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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a reasonable jury could conclude that petitioner was deliberately indifferent to the risk of sexual assault of pre-trial detainees given evidence that included prior sexual misconduct by jail guards involving female detainees—prior misconduct of which petitioner's policymaking official was aware—as well as uncontroverted expert testimony?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 654 F.3d 324. The opinion of the district court (Pet. App. 48a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2011 (Pet. App. 1a), and the petition for a writ of certiorari was filed on November 16, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner erroneously asserts that this case involves the question whether a single incident may suffice to show deliberate indifference of a municipal policymaker for purposes of liability under 42 U.S.C. § 1983. In fact, the court of appeals was clear that it did *not* uphold the jury's verdict on that basis. Rather, applying the deferential standard of review applicable to a jury's findings, the court of appeals relied on a broad range of evidence demonstrating deliberate indifference, which included multiple prior incidents of sexual abuse of inmates by guards as well as unrebutted expert testimony.

The court of appeals' factbound application of this Court's precedents does not conflict with any decision of this Court or another lower court. The disagreement between the court of appeals majority and dissent rests principally on their divergent views of the factual record in this case. Moreover, any continuing importance that the court of appeals' ruling might possibly have had will be eliminated by the

imminent issuance of regulations by the U.S. Department of Justice under the Prison Rape Elimination Act of 2003, which will establish standards, applicable to federal and state prisons, designed to prevent predatory acts against female detainees. These new rules—and not the court of appeals' ruling—will establish the standard of care that prison facilities must meet to avoid a finding of deliberate indifference to prison rape.

A. Legal Background

Congress in 2003 found that the United States was experiencing an "epidemic" of prison rape. 42 U.S.C. § 15601. It concluded that "[m]ost prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults." *Ibid.* Indeed, Congress determined that "[t]he high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution." *Ibid.*

To address this significant problem, Congress enacted the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601-15609). The federal statute includes among its purposes the "develop[ment] and implement[ation of] national standards for the detection, prevention, reduction, and punishment of prison rape," 42 U.S.C. § 15602(3), and the "protect[ion of] the Eighth Amendment rights of Federal, State, and local prisoners." 42 U.S.C. § 15602(7). It also is designed to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape." 42 U.S.C. § 15602(6).

1. The National Prison Rape Elimination Commission established by the Act released its report in

June 2009. *See* Nat'l Prison Rape Elimination Comm'n, Rep. (June 2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf.

The report found that"[p]rotecting prisoners from sexual abuse remains a challenge in correctional facilities across the country." *Id.* at 3. Significantly, inmates reported more incidents of abuse by staff than by other incarcerated persons. *Id.* at 4.

The report identifies supervision of guards during their interactions with inmates as "the core practice of any correctional agency" to "protect individuals from sexual abuse." *Id.* at 6. It calls for direct supervision of guards wherever possible, because "it is the most effective mode of supervision for preventing sexual abuse and other types of violence and disorder." *Ibid.* Additionally, the report directs correctional facilities to assess annually "the need for and feasibility of incorporating additional monitoring equipment," noting that "[t]echnologies are not replacements for skilled and committed security officers, but they can greatly improve what good officers are able to accomplish." *Ibid.*

Finding that "the potential for abuse is heightened" when inmates interact with prison staff of the opposite gender, the Commission found that "strict limits on cross-gender searches and the viewing of prisoners of the opposite gender who are nude or performing bodily functions are necessary because of the inherently personal nature of such encounters." *Id.* at 6-7.

2. The Act requires the Attorney General to promulgate "a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. § 15607(a)(1). State

facilities that fail to comply with these standards may face reduced eligibility for federal grants. 42 U.S.C. § 15607(c).

On February 3, 2011, the Department of Justice issued its proposed standards. Nat'l Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115). The proposal contains forty standards for adult prisons and jails, (*id*. at 6278-6285), including the following:

- Employment of "an upper-level, agency-wide PREA coordinator to develop, implement, and oversee agency efforts to comply with the PREA standards";
- "[A]dequate levels of staffing and, where applicable, video monitoring, to protect inmates";
- "[I]mplement[ation] of a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment"[1];
- "[A]ccess to forensic medical exams performed by qualified medical practitioners" for "all victims of sexual abuse";

[1] This standard would apply to prisons and "jail facilit[ies] whose rated capacity exceeds 500 inmates." 76 Fed. Reg. at 6278. Erie County Holding Center qualifies as such a facility, as it is capable of housing 680 inmates. See Jail Management Division, Erie County Sheriff's Office, http://www2.erie.gov/sheriff/index.php?q=jail-management-division (last accessed on Feb. 12, 2012).

- Provision of "a qualified staff member or a victim advocate * * * that provides services to sexual abuse victims";
- Mandatory training regarding "inmates' right to be free from sexual abuse" and "[h]ow to avoid inappropriate relationships with inmates";
- "[A]nnual refresher information to all employees to ensure [knowledge of] the agency's current sexual abuse policies and procedures";
- "[C]omprehensive education to inmates * * * regarding agency sexual abuse response policies and procedures," with annual refresher sessions;
- Provision of "multiple internal ways for inmates to privately report sexual abuse"; and
- Audits to ensure compliance.

At the time it issued the notice of proposed rulemaking, the Department of Justice anticipated that it would promulgate the final rule by the end of 2011. See Press Release, U.S. Dep't of Justice, Justice Department Releases Proposed Rule in Accordance with the Prison Rape Elimination Act (Jan. 24, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-ag-098.html.

