No. 09-1361

In The

Supreme Court of the United States

CITY OF RENO, RYAN ASHTON,
and DAVID ROBERTSON,

Petitioners,

v.

CHARLA and DUSTIN CONN,

Respondents.

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

PETITIONERS' REPLY BRIEF

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Respondents try to portray the Ninth Circuit's decision as an unremarkable application of settled law to the facts of this case, but they cannot obscure the radical holding below. The city and officers here did not "do nothing" (Opp. 23); they followed prescribed procedures to deliver Clustka to trained medical professionals, relying on them for diagnosis and treatment. Yet the Ninth Circuit authorized municipal liability for failure to train police in suicide prevention, even though respondents did not plead a pattern of suicides. The decision below created a *per se* rule authorizing municipal liability if a city does not train officers in suicide detection and an officer fails to detect a suicide risk.

The Ninth Circuit's *per se* rule conflicts with decisions of five circuits that have refused to allow municipal liability for jail suicides. Diagnosing the risk of jail suicides is the job of doctors, not police. Respondents cite no other case upholding liability for failure to train law-enforcement officers in these circumstances. The decision below also contravenes *City of Canton* v. *Harris*, particularly its respect for federalism and its ban on reasoning backwards, inferring municipal-policy liability from the mere fact of harm. 489 U.S. 378, 390-92 (1989).

The Ninth Circuit's ruling on individual-officer liability also conflicts with decisions of other circuits and of this Court in *Farmer* v. *Brennan*, 511 U.S. 825 (1994). Courts faithful to *Farmer* refuse to base deliberate-indifference liability upon officers' mere awareness of facts indicating risk. And because no

previous decision has held officers liable in these circumstances, qualified immunity must protect the officers.

Petitioners have consistently raised these extremely important issues.[1] This Court's review is imperative.

I. THE NINTH CIRCUIT'S *PER SE* RULE OF MUNICIPAL LIABILITY IRRECONCILABLY CONFLICTS WITH DECISIONS OF FIVE OTHER CIRCUITS

Respondents never pleaded that Reno had a pattern of jail suicides attributable to inadequate officer training or policies, which might have notified city policymakers of the need to train. On the contrary, they argued only that *single-incident* liability should lie because the need for suicide-prevention training and policies was obvious. First Am. Compl. ¶64; Pls.' Opp'n Summ. J. 29-30; Appellants' Opening Br. 47-48.[2]

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[1] Although respondents imply that petitioners waived both questions presented, Opp. 13, they discuss waiver only regarding the merits of the officers' individual liability, Opp. 13-16. (We refute that waiver contention *infra* pp. 8-9.) Respondents do not contest that petitioners have properly preserved the issues of municipal liability and qualified immunity.

[2] Respondents never pleaded below that four previous suicides in the sixteen months preceding Clustka's April 28, 2005 suicide, Opp. 6, out of more than 24,000 jail admissions, constituted a pattern of constitutional violations, nor did they adduce

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The decision below accepted that argument. It effectively adopted a blanket rule that suicide risk is a recurring part of officers' duties that always requires training. That amounts to a *per se* rule authorizing municipal liability for any jail suicide whose symptoms police officers could have detected, even where no pattern notified the city of a need for training.

The First, Fifth, Sixth, Seventh, and Eleventh Circuits stand squarely to the contrary. They reject municipal liability in similar circumstances, independent of their distinct holdings on individual liability. *Cf.* Opp. 12 n.1, 25. Respondents do not cite a single decision in which these courts affirmed municipal liability for failure to train officers or adopt policies on suicide prevention. Instead, they quote dicta from cases whose holdings conflict with the decision below.

The Fifth Circuit has repeatedly rejected, as a matter of law, municipal liability for failure to train in similar circumstances. Detainees' right to "adequate medical care" does not require cities to train police in suicide-prevention "psychological screening." *Burns* v. *Galveston*, 905 F.2d 100, 104 (5th Cir. 1990) (affirming summary judgment). "Failure to train police officers in [suicide] screening procedures" does not "rise to the level of a constitutional deprivation."

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any evidence connecting those *county*-jail suicides to the *city's* officer-training policies.

Id. *Burns* turned not on whether officers heard the suicide threat, but on a broader recognition that officers lack "the skills of . . . experienced medical professional[s] with psychiatric training." *Id.*; *see also* *Whitt* v. *Stephens*, 529 F.3d 278, 284 (5th Cir. 2008) (affirming summary judgment); *Hare* v. *Corinth*, 74 F.3d 633, 635-36, 645-46 (5th Cir. 1996) (en banc) (vacating individual liability in non-municipal-liability case).

