NO. 21-414

In the
Supreme Court of the United States

FIRST MIDWEST BANK, guardian of the estate of Michael D. LaPorta, a disabled person,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RUTHERFORD INSTITUTE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a plaintiff establishes that an official municipal policy or custom actually caused a violation of their constitutional rights, need they also establish that the policy or custom is the *only* cause before the municipality may be held liable under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978)?

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STATEMENT OF INTEREST[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. Rutherford specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

At every opportunity, the Rutherford Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward its preparation or submission. Counsel of record for all parties have received notice and have consented to this filing.

justice system, and accountability for law enforcement.

This case interests Cato because it concerns the erosion of the already limited circumstances under which municipal actors, such as the police, may be held accountable for clearly established violations of individual constitutional rights.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

When more than one actor combines to proximately cause constitutional injury, this Court's precedent requires a jury to decide whether the later actor's conduct supersedes the earlier actor's, such that the earlier act is no longer the moving force behind the constitutional violation. The jury in this case answered that question with a resounding no: off-duty police officer Patrick Kelly's drunken shooting of Michael LaPorta did not break the causal chain and absolve the City of Chicago from liability under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), for its own violation of LaPorta's constitutional rights.

The Seventh Circuit, however, turned the jury's no into a yes, and in so doing introduced a legal loophole into this Court's *Monell* causation analysis that threatens to swallow the doctrine. In *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 268 (1987), Justice O'Connor, dissenting from dismissal of the writ as improvidently granted, noted that, under *Monell*, a jury must determine whether the municipal policy or custom is the "moving force" behind the constitutional violation, in light of other possible "intervening causes." The Courts of Appeals have consistently emphasized that it is for a jury to decide whether an intervening cause, including a police officer's off-duty conduct, has broken the causal chain such that the municipal policy or custom is no longer the actual cause of the constitutional violation.

The Seventh Circuit's holding below announced a different rule, at odds with this Court's precedent: when an off-duty officer causes constitutional harm while acting under a municipal policy or custom, the municipality itself can no longer itself be liable for adopting that unconstitutional policy or custom. Contrary to the Seventh Circuit's holding below, however, a police officer's off-duty conduct cannot *per se* insulate a municipality from *Monell* liability where, as here, a jury decides that the municipality's policies or customs adopted under color of law remain the moving force underlying the constitutional violation.

Allowing the Seventh Circuit's decision and the legal loophole it created to stand unreviewed by this Court would not only cause unnecessary uncertainty under *Monell*, but it would also allow clearly unconstitutional municipal policies to escape judicial review. Rather than promoting accountability for violations of individual constitutional rights, the Seventh Circuit's decision provides a roadmap to municipalities for how to avoid *Monell* liability—simply authorize off-duty police officers to do unofficially what the police departments are constitutionally prohibited from authorizing officially.

This Court should, therefore, grant the petition for certiorari to clarify the proper standard of causation that applies to 42 U.S.C. § 1983 claims brought under *Monell* when more than one act actually causes constitutional harm. And in so doing, this Court can correct the Seventh Circuit's unsupported introduction of yet another legal roadblock to holding municipal actors accountable for the violation of individual constitutional rights.

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's Decision Introduces a Barrier to *Monell* Liability Unsupported by this Court's Precedent.

This Court has repeatedly cautioned that *Monell* liability is limited to a very narrow set of circumstances where an official municipal policy or custom is the "moving force" behind the plaintiff's deprivation of federal rights. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 400 (1997), quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

To avoid *Monell* turning into general *respondeat superior* liability, this Court explained that "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404 (1997); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

The deficient municipal policy or custom must be the "actual cause" of the constitutional violation. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 391 (1989). The mere chance that a municipal policy or custom may result in unconstitutional conduct by municipal actors, whether on- or off-duty, is not enough. The plaintiff must affirmatively tie the two together. *See Tuttle*, 471 U.S. at 824 n.8 ("The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the 'moving force' behind a

constitutional violation. There must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue.").

That is a particularly difficult task. Indeed, as this Court cautioned, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bryan Cty.*, 520 U.S. at 405. And, as the Courts of Appeals have recognized, "[a]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990); *see also Wortley v. Camplin*, 333 F.3d 284, 295 (1st Cir. 2003) ("Proximate causation and intervening cause are usually issues for the jury to resolve.").