B. The Rape Of Respondent

In December 2002, respondent was a pre-trial detainee at the Erie County Holding Center ("ECHC") in Buffalo, New York. Pet. App. 4a. On the evening of December 17, 2002, Deputy Sheriff Marchon Hamilton removed from their cells several female detainees who were housed near respondent and escorted them to the jail's recreation center. *Ib-*

id. Although respondent wished to follow the others, Hamilton ordered her alone to remain behind. *Ibid.*; Tr. 556-557.[2] Hamilton was the only guard working in respondent's cellblock at that time. Pet. App. 4a; Tr. 558.

When Hamilton returned, "he grabbed [respondent], put his hands over her nose and mouth, forced her into the deputies' private bathroom, and raped her." Pet. App. 4a.

Immediately following the rape, Hamilton offered respondent some cookies, which she accepted because she "was afraid not to * * * [b]ecause he thought I was going to tell." Tr. 560. Hamilton later entered the women's shower area where respondent was preparing to bathe and instructed her to "make sure [she] washed [her]self out good." Tr. 561. As she left the shower, Hamilton handed her a "twenty dollar bill folded up in a small square." Tr. 563.

Respondent, however, managed to preserve evidence of the rape on a plastic spoon—she believed that physical proof of the assault was essential in order to obtain an investigation by the prison authorities. Tr. 563. Following a shift change, respondent reported the rape to a female deputy, "Miss Sue," the following morning. Tr. 588.

C. The Evidence Of Petitioner's Deliberate Indifference To The Risk Of Sexual Assaults Against Female Detainees

Petitioner did not dispute at trial that Hamilton raped respondent.[3] The trial evidence focused in-

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[2] "Tr." refers to the trial transcript.

[3] Hamilton was prosecuted and pleaded guilty to rape. Pet. App. 4a.

stead on whether the rape of respondent was the consequence of a policy by petitioner of deliberate indifference to the risk of sexual abuse by jail guards against female detainees. This evidence included petitioner's formal rules concerning sexual relations between jail guards and prisoners, petitioner's inaction in the face of prior credible allegations of sexual abuse, the specific indifference of petitioner's policymaker, and unrebutted expert testimony that petitioner's failure to institute appropriate safeguards to prevent sexual abuse constituted a grossly inadequate response given the history of such incidents.

1. Prohibitions Against Sexual Assault Of Detainees

At all relevant times New York law provided that prisoners are "incapable of consent" to any sexual conduct with a jail facility's employees. N.Y. Penal Law § 130.05(3)(e)-(f). Accordingly, under New York law, a jail guard who engaged in *any* sexual conduct with a detainee may be charged with statutory second-degree sexual abuse. § 130.60. A jail guard who engaged in sexual intercourse with a detainee may be charged with statutory third-degree rape. § 130.25. The jury was advised of these laws categorically prohibiting sexual contact between jail guards and female detainees. Tr. 381, 534, 931-932, 1013.

As a matter of formal institutional policy, guards at ECHC were prohibited from engaging in any "intimate relationship with an inmate" or "having any physical contact with an inmate unless authorized by law in the case of justifiable use of force or preventing death or serious injury." Pet. App. 5a (internal quotation marks omitted).

ECHC policy neither prohibited nor imposed significant restrictions designed to prevent a male guard from being in the unaccompanied presence of a female detainee. The policy required that "at the start of each shift, a deputy of one sex [would] announce his or her presence on a unit housing prisoners of another sex." *Ibid.* The warning was neither mandatory nor repeated during periodic rounds when "prisoners undressing, showering, or using the toilets might be viewed naked" by opposite gender guards. *Ibid.*

No county policy prevented male jail guards from being alone with female detainees or viewing them in states of undress. *Ibid.* Moreover, ECHC did not employ any electronic or other monitoring devices to supervise the interactions between Hamilton and respondent. *Ibid.* And supervisors were not required to engage in mandatory periodic, documented random checks of male guards assigned to oversee female inmates.

2. Prior Incidents Of Sexual Abuse

In 1999, Elizabeth Allen, a pre-trial detainee in the very same cellblock in which respondent later resided, initially claimed that a male guard, Deputy Gary Morgan, had engaged her in sexual intercourse. Pet. App. 7a. Later, Allen amended her account to allege sexual conduct "just short of intercourse" with Morgan as well as multiple other incidents involving Morgan and other guards. *Ibid.*

Allen reported that "every time [Morgan] c[a]me on the gallery" he asked her to perform sexual acts in exchange for commissary items. Ct. App. J.A. A-137 (Statement of Elizabeth Letisa Allen). Others on the cell block were aware of these activities and would

yell out "[Y]o, Elizabeth [Allen], Gary [Morgan] workin'" when he arrived on shift. *Id.* at A-132. Allen's complaint described two occasions when she masturbated or sexually touched Morgan while he fondled her breasts—once in an area near the bathroom where respondent was assaulted and again in a space between cells. *Id.* at A-133, A-136.[4] Allen further reported that other male deputies observed Allen and Morgan spanking each other in a recreation area but allowed the activity to continue and did not report the incident; "they don't wanna have nottin' to do wit it." *Id.* at A-137.