The Seventh Circuit affirmed summary judgment for a county even where officers mistakenly discounted a drunken suicide threat as a joke. Determining whether a threat is serious "is not a judgment likely to be much assisted by special training." *Boncher* v. *Brown*, 272 F.3d 484, 488 (7th Cir. 2001) (Posner, J.). *Woodward* v. *Correctional Medical Services*, 368 F.3d 917, 928-29 (7th Cir. 2004) is inapposite. It involved failure to train medical professionals – not police – whose jobs involved suicide screening.

Likewise, the Eleventh Circuit recognized that a "suicide threat made under the influence of drugs or alcohol did not furnish jailers with reason to believe decedent was suicidal." *Popham* v. *Talladega*, 908 F.2d 1561, 1564 (11th Cir. 1990). Respondents claim that *Popham* turned on the jailers' failure to hear the threat, but *Popham*'s holding was broader. It followed *Harris* in rejecting municipal liability for "failure to train jail personnel to screen detainees for suicidal tendencies." *Id.*

The Sixth Circuit likewise rejects municipal liability for failure to train officers to diagnose suicidal symptoms. As a matter of law, neither officers nor a city can be liable for failing to diagnose suicidal tendencies in the distressed or angry statements of a drunk arrestee. *Barber* v. *Salem*, 953 F.2d 232, 239-40 (6th Cir. 1992).[3]

Finally, the First Circuit holds that cities need not train officers to diagnose "intoxicated and potentially suicidal detainees." *Manarite* v. *Springfield*, 957 F.2d 953, 959 (1st Cir. 1992). While some suicide-prevention policies existed in that case (Opp. 29), here too Clustka received six medical screenings pursuant to standard policy. If this case had arisen in the First Circuit, *Manarite* would bar recovery.

In short, five circuits have rejected municipal liability for failure to train officers or adopt suicide-prevention policies. Those circuits' holdings necessarily conflict with the Ninth Circuit's *per se* rule authorizing municipal liability wherever a city fails to train officers to diagnose symptoms and prevent a suicide. Apart from the Third and Ninth Circuit cases

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[3] *Cf. Cooper* v. *Washtenaw*, 222 F.App'x 459, 469 (6th Cir. 2007) (leaving open possibility of individual liability if officer actually knew inmate was on suicide watch and consciously disregarded it). *Cooper* did not determine whether the officer's actions might amount to a city policy; it did not substantively discuss suicide-prevention training, let alone resolve the issue. *Id.* at 473. And the inmate in this case had not been placed on suicide watch, which would have created actual notice.

(Pet. 22), respondents cite no case from these five circuits or any other that upholds municipal liability. Only this Court's intervention can resolve this entrenched, 5-2 circuit split. Pet. 23.

II. BY AUTHORIZING MUNICIPAL LIABILITY ABSENT PROOF OF A PATTERN OF VIOLATIONS, THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH *CITY OF CANTON* v. *HARRIS*

"[I]nadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Harris*, 489 U.S. at 388. Municipal liability for failure to train normally requires a pattern of employee wrongdoing, showing that city policymakers chose to disregard a "plainly obvious" "need for further training." *Id.* at 390 n.10; *accord Bryan Cty.* v. *Brown*, 520 U.S. 397, 409 (1997). Single-incident failure-to-train liability is exceptional and appropriate only in "a narrow range of circumstances." *Id.* at 409. The only example of single-incident liability this Court hypothesized was quite narrow. It involved giving police guns without teaching them about their lawful use, *Harris*, 489 U.S. at 390 n.10, where harm to citizens was inevitable.

The risk of injury is not comparably certain if police officers lack training to detect the risk that an arrestee will later commit suicide in jail, when there

are medical professionals who screen for that risk. As three concurring Justices warned, "[w]ithout some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Id.* at 395 (O'Connor, J., concurring in relevant part, dissenting in part). Diagnosing mental illness is no part of an officer's usual duties, and there are no constitutional guideposts to direct municipalities. *Id.* at 395-96. Relying on medical screening, rather than training police to detect jail-suicide risk, is not deliberate indifference to harm that is "substantially certain to result." *Id.* at 396.

