specifically, the cut-down tool ***was intended to cut through a smock***. *Id*. at 66:21-25; 67:6-9.

b. Judge Wetherell proposed a verdict form that allowed the jury, as long as it determined at least one of the individual Deputies had violated the constitution via deliberate indifference, to decide it was the Sheriff, rather than the individual Deputies, who was responsible for Fran's death. The Jail objected, arguing solely that such a verdict form allowed an inconsistent (App. 74) or a vicarious-liability-based verdict (App. 78). Those objections were overruled.

c. For the federal claims, the jury found Gaddis, Bauman, and the Sheriff had all violated Fran's constitutional rights via deliberate indifference to his known medical needs. App. 29-31, Questions 1, 2, 4, 5, 7. On the causation question, the jury found the Sheriff, rather than the Deputies, was the primary cause of Fran's death. *Id*., Questions 3, 6 & 7. On the state-law claims, where the Sheriff was not a defendant, the jury found Gaddis and Bauman had both acted with wanton and willful disregard (App. 32-33, Questions 8 &

10), and both of their conduct was a substantial factor in Fran's death. *Id*., Questions 9 & 11. The jury awarded $1,762,500. App. 33-34, Question 12. The Sheriff raised no verdict-inconsistency objection while the jury was impaneled.

d. The Sheriff's post-trial motions raised arguments under Rules 50(b) and 59(e). See ECF 242. He argued under Rule 50 there was insufficient evidence. *Id*. He also argued the Sheriff could not be held liable unless at least one of the Deputies was also liable under Section 1983, so the judgment should be amended under Rule 59(e) to remove him. App. 12-13. Although the Sheriff's complaint was with the design of the verdict form, for which the sole remedy available is a new trial, he expressly disclaimed that, asserting "[t]he defense does not seek a new trial," ECF 242 at 24, and "[t]he Court ***cannot*** opt for a new trial[.]" *Id*. at 23 (emphasis added). Rogers responded (see ECF 273), proving that many of the Sheriff's arguments were waived or involved invited error and that no court had ***ever*** used Rule 59(e) to grant judgment as a matter of law under any comparable circumstances. See, *e.g.*, *id*. at 8-11, 30-31. The Court denied the motions, adopting all Rogers's positions. App. 27.

e. The Eleventh Circuit issued an unpublished affirmance. App. 1-20. For the Sheriff's Rule 50 sufficiency challenge, the Court noted, among substantial other evidence, that "the Jail's own representative conceded at trial that the practice of housing suicidal inmates in a cell with a partially concealed interior both impeded adequate monitoring and posed an obvious

risk." App. 16. Because "the evidence in this case established far more than the mere possibility that Escano-Reyes would inflict self-harm" (App. 15), the Circuit concluded "Rogers presented sufficient evidence of deliberate indifference to require submitting this matter to the jury in the first instance and to support the jury's ultimate verdict." App. 17.

Next, the Court explained the Sheriff "conflates the elements of a § 1983 claim against an individual officer with *Monell*'s requirement of a constitutional violation. They are not one and the same." App. 19. No court has ever adopted the Sheriff's proposed requirement that individual tort liability is a prerequisite to *Monell* liability, and prior Eleventh Circuit precedent expressly demurred (see *Barnett* v. *MacArthur*, 956 F.3d 1291 (11th Cir. 2020)). Thus, the Court found no error of law, much less the manifest error of law for abuse of discretion under the only remedy the Sheriff sought, alteration of the judgment under Rule 59(e). App. 17-19. The Court also observed the Sheriff's argument was "likely waived" by his failure "to timely assert the issue." App. 19-20 n.10.

ARGUMENT

I. NO COURT ANYWHERE WOULD DISPUTE *MONELL* LIABILITY HERE BECAUSE THE JURY FOUND THE DEPUTIES COMMITTED A CONSTITUTIONAL VIOLATION

A. The Jury Expressly Found The Deputies Violated Fran's Constitutional Rights, And The Sheriff Conceded The Jury Made That Finding

The Sheriff's first three Questions Presented[4] are entirely predicated on the assumption the jury determined Gaddis and Bauman ***did not commit a constitutional violation*** and/or that the Eleventh Circuit allowed the imposition of *Monell* liability without a constitutional violation. Again and again, the Sheriff makes those factual representations. See, *e.g.*, Pet. 3 (the Eleventh Circuit affirmed the *Monell* violation here "despite a jury's determination that Sheriff's deputies had not committed an underlying constitutional violation"); *id*. at 5 ("the Eleventh Circuit * * * allow[ed] *Monell* liability even absent a constitutional violation by a defendant municipality's employees"); *id*. at 7 (The Eleventh Circuit "erroneously [held] that a finding of a constitutional violation by the two individual deputies responsible for monitoring the inmate was not a prerequisite to *Monell* liability against the Sheriff."); *id*. at 8 ("where, as here, a plaintiff sues

[4] For simplicity's sake, we treat the second Question Presented as falling within this group. But that bizarre question concerns only the law in four circuits having nothing whatever to do with this case, and it is not remotely presented here.

specific employees under §1983 and it is conclusively determined that those employees did not violate plaintiff's constitutional rights, then there can be no *Monell* liability for their governmental employer"); *id*. at 16-17 ("The Eleventh Circuit then affirmed the §1983 *Monell* judgment against the Sheriff even in the absence of an underlying constitutional violation by Gaddis or Bauman."); *id*. at 19 (characterizing "[t]he Eleventh Circuit's holding in this case" as "an underlying constitutional violation is not required for *Monell* liability"); *id*. at 24 n.8 ("Here, the deputies were determined by the jury not to have violated a constitutional right.").