Allen alleged that she had been sexually touched by at least one other deputy at the ECHC. *Id.* at A-127, A-138. Moreover, she stated that several male deputies would regularly come to watch her strip and fondle herself in exchange for cigarettes and other items. *Id.* at A-139, A-141. She offered to identify the officers involved in these other incidents from photographs, but petitioner's investigators did not follow up on these allegations. *Id.* at A-143; see also Ct. App. J.A. A-118-A-121 (Erie County Sheriff's Office, Professional Standards Division, Case Report #99-09) (no interviews of the other deputies whom Allen offered to identify).

When questioned about Allen's complaint, Morgan "initially falsely stated that he had allowed Allen out of her cell * * * in violation of her 'keep-lock' status, simply to allow her to retrieve cleaning equipment, and that no sexual activity occurred at that

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[4] Allen intimated that Morgan had engaged in sexual activity with another inmate: "he had let me out. First, he had let another inmate out. And, you, know that, but dat was between them, so. We gonna just leave that alone." Ct. App. J.A. A-130.

time." Pet. App. 7a-8a. However, Morgan later admitted that Allen had exposed herself to him—behavior in which she had a history of engaging—and confessed that he "may" have touched Allen's breasts "but insisted that any such contact was unintentional and not sexual." *Ibid*. He further admitted that he once "patted her on the back and he may have been a little lower * * * but it was never sexual, just kidding around." Ct. App. J.A. A-120.

The report of the internal affairs investigation of the Allen allegations "was skeptical of Morgan's denial and found 'likely . . . sexual contact between the guard and Allen.'" Pet. App. 8a. The report concluded that Morgan had clearly violated ECHC policy by allowing Allen out of her cell, failing to report exhibitionist behavior, and initially lying to investigators. It recommended a thirty-day suspension. *Ibid.*

The relevant policymaking official at the time of the abuse of Elizabeth Allen in 1999 was Sheriff Patrick Gallivan, who remained in that role at the time of the rape of respondent in 2002.

Gallivan, who received the report of the internal affairs investigation recommending a thirty-day suspension, required Morgan to forfeit only three days of compensatory time. *Ibid*. No other ECHC employees were investigated or reprimanded for improper sexual conduct. See Ct. App. J.A. A-121.[5]

Gallivan testified at trial that, following the investigation of the abuse of Elizabeth Allen, Superin-

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[5] On direct examination, Gallivan frequently answered with variations of "I don't recall all the specifics of this unsubstantiated allegation." Tr. 366, 367. See generally Pet. App. 6a n.3.

tendent H. McCarthy Gipson issued a one-page memorandum reminding ECHC personnel of the facility's "no-contact" policy. Pet. App. 8a-10a. The Gipson Memorandum advised that sexual conduct with detainees was "STRICTLY PROHIBITED," but only "encourage[d]" and did *not* require facility employees to report misconduct, even criminal acts, that violated the policy, and noted that "wrongful conduct could be an embarrassment to the entire department." Pet. App. 10a.[6]

Gallivan testified that this memorandum was issued not only in response to Allen's complaint but also "to prevent what happened in other facilities from happening at the holding center." Tr. 470. When asked for clarification, Gallivan explained that he was referring to "highly publicized events" at other correctional institutions in New York, including Orleans County and Onondaga County correctional facilities, which had come to his attention. Tr. 381-384.

3. The Unrebutted Expert Testimony

Thomas Frame, who had served as a Pennsylvania prison warden for twenty-four years and was a recipient of numerous awards, including "Warden of the Year" and a Lifetime Achievement Award from the Warden's Association, was the only expert to testify at trial. Pet. App. 10a, 11a; Tr. 526-527.

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[6] The memorandum may be fairly read to have *discouraged* reporting of criminal sexual abuse, insofar as it stated: "Any Holding Center employee with information concerning inappropriate conduct, (*other than criminal*), on the part of another employee is encouraged to bring this to the attention of an appropriate supervisor." Pet. App. 10a.

Frame testified that it was "bad policy"—both for the deputy and the inmate—to allow one-on-one unmonitored interactions between male guards and female inmates, where the male guard "has authority over the inmate and . . . can direct that inmate to do almost anything he wants." Pet. App. 11a; Tr. 531-534.[7] Instead, "good and accepted practice" was to "pair a female officer with a male officer whenever direct interaction with a female prisoner is required." Pet. App. 11a.

Addressing the particular facts of the case, Frame opined that the Allen complaint, even considered alone, should have put the policymaker on notice of the need for a policy change—that a "red light" should have gone on for Erie County. Pet. App. 27a. Frame stated that the Gipson Memorandum reiterating ECHC's no-contact rule and the governing New York law was "an inadequate response to the Allen complaint because it failed to 'remove the situation.'" Pet. App. 11a. Petitioner did not produce any expert testimony to rebut the expert opinions of Thomas Frame. *Ibid*.

D. Proceedings Below

Respondent filed suit under 42 U.S.C. § 1983 seeking damages from petitioner and other defendants.[8]

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[7] The guard's inherent authority was exacerbated in this case by the physical disparities between Hamilton and respondent. He was six feet, two inches tall and weighed at least two hundred pounds. Respondent stood five feet, two inches tall and weighed approximately one hundred and twenty pounds. Tr. 558.

[8] Respondent also named as defendants the Erie County Sheriff's Department, Sheriff Gallivan in his official capacity, and

Consistent with this Court's ruling in *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), the district court instructed the jury that it could hold petitioner liable only if it concluded that the rape of respondent was the consequence of a policy, practice or custom of deliberate indifference to the constitutional rights of female detainees at ECHC. Pet. App. 11a.