If a plaintiff can satisfy those rigorous standards—by establishing that a municipal policy or custom actually caused a constitutional injury, as the jury found here and as was not disturbed on appeal—*Monell* liability attaches. The plaintiff need not also show that the municipal policy or custom is the *only* cause of the violation of constitutional rights. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 268 (1987) (O'Connor, J., dissenting from dismissal of writ as improvidently granted) (noting that under *Monell* causation analysis, courts must determine whether the municipal policy or custom is the "moving force" behind the constitutional violation, in light of other

possible "intervening causes"). The Courts of Appeals have generally acknowledged this. *See e.g. Bielevicz*, 915 F.2d at 851 ("plaintiffs must simply establish a municipal custom coupled with causation—i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, *at least in part*, led to their injury (emphasis added)); *Spell v. McDaniel*, 824 F.2d 1380, 1388 (4th Cir. 1987) ("Proof merely that such a policy or custom was 'likely' to cause a particular violation is not sufficient; there must be proven at least an 'affirmative link' between policy or custom and violation; in tort principle terms, the causal connection must be 'proximate,' not merely 'but-for' causation-in-fact."); *see also e.g. Cash v. Cty. of Erie*, 654 F.3d 324, 342 (2d Cir. 2011); *Mann v. Helmig*, 289 F. App'x 845, 850 (6th Cir. 2008); *Van Ort v. Est. of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) ("Traditional tort law defines intervening causes that break the chain of proximate causation. This analysis applies in section 1983 actions. Applying these principles to this case, we must determine whether, as a matter of law, Stanewich's private actions were intervening causes which preclude any County liability for alleged negligent hiring or supervision." (citations omitted)); *Gutierrez–Rodriguez v. Cartagena,* 882 F.2d 553, 561 (1st Cir. 1989) ("An unforeseen and abnormal intervention ... breaks the chain of causality, thus shielding the defendant from [section 1983] liability." (quotations omitted)); *Dodd v. City of Norwich*, 827 F.2d 1, 6 (2d Cir. 1987) ("*Monell*'s view of causation is, we think, more encompassing than such a narrow, immediate focus on the cause of the shooting. In adopting its policies a municipality

must take into consideration the reasonably foreseeable conduct not only of its own employees but also of those citizens with whom its employees will interact. Basic principles of causation would render the policy a proximate cause of Dodd's death if Dodd's intervening actions were 'within the scope of the original risk' and therefore foreseeable."), *cert. denied* 484 U.S. 1007 (1988).

The Seventh Circuit's decision here departed from this Court's longstanding causation analysis under *Monell*. It instead engrafted a new limitation on causation requiring the unconstitutional municipal policy not only to be a proximate cause of the violation, but also the *only* cause. That is, any time off-duty conduct intervenes to cause constitutional harm, it is necessarily a superseding cause, and breaks the causal chain to the municipal policy. Notwithstanding that the "jurors concluded that two of the City's policies—its failure to maintain an adequate early warning system and its failure to adequately investigate and discipline officers—caused Kelly to shoot LaPorta," and thus satisfied the elements of a *Monell* claim, including causation (*First Midwest Bank v. City of Chicago*, 988 F.3d 978, 985 (7th Cir. 2021)), the Seventh Circuit reversed the jury's verdict, because Kelly was off duty at the time of the shooting and, thus, was not acting under the color of law (*id.* at 987), even though Kelly used his service weapon to shoot LaPorta (App. 113, 116). The Seventh Circuit disregarded, however, that it was Chicago's policies that the jury had concluded caused the deprivation of LaPorta's 14th Amendment right against infringement of his bodily integrity, and that those policies were indisputably adopted under color of law.

The causation question the Seventh Circuit overlooked is whether Kelly's off-duty actions using his service weapon were a reasonably foreseeable byproduct of the Chicago's failure to maintain an adequate early warning system that would have alerted to officer misconduct and its failure to adequately investigate and discipline officers. *See Van Ort*, 92 F.3d at 837; *Gutierrez–Rodriguez,* 882 F.2d at 561; *Dodd*, 827 F.2d at 6. As this Court has noted multiple times in the past, that is a difficult task in most cases. But it's one that the jury specifically found that LaPorta had satisfied. Thus, the jury reasonably concluded, LaPorta's off-duty conduct was an intervening cause, but not a superseding one that broke the causal chain back to Chicago's offending policies.

In effect, the Seventh Circuit's holding stands for the proposition that when the last actor who causes constitutional harm is not a state actor, or at least is not officially on duty at the time they act, that intervening cause absolves the municipality of *Monell* liability, even if the off-duty conduct was reasonably foreseeable when the municipality adopted the policy or custom. And that's so even when the municipality has adopted a facially unconstitutional municipal policy or custom, or a policy or custom that is reasonably foreseeable to cause an employee to violate individual constitutional rights and the municipality is deliberately indifferent to that violation, as the jury found here.