Those are ***flagrant*** misrepresentations. The jury here indisputably found that the Deputies violated Fran's constitutional rights. The instructions on the *Monell* claim specified "the Sheriff's Office is liable ***only if you find that Defendant Gaddis, Defendant Bauman, or both, violated Mr. Escano-Reyes' constitutional rights***." ECF 233 at 10 (emphasis added). In the Eleventh Circuit, the Sheriff ***expressly conceded*** the *Monell* jury instructions ***correctly required the jury to find the Deputies violated Fran's constitutional rights***, and that his ***only*** quarrel was with the design of the verdict form. See Initial Brief of Appellant Sheriff of Santa Rosa County, Florida, Case No. 21-13994 (11th Cir. filed March 10, 2022), at 45 ("The basis of this portion of the post-trial motion, and now this appeal, is that while ***the jury instructions correctly explained to the jury that in order to find Monell liability as against the Sheriff the Plaintiff first had to show that the deliberate***

indifference of Gaddis and Bauman caused the death of Escano-Reyes, the verdict form did not follow that instruction.") (emphasis added). Juries, of course, are presumed to follow their instructions (see, *e.g.*, *City of Los Angeles* v. *Heller*, 475 U.S. 796, 798 (1986) ("But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them.")). Under these circumstances, the jury found a constitutional violation by the Deputies, and the Sheriff has conceded as much.[5]

B. The Sheriff Conflates Constitutional Violations With Section 1983 Liability For An Individual Deputy

The Sheriff's primary difficulty is that *Monell* requires only a constitutional violation, which the jury expressly found. To circumvent that problem, the Sheriff wishes to argue that, rather than a constitutional violation, *Monell* requires an individual Deputy must first be found ***liable*** under Section 1983 before a municipality can be held liable. But no court has ever agreed, and the courts confronted with such a proposed

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[5] The amicus brief filed by the National Sheriffs' Association ("NSA") does not serve the purpose of bringing to the Court's attention relevant matter uncovered by the parties' briefs. See Sup. Ct. R. 37.1. Its attempt to provide legal analysis redundant with the Sheriff's is further hampered by the fact that it assumes "[h]ere, the jury held that deputies did not violate the inmate's constitutional rights." NSA Amicus Br. 2. Thus, there is no reason to address much of the brief, because it rests on a demonstrably false premise. Where necessary, it will be addressed in footnotes.

requirement have uniformly rejected it. It is against that background the Sheriff adopted his strategy of nakedly asserting that constitutional violations and individual-deputy-liability mean precisely the same thing and using those terms interchangeably. He tried that in the district court, where Judge Wetherell overruled his objection to the verdict form by explaining the difference between constitutional violations and individual-deputy-liability. See App. 83 ("So if the argument we're having is whether you have to have essentially an entire deliberate indifference claim proven to establish *Monell* liability, I don't think that's the case. You just have to have a constitutional right violation proven, and that's Questions 1 and 2 and 4 and 5."). On appeal, the Eleventh Circuit patiently explained that the Sheriff "conflates the elements of a § 1983 claim against an individual officer with *Monell*'s requirement of a constitutional violation. They are not one and the same." App. 19. Now the Sheriff dusts off the strategy for a third round.

Preliminarily, it is important to apply analytical rigor to the Sheriff's argument. If the Sheriff's claim is that *Monell* requires a constitutional violation, that claim founders on the jury's finding that the Deputies violated Fran's constitutional rights. If the Sheriff's claim is that *Monell* requires individual-deputy-liability, ***that*** claim (while legally unprecedented) is not properly preserved. If the Sheriff believed individual-deputy-liability was a necessary element of a *Monell* claim, he had to propose jury instructions clearly stating that requirement, and he didn't. To the contrary, he

submitted instructions requiring only a constitutional violation (see *infra*, Section II.C) and has conceded the jury instructions—which required only a constitutional violation—were correct.

Finally, when evaluating the Sheriff's legal claims, it is important to understand precisely what the jury did and didn't decide. For Deputy Gaddis, the jury determined that Gaddis (1) had subjective knowledge of the risk Fran would commit suicide, and (2) was deliberately indifferent to that risk. App. 29-30, Questions 1-2. The jury's answers to those two questions suffice to establish that Gaddis violated Fran's constitutional rights. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). The jury separately made identical findings against Deputy Bauman. App. 30-31, Questions 4-5. Over and above the finding of constitutional violation inherent in the jury's *Monell* verdict based on the instructions, the answers to those questions are ***additional*** express findings of constitutional violations by the individual Deputies.