Specifically, the jury was instructed that petitioner could not be held liable for constitutional violations by Hamilton merely because he was a County employee. *Ibid*. Rather, to establish municipal liability, respondent had to prove "by a preponderance of the evidence that the actions of Marchon Hamilton * * * [were] the result of an official policy, practice or custom." *Ibid*. Such a "policy" could be found if the evidence showed a failure on the part of petitioner and Gallivan as its policymaker to "supervise their subordinates amounting to deliberate indifference to the rights of those who came in contact with municipal employees." *Id*. at 12a.

The jury was cautioned that "mere negligence" was not sufficient to establish deliberate indifference, but that deliberate indifference required a showing that Gallivan "knew of and disregarded an excessive risk to the plaintiff's health and safety." *Ibid*. With respect to causation, the district court further instructed that respondent was required to prove that petitioner's actions or inaction were the "proximate cause" of her injury, *i.e.*, that they were "a substantial factor in bringing about [her] injury"

Marchon Hamilton. Pet. App. 3a. She won a default judgment against Hamilton for compensatory and punitive damages. *Id.* at 2a n.1. The claims against the Sheriff's Department and Gallivan were dismissed. *Id*. at 3a.

and that such injury "was a reasonably foreseeable consequence" of petitioner's policy. *Ibid.*

The court asked the jury to answer by special verdict three questions related to respondent's Section 1983 claim: (1) "Did Marchon Hamilton violate Vikki Cash's right to personal security guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution on December 17, 2002?"; (2) "Was the violation of her constitutional rights proximately caused by a custom, policy, or practice of the County of Erie?"; and (3) "Did Vikki Cash suffer injury as a result of the violation of her constitutional rights?" *Ibid.*

The jury answered all three questions in the affirmative and awarded respondent $500,000 in compensatory damages. *Id.* at 13a.

The district court subsequently overturned the jury's verdict by granting petitioner's motion for judgment as a matter of law under Fed. R. Civ. P. 50. Pet. App. 13a. The district court concluded in pertinent part that, because a policy of "allowing unsupervised male guards to be alone with female inmates * * * is not itself unconstitutional," respondent "had to prove more than that [this] policy caused the violation of her constitutional rights in order to prevail against the County." *Id.* at 54a. The court further concluded that "the record fails to support a reasonable conclusion that Sheriff Gallivan acted with deliberate indifference to plaintiff's safety." *Id.* at 58a.

The court of appeals reversed and reinstated the jury's verdict. The court noted at the outset the deference that is owed to a jury's verdict, emphasizing that "a court may set aside the verdict only if there

exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Id*. at 15a (internal quotation marks and citation omitted).

In light of these principles, the court found more than sufficient evidence to establish deliberate indifference.

First, the court noted that the risk of sexual assault was "acknowledged in New York state law," which "recognize[s] the moral certainty of guards confronting prisoners in sexually tempting circumstances with such a frequent risk of harm to prisoners as to require a complete prohibition of any sexual activity." *Id*. at 20a. It found the key issue to be "whether defendants could rely simply on guards' awareness of these criminal laws (and ECHC policies implementing them) to deter sexual exploitation of prisoners," or whether "defendants had reason to know that more was required" such as measures either "precluding or at least monitoring one-on-one contact between guards and prisoners." *Id*. at 20a-21a.

Second, "a reasonable jury could have concluded that the 1999 Allen complaint would have alerted Gallivan to the fact that mere proscriptions on sexual contact between guards and prisoners had proved an insufficient deterrent to sexual exploitation." *Id*. at 22a. The court determined:

> The Allen investigation report indicated, at best, that a female prisoner repeatedly had engaged in sexual exhibitionism before various guards, none of whom had reported the activity and some of whom may have paid for it with commissary

> items. At worst, the report indicated that male guards had engaged a female prisoner in a variety of more intimate sexual activities. Indeed, investigators indicated that, despite Allen's dubious credibility, they thought it likely that such prohibited sexual activity had in fact occurred in Allen's case.

Id. at 22a-23a. In addition, "a jury could have determined that Gallivan's conceded awareness of 'highly publicized incidents' at other New York correctional facilities should further have alerted him to the inadequacy of a mere proscriptive policy to deter guards' sexual misconduct." *Id.* at 23a.

The court rejected the argument that—unlike the rape of respondent—the Allen misconduct was not "assaultive" in nature. *Ibid.* Because prison inmates are legally incapable of consent, New York law "draws no distinction between assaultive and non-assaultive sexual activity in the prison context; it tolerates neither." *Id.* at 23a-24a. For that reason, "even if Gallivan had no knowledge of prior sexual *assaults*, it was hardly speculative for a jury to conclude that, at least by 1999, he knew or should have known that guards at ECHC and other local correctional facilities were engaging in proscribed sexual contact with prisoners." *Id.* at 24a (emphasis in original). Furthermore, the court noted that Gallivan's "continued reliance on penal proscriptions alone was insufficient to protect prisoners from the range of harms associated with such misconduct, of which rape is obviously the most serious example." *Ibid.*

The court recognized that, following the investigation of the Allen assaults, the prison superintendent issued the Gipson Memorandum reminding jail guards of the prohibition against sexual contacts

with inmates. But "the jury was entitled to rely on unrebutted expert testimony [from Thomas Frame] that the [Gipson Memorandum's] reiteration of existing law and ECHC policy was inadequate to protect female prisoners from sexual harm." *Id.* at 26a. In this respect, the court of appeals pointed to this Court's recent conclusion that "'[p]olicymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action — the 'deliberate indifference' — necessary to trigger municipal liability.'" *Ibid.* (quoting *Connick* v. *Thompson*, 131 S. Ct. 1350, 1360 (2011)).