The Seventh Circuit's failure to analyze whether Kelly's off-duty conduct was not only intervening cause, but also a superseding one flatly contradicts

this Court's causation precedent under *Monell* and its progeny. *See e.g. Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) ("Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates"), *cert. denied* 493 U.S. 1044 (1990); *Dodd*, 827 F.2d at 6; *Cazares v. Frugoli*, No. 13 C 5626, 2017 WL 1196978, at *15 (N.D. Ill. Mar. 31, 2017) (noting that "the Seventh Circuit and other courts in this district have declined to analyze *Monell* claims under *DeShaney* where the allegations were predicated on a custom or policy causing the constitutional deprivation"), *abrogated by First Midwest Bank v. City of Chicago*, 988 F.3d 978 (7th Cir. 2021); *Oldham ex rel. Young v. Cincinnati Pub. Sch.*, 118 F. Supp. 2d 867, 875 (S.D. Ohio 2000) (analyzing *DeShaney* and *Monell* claims separately); *Perez v. City of New York*, No. 97 CV 2915, 1999 WL 1495444, at *3 (E.D.N.Y. Nov. 16, 1999).

This Court should grant the writ of certiorari to clarify the standard of causation that must be applied under *Monell* when off-duty conduct intervenes between official municipal policies or customs that are otherwise the moving force causing constitutional harm.

II. If This Court Declines to Review the Seventh Circuit's Decision, Clearly Unconstitutional Municipal Policies Will Avoid Judicial Review, and Will Further Erode Individual Constitutional Rights.

The Seventh Circuit's rule that intervening off-duty conduct always breaks the causal chain under

Monell will have enormous consequences for the enforcement of individual constitutional rights and the accountability of municipal actors who violate them, beyond unsettling the law of *Monell* causation that the Courts of Appeals had consistently applied. Indeed, such a rule, if left unreviewed by this Court, would encourage police departments, and all municipal actors, to tacitly authorize unofficially what they cannot constitutionally authorize officially.

Under the Seventh Circuit's decision, a police department can look the other way while off-duty officers customarily conduct patently unconstitutional searches of homes, in violation of the 4th Amendment, knowing that the off-duty conduct will immunize the department from *Monell* liability, and qualified immunity or a color of law argument will protect the off-duty officers from judgment. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) (expressing "strong doubts" about qualified immunity doctrine); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity doctrine "sends an alarming signal to law enforcement officers and the public"). Take *Florida v. Jardines*, 569 U.S. 1 (2013), as an example. There, this Court held that where an on-duty police officer invades the curtilage of a private home with a drug sniffing dog to detect the presence of drugs, that is a clear violation of the 4th Amendment. *See id.* at 11. But if that same action is taken by the same police officer with the same drug sniffing dog, while they are off duty, acting under a municipal policy to get drugs off the street, that clear violation of the 4th Amendment actually caused by the municipal policy goes unremedied, under the Seventh

Circuit's rationale. So too could on-duty police officers customarily call on their off-duty counterparts to confiscate bystanders' cell phones during detentions of suspects, in violation of the 1st and 4th Amendments, to eliminate evidence contradicting official police descriptions of those events and to avoid *Monell* liability.

Like qualified immunity decisions where the individual constitutional rights are not held to be clearly established, the hypotheticals where the Seventh Circuit's decision would immunize otherwise plainly unconstitutional municipal acts are virtually endless. *Compare First Midwest Bank*, 988 F.3d at 985 (off-duty conduct not under color of law), *with Vann v. City of New York*, 72 F.3d 1040, 1051 (2d Cir. 1995) ("we note that appellees also argue that even if there was deliberate indifference tantamount to a custom or policy, it did not cause Vann's injuries because Morrison was off duty when that assault occurred. The issue of causation remains to be decided by the jury. Certainly the Department's retention of Morrison as a police officer despite his abusive history empowered him to make arrests even while off duty. And it would be entirely permissible for the jury to find that the Department's restoration of Morrison to full-duty status and its indifference to the postreinstatement civilian complaints against him caused him to feel entitled, whether on duty or off, to compel the 'respect' he demanded through the use of violence. In any event, the district court did not decide the causation issue and, on the record before us, we cannot conclude that the Department's actions did not cause Vann's injuries"). The lack of legal accountability for violations of the individual rights enshrined in our

Constitution only spurs more lawless action. This Court is best positioned to reaffirm the primacy of individual constitutional rights against infringement by the State, and ensure that the Seventh Circuit's decision does not create yet another legal loophole when a municipality's policies or customs actually cause constitutional harm.

CONCLUSION

For these reasons, and those stated by petitioner, the Court should grant the petition for certiorari.

Respectfully submitted,

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