The Sheriff's arguments are based on a willful misinterpretation of the jury's responses to Questions 3, 6 and 7. Having determined that Gaddis, Bauman ***and the Sheriff*** violated Fran's constitutional rights (see App. 31, Question 7), the jury considered whose violation most directly resulted in Fran's death. The Sheriff repeatedly asserts (*e.g.*, Pet. 4, 23, 33) ***only*** the individual Deputies' actions were at issue here, but that is manifestly untrue. Gaddis and Bauman didn't assign Fran to ACR-1; Sheriff Johnson did that. Gaddis and Bauman didn't make it an acceptable practice to

cover the windows; Sheriff Johnson did that. Gaddis and Bauman didn't determine that close watch checks should ignore inmate safety; Sheriff Johnson did that. The jury's answers to Questions 3, 6 and 7 didn't magically erase the Deputies' constitutional violations; they merely determined that, insofar as the Deputies were "following orders" while Fran died, the fault for Fran's death was properly attributed to the Sheriff, not to them.

C. *Heller* Requires Only A Constitutional Violation, And *Barnett* Fully Complies

Most of the Sheriff's Petition involves allegations about how courts are implementing *Los Angeles* v. *Heller*, 475 U.S. 796 (1986). There, a motorist sued for arrest without probable cause and using excessive force. In a bifurcated trial, the jury rejected both claims against the officer. *Id*. at 797-98. The jury found no constitutional violation. The Court stated the *Monell* implications:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

Id. at 799; see also *id*. ("[N]either [*Monell*], nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.").

The *Heller* Court used phrases like "constitutional injury" and "constitutional harm" to denote the necessity of proving a ***constitutional violation***. Courts have uniformly interpreted *Heller* that way, and the Sheriff agrees. *E.g.*, Pet. 33 ("This Court in *Heller* held without qualification that where employees are identified and sued and ***held not to have violated plaintiff's constitutional rights***, there can be no *Monell* liability.") (emphasis added). Thus, *Heller* stands squarely for the proposition that *Monell* plaintiffs must prove a constitutional violation to prevail. That is why the jury instructions here—based on the Eleventh Circuit's standard form instructions—required Plaintiff to prove the Deputies committed a constitutional violation before holding the Sheriff liable. ECF 233 at 10. But there is ***nothing*** in *Heller* to suggest that, once a constitutional violation has been proved, ***a plaintiff must also secure Section 1983 damages from an individual Deputy*** to permit *Monell* liability.

Much of the Sheriff's ire is focused on *Barnett* v. *MacArthur*, 956 F.3d 1291 (11th Cir. 2020), as the case "in which the court began to follow the trend announced by several other circuits that *Monell* liability may attach even without an underlying constitutional violation." Pet. 17. In *Barnett*, a Deputy jailed Barnett on suspicion of DUI. 956 F.3d at 1293. Barnett's breathalyzer read "0.000," yet Barnett was detained for 8 hours per the Seminole County Sheriff's policy of holding all DUI arrestees for 8 hours. *Id*. When the

state dropped the DUI charges, Barnett sued. *Id*. A jury absolved the Deputy of Section 1983 liability. *Id*.

The Eleventh Circuit reversed summary judgment on *Monell* and remanded for trial. *Id*. at 1293-94. The Sheriff argued the jury's verdict for the Deputy precluded *Monell* liability. The Eleventh Circuit disagreed:

> As the Sheriff sees things, the jury verdict means that there was no Fourth Amendment violation, and without a Fourth Amendment violation there cannot be municipal liability under *Monell*. * * * The syllogism is superficially seductive, but on this record it does not work. It is true, as the Sheriff says, that "an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred." *Rooney* v. *Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996). But the problem for the Sheriff is that the jury verdict in favor of Deputy MacArthur does not constitute a finding that Ms. Barnett suffered no Fourth Amendment violation as a result of the detention.

Id. at 1301. The Eleventh Circuit ***accepted*** *Heller*'s requirement for proof of a constitutional violation in *Monell* claims but realized the jury's verdict for the Deputy (for false arrest) didn't negate a constitutional violation when other Jail employees held Barnett per the Sheriff's policy. What the Sheriff was ***really*** arguing is that it was necessary to find an individual Deputy ***liable*** under Section 1983 to permit a *Monell* claim. But the Eleventh Circuit confirmed that "*Monell*

and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government." *Id*.

The Sheriff believes *Barnett* (by failing to require individual-deputy-liability as an element of *Monell*) contradicts *Heller* and "considers it profoundly remarkable" (Pet. 18 n.6) that the *Barnett* panel failed to cite *Heller* "despite its obvious import to the issue." *Id*. In that regard, it is worth noting that, when the Sheriff in *Barnett* (represented by the same counsel representing the current Sheriff) filed a 30-page Petition for Certiorari, *Heller* was not even cited ***once***. See Petition for Writ of Certiorari, *Lemma* v. *Barnett*, Case No. 20-595 (filed Oct. 30, 2020). Indeed, none of the ***four*** questions presented even concerned individual-deputy-liability; they were ***all*** directed to Fourth Amendment issues. See *id*. at i. But that's not profoundly remarkable. The *Barnett* Sheriff understood what the current Sheriff feigns ignorance of—all courts agree a constitutional violation ***is*** required for *Monell* liability, and all courts agree that full-blown individual-deputy-liability is ***not*** required. There is no confusion, as shown next.