Third, the court found that the jury was entitled to rely on Frame's expert testimony that it was then the "accepted prison practice for deterring sexual misconduct between male guards and female prisoners * * * to prohibit unmonitored one-on-one interactions." *Id.* at 26a. Frame further testified that "[t]o the extent ECHC policies permitted such [unmonitored] interactions, * * * the Allen complaint should have served as a 'red light' alerting defendants that 'this is not a good policy,' and that it was necessary to eliminate the conditions conducive to the prohibited activity." *Id.* at 26a-27a. Moreover, his testimony established that something more than the Gipson Memorandum was required to redress the risk of sexual abuse at the ECHC. *Id.* at 26a.

The court noted that it had "no occasion to consider the possibility of contrary views," because petitioner "offered no such evidence." *Id.* at 27a. In light of the deference owed by a court to a jury's verdict, "we must assume that the jury credited the opinion of Cash's expert and permissibly relied on it in decid-

ing that Gallivan's failure to do more than issue [a warning memorandum] demonstrated deliberate indifference to the risk of continued and possibly aggravated sexual misconduct posed by unmonitored one-on-one contact between male guards and female prisoners." *Id.* at 27a.

Fourth, the court concluded that the jury could draw an adverse inference from Gallivan's "token response" to the Allen misconduct and his evasive trial testimony. *Ibid.* Gallivan "could not even recall whether he ever reviewed the Allen investigation report—which was addressed to him—or only relied on a subordinate's account of its contents," and "rather than following investigators' recommendation to suspend the offending deputy for thirty days, the Sheriff's Department imposed only three days' suspension, and allowed the deputy to satisfy the punishment by giving up accrued compensatory time." *Id.* at 27a-28a.

Fifth, the "apparent failure to make any effort to identify, much less discipline, other guards involved in a broader pay-for-exhibitionism practice at ECHC could have supported a jury inference that defendants were not committed to providing the supervision and discipline necessary to enforce the no-contact policy and, thereby, to protect prisoners from sexual exploitation." *Id.* at 28a. This inference was supported by Gallivan's own trial testimony in which he "professed [an] inability on the stand to provide a 'yes' or 'no' answer to the question whether, as sheriff, he had 'duty to keep safe any inmates that were put into [his] care and custody.'" *Ibid.*

Stressing again the deferential standard of review applicable to the jury's determination, the court concluded that "[w]hen the evidence is viewed in the

light most favorable to [respondent] and all inferences are drawn in her favor, a reasonable jury was not *compelled* to find for defendants." *Ibid* (emphasis in original). "[T]he jury reasonably could have found that defendants knew, by virtue of New York state law, that female prisoners in their custody faced a risk of sexual abuse by male guards," that by 1999 they "knew that a policy simply proscribing all sexual contact between male guards and female prisoners was insufficient to deter such conduct," and that "mere reiteration of the proscriptive policy unaccompanied by any proactive steps to minimize the opportunity for exploitation, as for example by prohibiting unmonitored one-on-one interactions between guards and prisoners, demonstrated deliberate indifference to defendants' affirmative duty to protect prisoners from sexual exploitation." *Id.* at 29a.

Judge Jacobs dissented. In his view, the majority's "opinion can be read (and will be read) to impose strict liability on municipalities and policymakers for any incidents that arise in a prison." *Id.* at 42a. According to the dissent, "the Allen complaint was not ignored" but "provoked an investigation" that led to "ambiguous conclusions" and also that "resulted in discipline." *Ibid.* Judge Jacobs also faulted the majority for relying on "evidence that the sheriff was aware of incidents at *other* New York correctional facilities." *Id.* at 44a (emphasis in original).

He concluded that "[i]f the evidence in this case amounts to sufficient warning of a criminal sexual assault, then a supervisor or government is always on notice of the risk of sexual abuses in prisons, and will always be liable when, sooner or later, something bad happens." *Ibid.* He predicted that "the only

effective solution would be to have no guards of the opposite sex in women's or men's prisons." *Id.* at 46a.

ARGUMENT

The court of appeals' determination does not conflict with any decision of another court of appeals or with this Court's precedent. In holding that the evidence was sufficient to sustain the jury's finding of deliberate indifference, the lower court faithfully applied this Court's decisions regarding municipal liability under Section 1983 and appropriately deferred to the jury's determination based on the particular factual record in this case, particularly the evidence of petitioner's knowledge of and lack of effective response to past sexual abuse and misconduct by prison guards. Review by this Court is not warranted.

A. The Decision Below Constitutes A Fact-bound Application Of Settled Law That Will Have No Future Impact On Prison Operations.

Attempting to depict the court of appeals' fact-bound decision as a ruling with dramatic precedential consequences, petitioner asserts that the decision below imposes "single incident" liability. That is simply false—the court of appeals explained that its ruling rested on a variety of facts supporting the jury's finding of deliberate indifference. In the same vein, petitioner claims that the decision below will require same-sex supervision of all prison inmates, when the court did not impose any such requirement or standard. To the contrary, it emphasized that a determination of deliberate indifference "necessarily depends on a careful assessment of the facts at issue in a particular case." Pet. App. 17a.