As the dissenters below stressed, the "city more than fulfilled [its] obligation" to make "psychiatric care available to" Clustka. Pet. App. 7. Medical professionals evaluated her on six separate occasions. "The city didn't fail to address the problem of inmate suicide; it failed to address the problem in the way [the majority] think[s] best." *Id.* at 9. *Harris* warned against just this type of "judicial meddling," *id.*, as well as "an endless exercise of second-guessing municipal employee-training programs," 489 U.S. at 392; Pet. 27-28.

III. BY AUTHORIZING INDIVIDUAL LIABILITY, THE NINTH CIRCUIT HAS GUTTED *FARMER* v. *BRENNAN*'S ACTUAL-KNOWLEDGE REQUIREMENT AND QUALIFIED IMMUNITY, AS PETITIONERS HAVE CONSISTENTLY ARGUED

1. Respondents claim that petitioners waived the individual-liability merits issue by failing to "argue[ ] that, if they had such actual knowledge," "they *lacked a duty to report* suicide risks." Opp. 15, 13. They attack a straw man. Petitioners neither made that argument below nor make it now.

Petitioners did, however, advance below the same claim that they make now: evidence of notice of possible symptoms is insufficient alone to support a finding of actual knowledge and deliberate indifference. They argued that "[p]laintiffs were required to present sufficient evidence that would allow a trier of fact to conclude the officers knew Clustka was suicidal," but "[t]he undisputed facts of this case are insufficient to meet these standards" of inference required by *Farmer* and its progeny. Appellees' Answering Br. 31. "Plaintiffs produced no evidence that either officer actually knew Clustka was at substantial risk of serious harm. Instead, they argue only that the circumstances support an inference that they were negligent in diagnosing her condition. . . ." *Id.* at 32-33. They disputed, as a matter of law, liability for an "alleged failure to recognize a prisoner's alleged heightened suicidal risk" absent direct evidence of

actual knowledge. Pet. Reh'g En Banc 11. That is the same claim advanced here. Pet. 34-35.

Without such knowledge, respondents seem to agree that no claim lies and no duty to report exists. *See* Opp. 14. Because the officers had no duty to – and did not – diagnose those symptoms, they had no duty to report them.[4]

2. Respondents deny that the decision below imposed a duty on law-enforcement officers to "diagnose and report detainees' symptoms of suicidal tendencies." Opp. 1. But they repeatedly insist that the officers had actual knowledge that Clustka was at genuine risk of suicide. Opp. 1-2, 12, 16-17, 23-24. Respondents embrace the Ninth Circuit's approach that one can infer actual knowledge of a current

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[4] The only case respondents cite is inapposite. In *Zobrest* v. *Catalina Foothills*, a party failed to argue below that a school district's policy violated the state constitution and federal regulations, brand-new sources of law never mentioned before. 509 U.S. 1, 7-8 (1993). Petitioners in *Zobrest* thus failed to preserve distinct claims. Here the questions presented involve the same claims under 42 U.S.C. §1983 and the Due Process Clause at issue below. *See Yee* v. *Escondido*, 503 U.S. 519, 533-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below [or] the manner in which the question was framed below."); *Harris*, 489 U.S. at 383-84 (addressing on merits even party's substantial departure from position below). Furthermore, *Zobrest* dealt with the canon of constitutional avoidance, not waiver. 509 U.S. at 7-8. And here, the decision below expressly considered and resolved the issues. Pet. App. 10, 30-35.

suicide risk from awareness of possible symptoms, such as suicide threats. Despite respondents' semantic quibbling, that is tantamount to imposing a duty on police to diagnose and report jail-suicide risk.

This approach directly conflicts with *Farmer*. To prove deliberate indifference, plaintiffs must establish two distinct prongs. "[T]he official must both [1] be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and* [2] *he must also draw the inference*." *Farmer*, 511 U.S. at 837 (emphasis added). The decision below effectively collapsed the second prong into the first one, allowing every plaintiff to defeat summary judgment and nullify *Farmer* by alleging knowledge based on awareness of symptoms. Here, the officers have consistently described the seatbelt incident as the manipulative actions of a belligerent drunk, not a genuine suicide attempt. Because they are not medical professionals, they could not and did not have to diagnose whether Clustka's threats were serious. As non-medical intermediaries, not charged with her ultimate custody, they did not have to diagnose or treat her. All they had to do was to bring Clustka to medical professionals for screening, which they did.

Only in exceptional cases can a factfinder "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842; *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 734-35, 738 (1994) (risk obvious where officers tied inmate to hitching post, shirtless under burning sun, for seven

hours without bathroom breaks). An inmate's bleeding wound may reflect an obvious risk of harm, but suicidal symptoms rarely reveal such obvious risks and usually require expert medical diagnosis.