D. There Is No Confusion Among The Circuits; Only The Sheriff Is Confused

1. The Petition (at 20-33) contains a meandering caselaw discussion, in which the Sheriff intends to show a split or confusion among the circuits (and occasionally district courts or state-supreme-court

concurring opinions) on *Heller*. But there is no split or confusion. *Heller* requires a constitutional violation for *Monell* liability. The Sheriff has not identified ***any*** case in which *Monell* liability was imposed absent a constitutional violation.

2. *Monell* cases arise in a wide variety of fact patterns. Factual differences frequently dictate different results. The Sheriff's analysis consists of examining the results of various cases and concluding from differing results that courts must be "confused," but doing so without examining ***why*** courts reached their results. This approach prevents the Sheriff from identifying any kind of meaningful split, because he compares cases reaching different results even within the same circuit.

Most significantly, the Sheriff takes that approach with the Eleventh Circuit. He attempts to convey the impression that the ***unpublished*** decision below announces a dangerous rule of law there, but he admits the Eleventh Circuit articulated the governing rule ***correctly*** in a ***published*** decision issued ***after*** this one. See Pet. 32 ("[E]ven the circuit courts that have recognized some sort of limitation to *Heller* have themselves in other cases properly applied *Heller* to dispense with a *Monell* claim, with little or no discussion of the nuance articulated in *Barnett* or the cases cited therein. This includes even the Eleventh Circuit.") (citing *Baker* v. *City of Madison*, 67 F.4th 1268, 1282 (11th

Cir. 2023)).[6] In other words, the Sheriff concedes the Eleventh Circuit is correctly articulating the law in its recent ***published*** decisions, so the most he can be complaining about is "misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The same analysis governs discussions of other courts. Thus, the Sheriff claims the Fourth Circuit is one of the "good" courts articulating the law in his preferred manner: "The Fourth Circuit adheres to *Heller* without reservation." Pet. 29 n.9 (citing *Waybright* v. *Frederick County*, 528 F.3d 199, 203 (4th Cir. 2008)). But he ultimately concedes the Fourth Circuit is "good" only because it has not yet addressed a fact pattern that would logically give rise to *Monell* liability without individual-deputy-violation. See Pet. 21 ("Other circuits, such as the Fourth, Fifth, and Sixth Circuits, appear not to have confronted the limitation identified by their sister courts.").[7] That analysis doesn't show

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[6] Sheriff's amicus agrees the Eleventh Circuit is currently correctly articulating the law: "Even the Eleventh Circuit has recently acknowledged that *Monell* liability requires an underlying constitutional violation by the deputy." NSA Amicus Br. 9 (citing *Jacobs* v. *Ford*, 2022 U.S. App. LEXIS 10265 (11th Cir. Apr. 15, 2022)).

[7] Amicus follows suit. For example, it cites the Sixth Circuit as requiring a constitutional violation (see NSA Amicus Br. 10 (citing *Grabow* v. *County of Macomb*, 580 Fed. Appx. 300 (6th Cir. 2014)), then cites the Sixth Circuit as its lead example of circuits that ***don't*** require a constitutional violation. See NSA Amicus Br. 19 (citing *North* v. *Cuyahoga County*, 754 Fed. Appx. 380 (6th Cir. 2018)).

confusion among the courts; it merely reflects a confused discussion of the law.

3. The Sheriff focuses his fire at cases permitting *Monell* liability where the constitutional violation isn't attributable to a single, identifiable Deputy. In certain types of *Monell* cases, the constitutional violation results rather abstractly from the challenged policy and is difficult to tie to the actions of one or more individual Deputies. *Barnett* is an example. The constitutional violation arose from the municipal policy requiring everyone arrested for DUI to be held for a minimum of eight hours, even if it became clear that an arrestee was innocent. Any deputies on duty at the time would have refused to release the innocent arrestee, but none had any individual discretion to do so; the problem was the policy itself.

The Sheriff implies such cases are in derogation of *Heller*. See, *e.g.*, Pet. 24 ("The common thread in this line of cases, and other cases cited below, is the conclusion by some circuit courts that *Heller* does not apply where the *Monell* claim is not tied to the acts of specific employees.").[8] But that's wrong. *Heller* requires a

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[8] One example is *Garcia* v. *Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985) ("Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights."). The Sheriff's suggestion that, in its subsequent opinion in *Crowson* v. *Washington County*, 983 F.3d 1166 (10th Cir. 2020), "the Tenth Circuit has since then questioned its own opinion in *Garcia* and has struggled with how to apply *Heller*" (Pet. 22), is incorrect. *Crowson* confirmed that "[t]he subsequent

constitutional violation. In *Heller*, the challenged policy was authorizing excessive force; such a policy necessarily causes harm only if implemented through an individual Deputy's use of excessive force. ***In that factual context***, determining the deputy failed to use excessive force absolved the municipality under *Monell*. But nothing in *Heller* precludes a different kind of constitutional violation, ***one imposed by the policy itself*** and not directly implemented through an individual Deputy. Much of the Sheriff's analysis founders on the mistaken assumption that a constitutional violation not tied to an individual Deputy somehow fails to "count" as a constitutional violation. See Pet. 21-24.[9]

Ultimately, although the Sheriff criticizes cases permitting *Monell* liability where the constitutional violation traces to the policy rather than individual Deputies' actions, he's unable to find any court agreeing with his proposed rule of law on similar facts. He therefore limits his argument to insisting that the present case is one requiring a violation by an individual

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development of our municipal liability caselaw confirms that *Heller* did not undermine *Garcia*." 983 F.3d at 1189.