Most importantly, petitioner ignores the fact that soon-to-be-issued federal regulations under the Prison Rape Elimination Act will specify standards designed to address the significant problem of prison rape. These new standards, not the court of appeals' decision, will be the source of any compliance costs that petitioner must shoulder. And these new standards, not the court of appeals' ruling, will govern any future Section 1983 claims seeking damages on grounds of deliberate indifference to the threat of rape in prison facilities.

1. The Decision Below Does Not Impose Single-Incident Liability.

Petitioner wrongly claims that the Second Circuit's decision impermissibly imposed "single-incident" liability. Pet. 8, 11, 14-15; see also *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823-824 (1985) (plurality opinion) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.").

In fact, neither the jury's finding of deliberate indifference nor the court of appeals' decision upholding that determination rested solely on the fact that respondent was raped. Rather, the evidence—viewed as it must be, in the light most favorable to the jury's verdict—established petitioner's deliberate indifference on the basis of several events pre-dating respondent's rape.

The most critical facts were the abuse suffered by Elizabeth Allen and petitioner's inadequate investigatory and disciplinary response. As the court of ap-

peals determined, "[a] jury could have concluded that [the investigators' finding that prohibited sexual activity 'likely' had occurred in Allen's case] should have alerted defendants that they could not rely simply on guards' awareness of a no-tolerance policy to deter sexual misconduct." Pet. App. 23a. And, of course, Allen's statement indicated that other incidents of abuse had occurred, but petitioner failed to investigate those incidents. See pages 8-11, *supra*.

The court of appeals also found that "a jury could have determined that Gallivan's conceded awareness of 'highly publicized incidents' at other New York correctional facilities should further have alerted him to the inadequacy of a mere proscriptive policy to deter guards' sexual misconduct." Pet. App. 23a. The verdict here thus rested on far more than the evidence of the rape of respondent.

2. The Decision Below Does Not Mandate Same-Sex Supervision.

Petitioner is again wrong when it claims that "the Second Circuit premised liability on the lack of a policy requiring same sex supervision of inmates." Pet. 17. The court of appeals specifically and explicitly did *not* hold, or even indicate, that prison officials could avoid liability only by adopting such a policy. Rather, it stated that "a policy permitting unmonitored one-on-one interactions between a guard and a prisoner of different sexes [is] not itself unconstitutional." Pet. App. 21a; see also *id.* at 25a, n.7 (expressly rejecting contention that the court of appeals' ruling means that all "one-on-one interactions between male guards and female prisoners" will result in Section 1983 liability; "[r]ather, the relevant inquiry is whether in a particular case policymakers had reason to know that guards were taking advan-

tage of one-on-one interactions to engage in criminal sexual conduct harmful to prisoners and responded to such knowledge in a way that manifested deliberate indifference to that harm, whatever its degree").

The finding of liability in this case does not rest on petitioner's failure to adopt a specific procedure; it rests on the absence of "*any* proactive steps to minimize the opportunity for exploitation, as for example by prohibiting unmonitored one-on-one interactions between guards and prisoners." *Id.* at 26a (emphasis added). The record reveals a variety of options available to respondent other than same-sex supervision, including video monitoring, mandatory enhanced supervisory oversight, additional training, and increased enforcement (such as enabling inmates to report abuse more easily and more certain investigation and punishment). It was petitioner's failure to take "*any* proactive steps" that was the basis for the court's decision.

3. Any Possible Prospective Effect Of The Decision Below Will Be Eliminated By The Federal Regulations Issued Under The Prison Rape Elimination Act.

Even if the court of appeals' ruling could be read to impose new standards and additional costs on prison operations, review by this Court would be unwarranted because any such requirements will be superseded by the federal regulations establishing standards for prevention of prison rape.

As we have explained (see pages 2-5, *supra*), the Department of Justice will soon promulgate a rule identifying the measures that jails and prisons must implement to reduce the incidence of prison rape. The proposed rule would impose numerous affirma-

tive obligations far more specific than the court of appeals' conclusion that petitioner was required to do *something* other than simply reiterate its policy prohibiting sexual abuse in prison, including:

- Appointment of a PREA coordinator to oversee facility efforts to combat prison rape, 76 Fed. Reg. at 6278 (Section 115.11(b));
- "[A]dequate levels of staffing" or "video monitoring," *ibid.* (Section 115.13(a));
- "[A] policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to * * * deter staff sexual abuse," *ibid.* (Section 115.13(d));
- Employee training, including "annual refresher information to all employees," on the agency's sexual abuse policies and procedures, *id.* at 6280 (Section 115.31); and
- "[C]omprehensive education to inmates * * * regarding agency sexual abuse response policies and procedures," with annual refresher sessions, *ibid.* (Section 115.33).

It is the final Department of Justice regulation, and not the decision below, that will both specify the procedures that petitioner must adopt to reduce the incidence of prison rape and result in new costs for petitioner (unless petitioner chooses not to comply with the regulation and risk a reduction in federal funding). Petitioner's alarmist statements (*e.g.*, Pet. 26) regarding the supposed cost of complying with

the court of appeals' supposed requirement of same-sex supervision are therefore entirely irrelevant.[9]

Moreover, this federal regulation, not the court of appeals' ruling, will set the standard for any future claims of deliberate indifference. A municipality that complies with the federal standards could not be shown to be deliberately indifferent to the risk of prison rape; to the contrary it will have addressed the issue in the manner deemed appropriate by prison experts.