Where facts do not clearly prove the seriousness of a threat – as when a belligerent drunk threatens suicide – courts routinely grant summary judgment. Thus, awareness of a suicide threat satisfies *Farmer*'s first prong, but does not suffice to prove that the official actually inferred a genuine suicide risk, as required by *Farmer*'s second prong. *See, e.g.*, *Domino* v. *Texas Dep't Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (affirming summary judgment for prison *psychiatrist* who mistakenly discounted inmate's statement that "he'd kill himself, he wanted to die"); *Bell* v. *Stigers*, 937 F.2d 1340, 1341, 1344 (8th Cir. 1991) (affirming summary judgment despite inmate's comment to jailer: "'Well I think I'll shoot myself.'"), *overruled on other grounds by Farmer*, 511 U.S. at 837.

This Court, in *Davidson* v. *Cannon*, rightly distinguished negligent failure to report information from deliberate indifference. 474 U.S. 344, 347-48 (1986). Officials are not deliberately indifferent where they learn of a threat but erroneously or even negligently discount its seriousness. *Id.* at 347-48. That is exactly what happened here.

3. The decision below conflicts with decisions of the First and Third Circuits. In those circuits, officers cannot be held liable just because they are on notice

of possible symptoms; they must actually know of, yet ignore, a risk. *Williams* v. *West Chester*, 891 F.2d 458, 465 (3d Cir. 1989) (rejecting liability because there was "no direct evidence" officers "actually knew" of decedent's "suicidal propensity"); *Freedman* v. *Allentown*, 853 F.2d 1111, 1113, 1117 (3d Cir. 1988) (refusing to infer actual knowledge of risk from awareness of suicidal tendencies and past attempts); *see Elliott* v. *Cheshire*, 940 F.2d 7, 9, 12 (1st Cir. 1991) (officer not liable for not passing along information about possible symptoms of suicide risk). Unlike the decision below, each of these cases put teeth into *Farmer*'s and *Davidson*'s actual-knowledge prong for deliberate indifference. Thus, they found no duty to report information relevant to diagnosing suicidal tendencies.

4. Respondents likewise err in claiming that petitioners have conceded causation, Opp. 13-14, which is subsumed within the questions presented. As the petition argued, "there is no basis here to find either deliberate indifference to a known risk or causation." Pet. 35. Six sets of trained medical professionals screened Clustka but could not detect a genuine suicide risk. Three of those medical screenings, two more arrests, and almost two days intervened between the seatbelt incident and the suicide. Pet. App. 7, 14-15. There is no basis for finding that petitioners' actions caused Clustka's suicide or could have prevented it.

5. Because the First and Third Circuits rejected liability in similar circumstances, qualified immunity

protects the officers. Pet. 36-37. They could not have understood that they were violating their duties. Each case respondents cite, Opp. 24, involved direct evidence that custodial officers at a jail knew of and affirmatively disregarded suicide risks. *Snow* v. *Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005) (jailer told plaintiffs their daughter was suicidal but took no other action); *Turney* v. *Waterbury*, 375 F.3d 756, 760-61 (8th Cir. 2004) (sheriff "personally knew [decedent] was volatile," had been told of prior suicide attempt, and *affirmatively prevented* intake officer from filling out suicide-screening form); *Cavalieri* v. *Shepard*, 321 F.3d 616, 619-22 (7th Cir. 2003) (after victim's mother warned officer of suicide risk and implored him to put son on suicide watch and not leave him alone, officer promised to do so but did not); Pet. App. 12-13. None involved police who entrusted arrestees to jailers and medical professionals for medical screening.

IV. THE NINTH CIRCUIT'S HOLDING GREATLY BURDENS CITIES AND OFFICERS

The entrenched conflict among the circuits confuses cities and law-enforcement officers. Pet. 37-39. They need guidance about whether officers must serve as psychiatrists or may instead rely on medical professionals. The decision below burdens cash-strapped municipalities with novel training requirements. *Amici* Br. 6-17. Judge Reinhardt's opinion, left unchecked, is a "sweeping and dangerous precedent" that empowers federal judges to undermine "our tradition of local self-government." Pet. App. 16

(Kozinski, C.J., dissenting from denial of rehearing en banc).

CONCLUSION

This Court should grant the petition, or alternatively summarily reverse the decision below.

Respectfully submitted,

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