[9] Amicus replicates this error, as seen in the internal contradiction inherent in the section heading for Argument IV, which provides "MANY CIRCUITS * * * DO NOT REQUIRE AN UNDERLYING CONSTITUTIONAL VIOLATION" but usually only "WHERE PLAINTIFF SUFFERED A CONSTITUTIONAL VIOLATION THAT CANNOT BE ATTRIBUTED TO ANY INDIVIDUAL DEFENDANT'S UNCONSTITUTIONAL CONDUCT." NSA Amicus Br. 19. The complaint appears to be that some courts don't require a constitutional violation when there is a constitutional violation of a particular type. The section heading rebuts the entire argument.

Deputy. See, *e.g.*, Pet. 23 ("In the instant case, as in *Heller*, the plaintiff ***explicitly*** pinned her *Monell* claim against the Sheriff to the claim that Gaddis and/or Bauman acted unconstitutionally."). This case actually has components of ***both*** individual-deputy constitutional violation ***and*** policy constitutional violation to it, but at most that would require only proof that an individual Deputy violated Fran's constitutional rights. The Sheriff admits this. See Pet. 24 ("the *Monell* claim in this case necessarily depended ***on a constitutional violation by one or both of the deputies, Gaddis or Bauman***") (emphasis added). As demonstrated above, the jury expressly found just that. See *supra*, Section I.A.

The Sheriff has failed to identify ***any*** case in which the absence of individual-deputy-liability (as opposed to the absence of a constitutional violation itself) precludes *Monell* liability. The courts are perfectly aligned on this point, and no case with similar facts conflicts with the decision below.

4. The closest the Sheriff comes to finding disagreement among the circuits involves not *Heller*, but this Court's subsequent decision in *Collins* v. *City of Harker Heights*, 503 U.S. 115 (1992), which sets forth standards governing substantive due process claims. The Sheriff's extended discussion (Pet. 26-30) centers on *Fagan* v. *City of Vineland*, 22 F.3d 1283 (3d Cir. 1994). *Fagan* created a very limited doctrine allowing for policy-related constitutional violations in substantive due process cases involving police chases. See *id*. at 1292 ("[I]n a substantive due process case arising

out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution.").

Some courts have been critical of *Fagan*. In *Evans* v. *Avery*, 100 F.3d 1033, 1039-40 (1st Cir. 1996), the First Circuit declined to follow *Fagan* because *Fagan* misread *Collins*. The Seventh Circuit did too in *Thompson* v. *Boggs*, 33 F.3d 847, 859 n.11 (7th Cir. 1994). But it's not clear why that matters here. The Third Circuit has expressly limited *Fagan* to the substantive due process context because of differences in standards of proof (specifically the "shocks the conscience" test) applied there. See *Grazier* v. *City of Philadelphia*, 328 F.3d 120, 124 & n.5 (3d Cir. 2003). So to the extent *Fagan* has any continuing viability, it is in a niche area of the law involving substantive due process in police chase cases having nothing whatever to do with this case.

There is no disagreement among the courts on the issues presented here. *Heller* always requires proof of a constitutional violation for *Monell* liability. In some cases (like *Barnett*), proof of the constitutional violation comes at the policy level rather than the individual-deputy level, but it remains required. And no case has ***ever*** held that individual-deputy Section 1983 ***liability*** (as opposed to the constitutional violation itself) is required for *Monell*. The Sheriff's discussion reveals confusion only in its own analysis. The jury found a constitutional violation by the Deputies. The Sheriff has been unable to identify ***any*** court that would preclude *Monell* liability on these facts.

II. NUMEROUS PROCEDURAL ISSUES BAR EFFECTIVE REVIEW

A. The Sheriff Claims His Questions Raise Clean Legal Issues When Actually Review Is For Abuse Of Discretion Under A Rule Never Used In The Manner Sought Here

The Sheriff pretends this Court would be reviewing a legal question or comparing the Eleventh Circuit's decision to those of other courts analyzing *Monell*. In Part I, for simplicity's sake, we indulged that pretense to show why his legal analysis was mistaken. But that pretense remains false; this case cannot be evaluated either as a legal question or meaningfully compared to other circuit decisions. Unlike every other case cited, the Sheriff raised his Questions Presented as part of a post-judgment Motion to Alter Judgment under Rule 59(e). The supposed legal issues—individual-deputy-liability juxtaposed against *Monell* liability—is only one aspect of a web of discretion evaluated by the District Court and affirmed by the Eleventh Circuit. The Circuit noted simply that it reviews "the denial of a Rule 59 motion for abuse of discretion." App. 14 (citing *Arthur* v. *King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). Fatally to the current Petition, the Circuit explained "Rule 59(e) allows courts to alter judgments only where there is newly discovered evidence or manifest errors of law or fact." *Id.* (internal quotes omitted). After reviewing the entire record, the Circuit held "the district court did not abuse its discretion by denying

the Sheriff's motion to amend the judgment under Rule 59(e)." App. 20.