Finally, given the impending issuance of the federal rule, it is not surprising that no other government entities have filed amicus briefs in support of petitioner.[10] Their inaction confirms the conclusion

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[9] The proposed regulation, like the court of appeals' decision (see pages 22-23, *supra*), does not require same-sex supervision. 76 Fed. Red. at 6253-6254. Rather, it confers flexibility in implementing either direct staff supervision or video monitoring. See 76 Fed. Reg. at 6251-6252.

Interestingly, comments filed by New York State did not disagree with some elements of the proposed regulations imposing requirements that the trial record does not disclose were part of ECHC's policies at the time respondent was raped, such as appointment of a coordinator for anti-rape efforts, mandatory periodic unannounced rounds by supervisors to deter sexual abuse, and education for facility employees and inmates. See Comments in Response to the Notice of Proposed Rulemaking regarding the National Standards to prevent, Detect, and Respond to Prison Rape, State of New York Department of Correctional Services, April 4, 2011.

[10] Numerous governmental entities filed comments responding to the Attorney General's Notice of Proposed Rulemaking. See National Standards To Prevent, Detect, and Respond to Prison Rape, Docket Folder Summary, *available at* http://www.regulations.gov/#!docketDetail;rpp=10;po=10;D=DOJ-OAG-2011-0002 (listing comments).

that the source of any future obligations in this area will be the federal regulation, not the court of appeals' ruling.

B. There Is No Conflict Among The Courts Of Appeals.

Petitioner also attempts to justify the need for this Court's review by asserting that "[t]he Second Circuit's decision conflicts with decisions of the Fifth, Eighth and Tenth Circuits." Pet. 23. There is no conflict, as each of the three cases are legally and factually different from the decision below.

The issue in *Hovater* v. *Robinson*, 1 F.3d 1063 (10th Cir. 1993), was whether a supervisory sheriff at a detention facility was protected by qualified immunity against a claim seeking damages under the Eighth Amendment for his subordinate's sexual assault of a female inmate. *Hovater* is plainly distinguishable on at least three grounds.

First, *Hovater* involved the personal liability of an individual supervisor, not municipal liability and the policy or custom requirement of *Monell*.[11] Second, there was no evidence of any prior assaults upon inmates; *Hovater* was a case of single-incident liability. 1 F.3d at 1064 ("[p]rior to the alleged sexual assault of Ms. Hovater, no female inmate had complained of sexual misconduct by [the defendant] or any other detention officer"). Third, *Hovater* involved an

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[11] Although the inmate in *Hovater* sued the county that operated the jail, the issue before the Tenth Circuit was solely the supervising sheriff's claim of qualified immunity from personal liability. 1 F.3d at 1065-1066. Municipalities, of course, do not have any qualified immunity from Section 1983 suits. See *Owen* v. *City of Independence*, 445 U.S. 622, 657 (1980).

Eighth Amendment claim by a convicted inmate, not a due process claim by a pre-trial detainee. Indeed, this Court has made clear that the requirement for a showing of "deliberate indifference" under the Eighth Amendment is far more demanding than for a showing of "deliberate indifference" for purposes of municipal liability under Section 1983. See *Farmer* v. *Brennan*, 511 U.S. 825, 840-842 (1994).

The Fifth Circuit's unpublished decision in *Lewis* v. *Pugh*, 289 Fed. Appx. 767 (5th Cir. 2008), is also inapposite. *Lewis* involved a plaintiff's Section 1983 claim against a municipality based on an incident in which a police officer offered the plaintiff a ride and then raped her. *Id.* at 769. But there was no evidence of any prior sexual assaults to establish the defendant's deliberate indifference. *Id.* at 772-73 (noting that "[t]here were no allegations of sexual misconduct * * * [or] any other sexual offenses prior to [the rape] in March 2005" and, therefore, "no conduct from which it could be reasonably concluded that [police chief] Johnson or the City made a deliberate or conscious choice to endanger constitutional rights"). Of course, there was evidence of prior incidents of sexual abuse in the record in the present case. Nor did *Lewis* involve a prison setting in which the government has an affirmative duty of care regarding those in its custody.

Finally, *Andrews* v. *Fowler*, 98 F.3d 1069 (8th Cir. 1996), also concerned a police officer who raped a woman whom he had induced to enter his car. *Id.* at 1073. Like *Lewis*—and unlike this case—the deliberate indifference claim did not rest on evidence of prior incidents: "there is no evidence that the city ever had received, or had been deliberately indifferent to, complaints of violence or sexual assault on the

part of an officer prior to the time Fowler raped Kristi Andrews." *Id.* at 1076. Moreover, *Andrews* arose in the law enforcement context and did not involve prison inmates; consequently, the Eighth Circuit tailored its holding to that context: "In light of the regular law enforcement duties *of a police officer*, we cannot conclude that there was a patently obvious need for the city to specifically train [police] officers not to rape young women." *Id.* at 1077 (emphasis added).

Because Petitioner cannot point to any conflict among the lower courts, there is no reason to grant review in this case.[12]

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[12] Petitioner urges this Court to address "whether the requirements set forth in *Connick* apply to policy claims not grounded in failure to train." Pet. 20-21. But that argument rests entirely on petitioner's flawed contention that this case involves single-incident liability and therefore conflicts with *Connick*. See Pet. 21. Because, as we have discussed, the finding of deliberate indifference in fact rests on evidence of multiple incidents, there is no conflict with *Connick*.