The Sheriff focuses on a single legal aspect of the Opinion, but the Rule 59 process—and appellate review thereof—weighs multiple factors and the jurors' overall ability to assess the facts, hallmarks of discretionary decision-making. It is ***that*** process, and not any of the Sheriff's supposed Questions Presented, that the Eleventh Circuit reviewed for abuse of discretion and that would come before this Court in the Petition. A full reckoning of the discretionary factors transcends this section, but they were discussed at the charge conference, including the Sheriff's concern about an inconsistent verdict, how the case was pled, the proofs to date, jurors' comprehension, and consistency among the model instructions, instructions as given, and verdict form. See App. 62-87. These factors—and in particular inconsistent verdict and vicarious liability—were then argued by the Sheriff in his Rule 59(e) Motion. ECF 242 at 11. Rogers's Opposition rebutted each, and the District Court adopted Rogers's reasoning. App. 27. Denial was the product of multiple considerations by a jurist who presided over the pleadings, proofs, charge conference, charge and deliberations, and weighed them in 70-plus pages of Rule 59(e) briefing.

Eleventh Circuit review was even more restrictive. Not only was the decision below reviewed only for abuse of discretion requiring "manifest errors of law," but Rule 59(e) "is an extraordinary remedy which should be used sparingly." Wright & Miller, FP&P

§ 2810.1 (2021) (collecting authority). "[B]ecause of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." *Id*. The Sheriff has cited nothing—***not even one example***—suggesting that Rule 59 could "delete" him from the judgment in the fashion demanded below. Successful invocation shows Rule 59(e) requires vastly more than an erroneously decided liability issue. It can correct ministerial errors like adding overlooked prejudgment interest (*Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989)); adjusting for an intervening change in controlling law (*Fund For Animals* v. *Williams*, 311 F. Supp. 2d 1 (D.D.C. 2004), aff'd, 428 F.3d 1059 (D.C. Cir. 2005)); clarifying that an abstention ruling permitted refiling in state court (*Belair* v. *Lombardi*, 151 F.R.D. 698 (M.D. Fla. 1993)); amending mathematically-miscalculated damages (*Lubecki* v. *Omega Logging*, 674 F. Supp. 501 (W.D. Pa. 1987)); or "amending" the plainly mistaken dismissal of ***all*** claims instead of just one. *GO Computer* v. *Microsoft*, 508 F.3d 170 (4th Cir. 2007).

B. The Sheriff's Questions Presented Sound In Verdict Inconsistency And Were Waived By His Conduct Below

The Sheriff's use of Rule 59 is independently defaulted because he pursues a verdict-inconsistency objection raisable only with the jury still empaneled. Plaintiff pointed this out to both the District and Circuit Courts, and the Opinion discusses it without deciding the issue "because *Barnett* is dispositive." App. 19-20 n.10. The Sheriff wants this Court to disagree

with the Eleventh Circuit's *Barnett* analysis, but that would only trigger the undecided waiver issue; the Sheriff would still lose, barring effective relief.

The Sheriff has never bothered to address this point. That is, refutation of the waiver has been itself waived below. Rogers developed the factual record proving the Sheriff's default starting in the District Court and culminating in the Eleventh Circuit's assessment above; the facts and law are beyond dispute. At the charge conference, the Sheriff objected to the verdict-form because "having that question there presents the opportunity or the possibility for an inconsistent verdict." App. 74. In his Rule 59 Motion, the Sheriff also argued that "without requiring an affirmative answer to all three questions as to Gaddis and Bauman, including causation, there was risk of an inconsistent verdict." ECF 242 at 11 (citing charge conference transcript). Rogers responded by pointing out that inconsistency complaints were timely only after verdict but while the jury was empaneled (ECF 273 at 5-6), and the Court agreed with all Rogers's points. App. 27. The Eleventh Circuit determined the issue was "likely waived," but reached the merits anyway. App. 19-20 n.10. The requirement to raise inconsistency issues while juries are empaneled is rigorously enforced in the Eleventh Circuit and every circuit to consider the issue. See 9B Fed. Prac. & Proc. Civ. § 2504.1 (3d ed.) & n.16 & 17 (collecting authorities).

C. Any Error Was Embedded In The Sheriff's Own Jury Instructions And Verdict Form, Further Precluding Review

Rogers in no way concedes error. But, assuming *arguendo* the Petition could identify any error, such "error" would necessarily be invited. The conceit underlying the entire Petition is that Gaddis and/or Bauman had to face Section 1983 liability for Fran's death in order for the Sheriff to face liability under *Monell*. That, of course, is utterly false and was debunked by the Eleventh Circuit's Opinion. But even if the Sheriff were right, any error would be invited because the Sheriff's ***own proposed jury instructions and verdict form*** recognized precisely the distinction used at trial. The need for a constitutional violation, understood separately from individual-deputy Section 1983 ***liability***, was consistent with ***both*** parties' proposed instructions.

Proffering a jury instruction or verdict form and later assailing it as error is deemed invited error, precluding relief. *U.S.* v. *Nelson*, 712 F.3d 498, 511 (11th Cir. 2013) (appellant "cannot now complain about the circularity of an instruction that he, through counsel, requested and approved"); *Ford* v. *Garcia*, 289 F.3d 1283, 1294 (11th Cir. 2002) ("the instruction eventually given to the jury reflected changes that Appellants themselves proposed"). This, again, is a universally recognized aspect of federal law. 9C Fed. Prac. & Proc. Civ. § 2558 (3d ed.).

The Sheriff's proposed *Monell* instruction borrowed from Section 5.10 of the Eleventh Circuit Pattern Jury Instructions. The only pertinent sentence read: "You should consider whether Sheriff Johnson, in his official capacity, is liable only if you find that Deputy Gaddis or Deputy Bauman ***violated Mr. Escaño-Reyes's constitutional rights***." ECF 190-1 at 31 (emphasis added). That proposal made no mention of the Sheriff's current argument, that individual-deputy-liability was required, and it is functionally identical to the District Court's instruction as given. See ECF 233 at 10.

The same is true with any alleged issue with the verdict form. The Sheriff's ***own proposed verdict form*** Question 6 read: "Did Deputy John Gaddis ***intentionally commit a known violation of Mr. Jose Francisco Escaño-Reyes constitutional rights*** by being deliberately indifferent to a strong likelihood of him committing suicide?" ECF 190-3 at 4 (emphasis added); see also *id*. (Question 8 contains identical language for Bauman). Only ***after*** the jury had determined whether Gaddis violated Fran's constitutional rights did the follow-on question address causation, asking "Did Deputy John Gaddis' conduct cause Jose Francisco Escaño-Reyes' death?" *Id*., Question 7. Question 9 asked the same question about Bauman. See *id*. at 5. In sum, both the Sheriff's proposed instructions ***and*** verdict form distinguished between completed individual-deputy liability (requiring causation) and a constitutional violation. The parties, and both Courts, agreed: the Deputies could violate Fran's

constitutional rights without causing his death. The two determinations have always been legally distinct—even in the Sheriff's own submissions to the Court. The Sheriff has therefore clearly invited any alleged error based on the notion that a constitutional violation (or *Monell* liability) requires something ***more*** than deliberate indifference itself (found by the jury based on its answers to Questions 1, 2, 4, 5, and 7 of the actual verdict form). In the district court, Rogers opposed the Sheriff's Rule 59 Motion on the basis of invited error, and the District Court adopted all of Rogers's positions. App. 27.

The Sheriff thus invited any supposed "errors." That the Sheriff preserved ***an*** objection (*i.e.*, asking that the jury say yes to Questions 3 and/or 6 before completing Question 7) doesn't help. That is, a litigant isn't free to simultaneously proffer a set of legal conclusions but preserve objections to the adoption of portions of their ***own*** instructions. See, *e.g.*, Fed. R. Civ. P. 51; Wright & Miller, FP&P § 2554 (2021) ("A party may not state one ground when objecting to an instruction to the jury under Rule 51 and later attempt to rely on a different ground for the objection on appeal.") (citing copious authority).

D. The Sheriff Has Expressly Disavowed The Only Available Remedy

The only remedy sought by the Sheriff is legally barred. The Eleventh Circuit found no error and thus had no reason to reach this issue, but it effectively bars

review now. Claiming erroneous verdict-form design submitted to a properly instructed jury, the Sheriff seeks deletion from the judgment, effectively equivalent to judgment as a matter of law. But the Sheriff has never cited any case anywhere granting such relief. To the contrary, erroneous jury instructions/verdict-form-design results in a new trial. *Goodgame* v. *Am. Cast Iron*, 75 F.3d 1516, 1521 (11th Cir. 1996); *Heller Int'l Corp.* v. *Sharp*, 974 F.2d 850, 860 (7th Cir. 1992) ("[J]udgment n.o.v. is not the correct remedy for erroneous jury instructions. The proper remedy is a new trial."); *Kendrick* v. *Illinois Central Gulf Railroad Co.*, 669 F.2d 341, 343 (5th Cir. 1982) ("A judgment n.o.v. is not the proper cure for an erroneous instruction. A new trial is the appropriate therapy.") (citing 11 C. Wright & A. Miller, Federal Practice and Procedure § 2805 (1973)); *Martin* v. *Cavalier Hotel Corp.*, 48 F.3d 1343 & n.2 (4th Cir. 1995).

The Sheriff made ***very*** clear in his Rule 59(e) Motion that "[t]he defense does not seek a new trial," ECF 242 at 24, and that "[t]he Court ***cannot*** opt for a new trial[.]" *Id*. at 23 (emphasis added). This Court can't grant him the remedy he seeks, effectively precluding review.

III. OVERWHELMING EVIDENCE SUPPORTS THE *MONELL* VERDICT

The Sheriff's final Question Presented concerns the proof his suicide-monitoring practices were unconstitutional. Although the Sheriff tries to make this

sound like an abstract legal question, the only issue he preserved is the sufficiency of the evidence under Rule 50.[10] The Sheriff doesn't provide any reason why this Court should be interested in certiorari review of garden-variety sufficiency. And although the Sheriff doesn't actually cite the evidence against him, it was overwhelming, making this a particularly poor vehicle to review routine sufficiency standards under Rule 50.