Petitioner's references to "strict, vicarious liability" and the supposed elimination of a causation requirement (Pet. 22-23) are also grounded in petitioner's false assertion that this case involves single-incident liability. It is true that "[t]he plaintiff must * * * demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged," *Bd. of Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 404 (1997) (emphasis in original). Here, petitioner deliberately maintained a demonstrably inadequate policy notwithstanding multiple prior incidents of sexual abuse of inmates by guards. Petitioner's decision made it "more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause." *Id.* at 407, 409.

C. The Decision Below Accords Fully With This Court's Precedents Regarding Municipal Liability Under Section 1983.

This Court has held that "[p]olicymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Connick*, 131 S. Ct. at 1360 (internal quotation marks omitted). Deliberate indifference may take the form of inaction: a municipality's "policy of *inaction* in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution." *Ibid.* (internal quotation marks omitted) (emphasis added).

The court of appeals explained that the deliberate indifference claim here turned on "the adequacy of [petitioner]'s own actions to prevent sexual contact between guards and prisoners consistent with their affirmative duty to protect prisoners in their custody." Pet. App. 19a. The jury reasonably found that petitioner continued to adhere to a policy that it knew had failed to prevent sexual abuse of inmates by prison guards. That finding is fully consistent with the deliberate indifference standard articulated in *Connick* and does not warrant this Court's review.

To begin with, the standard for overturning the jury's determination is extraordinarily high. "[T]he court must draw all reasonable inferences in favor of the nonmoving party"; "it may not make credibility determinations or weigh the evidence"; and it "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves* v.

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-151 (2000). The court of appeals properly applied that standard and concluded that the jury's verdict should be upheld.

1. A Reasonable Jury Could Find That Petitioner Had Notice Of The Risk Of Sexual Assault Of Female Inmates.

The jury reasonably could have found that petitioner was on notice that female inmates in its custody faced a risk of sexual assault by male prison guards for three reasons.

First, New York Penal Law establishes categorically that the risk of guards encountering "sexually tempting circumstances" poses a risk of harm to prisoners, to a degree of "moral certainty." Pet. App. 20a; see also N.Y. Penal Law §130.05(3)(e)-(f) (prisoners are incapable of consenting to any sexual activity with guards); and §§ 130.25(1), 130.60(1) (subjecting guards to criminal liability for sexual activity with prisoners). As the court of appeals recognized, the risk of sexual exploitation "is acknowledged in New York state law," and petitioner "cannot claim that the evidence was insufficient to alert [it] to the risk of sexual exploitation posed by male deputies guarding female prisoners at ECHC." Pet. App. 20a.

Second, the trial record included evidence that petitioner knew of prior incidents of sexual misconduct at ECHC. See pages 8-11, *supra.* It therefore was "hardly speculative for a jury to conclude that, at least by 1999, [Gallivan] knew or should have known that guards at ECHC and other local correctional facilities were engaging in proscribed sexual contact with prisoners." Pet. App. 24a. Moreover, the sole expert witness testified that the Allen complaint,

even considered alone, should have put the County on notice regarding the need for a policy change. Petitioner offered no contrary expert opinion, so it is reasonable to "assume that the jury credited the opinion of [respondent's] expert." *Id.* at 27a.

Third, petitioner knew of incidents of sexual misconduct in other New York prisons. See page 11, *supra*. A reasonable juror could have concluded both that these other incidents involved sexual assault and that they provided further notice of the inadequate procedures in place at the ECHC.

2. A Reasonable Jury Could Find That Petitioner's Failure To Respond To The Known Risk Constituted Deliberate Indifference

To address this known risk and the known inadequacy of its existing procedures, petitioner did no more than reiterate its already-existing policy regarding sexual contact between inmates and guards. And it "encourage[d]"—but did not mandate—peer and supervisory reporting," and noted that "wrongful conduct could be an embarrassment to the entire department." Pet. App. 9a-10a. Petitioner thus continued to rely upon "mere proscriptions on sexual contact," even though such proscriptions had already "proved an insufficient deterrent to sexual exploitation." *Id.* at 22a.

Moreover, in response to the Allen Complaint, petitioner imposed only a three-day suspension of the offending deputy—significantly less than the investigators' recommendation of a thirty-day suspension. *Id.* at 28a. Petitioner also allowed the deputy to satisfy the punishment by giving up accrued compensatory time. *Ibid.* And petitioner also failed to "make

any effort to identify, much less discipline, other guards involved in a broader pay-for-exhibitionism practice at ECHC." *Id.* at 28a. As the court below noted, this evidence "could have supported a jury inference[]" that petitioner was "not committed to providing the supervision and discipline necessary to enforce the no-contact policy and, thereby, to protect prisoners from sexual exploitation." *Ibid.*

Under these circumstances, a reasonable jury could have determined that Gallivan's "conceded awareness" of the 1999 Allen Complaint and other "highly publicized incidents" at New York correctional facilities should have "alerted [petitioner] to the inadequacy of a mere prescriptive policy to deter guards' sexual misconduct," and that petitioner "could not rely simply on guards' awareness of a no-tolerance policy." *Id.* at 23a.

Petitioner's "mere reiteration of the proscriptive policy unaccompanied by any proactive steps to minimize the opportunity for exploitation * * * demonstrated deliberate indifference to defendants' affirmative duty to protect prisoners from sexual exploitation." *Id.* at 29a. This "continued adherence to an approach that they kn[ew] * * * ha[d] failed to prevent tortious conduct by employees," see *Connick*, 131 S. Ct. at 1360, provided ample basis for the jury to find the deliberate indifference that triggers municipal liability under Section 1983.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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