1. As with his first three attempts, the Sheriff's fourth Question Presented relies on a demonstrably false premise. The section heading for the Sheriff's second Reason for Granting the Petition asks whether "the mere fact of Reyes' successful suicide is insufficient evidence of deliberate indifference on which to ground *Monell* liability." Pet. 34. In making his argument, the Sheriff represents to the Court that "[t]he Eleventh Circuit in this case [] relied simply on the fact that Reyes did in fact commit suicide to conclude that these customs evolved with the necessary mens rea by the Sheriff to show that the customs were the unconstitutional cause of the suicide." *Id*. at 36.

That is a breathtaking misrepresentation. The Sheriff doesn't actually cite to any supporting portion

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[10] There is no question about the governing rule. The Sheriff admits "[t]he circuit courts that have touched on this issue all appear to be in accord that policies or customs which create an opportunity for a constitutional violation cannot sustain a *Monell* verdict if those policies and customs did not cause the underlying violation of plaintiff's rights," Pet. 34, and that the Eleventh Circuit correctly recites the law. See *id*. at 34-35 (citing, *e.g.*, *Gill* v. *Judd*, 941 F.3d 504, 526 n.6 (11th Cir. 2019)). The instructions contained such a requirement. See ECF 233 at 10.

of the Opinion, and there is none. Recourse to the actual Opinion reveals the things on which the Eleventh Circuit actually relied, like "contrary to the Jail's written procedures, its custom allowed deputies to monitor Escano-Reyes by performing a solely visual check—in this case, merely seeing flashes of movement—from the booking desk rather than confirming he was safe" (App. 15), and "the evidence in this case established far more than the mere possibility that Escano-Reyes would inflict self-harm" (*id*.), and "the Jail's own representative conceded at trial that the practice of housing suicidal inmates in a cell with a partially concealed interior both impeded adequate monitoring and posed an obvious risk" (App. 16), and "evidence at trial showed that the Jail's policies * * * created an obvious risk of suicide." *Id*. This evidence doesn't disappear simply because the Sheriff ignores it.

Because of the difficulty in proving subjective knowledge, "a factfinder may conclude a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer* v. *Brennan*, 511 U.S. 825, 842 (1994). That is why the admission by the Sheriff's designated representative that his policies were obviously risky is alone sufficient to deny his Rule 50 motion, and the Sheriff has never addressed that concession.[11]

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[11] Amicus also concedes the sufficiency question in its discussion of how this Court treats obvious risk: "[t]hat a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so." NSA Amicus Br. 17 (quoting *Farmer*, 511 U.S. at 844). Prison officials may themselves "prove that they were unaware even of an obvious risk to inmate risk or safety."

There is much more supporting the verdict that the Sheriff has never addressed, summarized *supra* (at 1-8): the Sheriff's understanding through his written policy that suicidal inmates had a serious medical need requiring direct continuous observation, his willful disregard of those written policies, the undisputed expert testimony that the Sheriff's adopted practices were unconstitutional and showed inadequate regard for human life, the fact that Fran's suicide smock was so obviously dangerous that anyone looking at it would have seen the risk, and the ACR's "cut down" tool kept precisely to cut through smocks if inmates were hanging. Proof of the Sheriff's actual knowledge of the risk (and obviousness) was overwhelming.

2. The Sheriff passingly makes a second sufficiency argument on causation. See Pet. 37 ("The Sheriff has been held liable under *Monell* because Gaddis and Bauman to a large degree did ***not*** follow the Sheriff's customs for close watch.") (emphasis original). That ship has sailed, however. The Sheriff failed to preserve such a causation argument in his Rule 50(a) motion. See Day 4 Tr. 152-63. The trial court failed to rule on it at the Rule 50(a) stage. See *id*. at 163-64, 169. Rogers opposed the Sheriff's Rule 50(b) motion by arguing the causation point was waived, and the District

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Id. That is true, of course, but no one ever argued that the jury was ***forced*** to find actual knowledge from the obviousness of the risk. The law is clear, however, that they ***may*** do so, and they ***did*** here, ending the sufficiency inquiry.

Court agreed, adopting Rogers's rationale. App. 27. The Eleventh Circuit appears to have agreed also, failing to address the argument. App. 1-20.

Regardless, there was extensive causation evidence. Both Deputies testified they complied with the Jail's practices during the critical hour-long period when Fran was trying to hang himself. Most importantly, the jury saw a videotape of Fran trying to hang himself for over an hour under circumstances that, had the Jail required the Deputies to walk fifteen feet and look into the cell to see whether Fran was safe at any point during that hour, his death would certainly have been avoided. See *supra*, 1-8.[12]

[12] Below, the Sheriff based his causation argument on construing factual disputes ***in his favor*** but ***against the Deputies***, arguing for example the Deputies didn't comply with Jail practice during the critical time period. Rule 50, however, requires those disputes to be resolved in favor of the jury's verdict and against the Sheriff.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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