No. 20-427

In the Supreme Court of the United States

POLK COUNTY,

Petitioner,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS BRIEF OF THE STATES OF LOUISIANA, ARKANSAS, INDIANA, NEBRASKA, OKLAHOMA, AND TEXAS IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the "single-incident" theory of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), liability may be used to hold a municipality liable under §1983 on the theory that its failure to do more to prevent an employee from committing crimes that he had been trained and knew were expressly forbidden by municipal policy (and the law) was tantamount to embracing a policy of condoning constitutional violations.

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INTERESTS OF *AMICI CURIAE*[1]

The States of Louisiana, Arkansas, Indiana, Nebraska, Oklahoma, and Texas as *amici curiae*, have a strong interest in protecting both themselves and their municipalities from suits arising from unquestionably criminal actions of municipal employees. They also have a strong interest in regulating their municipalities as they see fit, rather than surrendering their power to the federal government.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court emphasized that municipalities cannot be held liable for their employees' actions under a theory of *respondeat superior*. 436 U.S. at 691; *see also Connick v. Thompson*, 563 U.S. 51, 70 & n.12 (2011) ("[M]unicipal liability under § 1983" must not "collapse into *respondeat superior*"). The Seventh Circuit's *en banc* decision below threatens to erode this long-established protection.

If the Seventh Circuit's decision stands, and its rationale spreads to other federal circuit courts, municipalities throughout the country could be left defenseless in their efforts to protect themselves from liability for harms that they never condoned—indeed for harms resulting from outright criminal

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[1] On October 29, 2020, counsel for amici gave notice to counsel for Respondents that amici intended to file a brief supporting Appellants. Counsel for Respondents did not indicate whether or not they opposed filing the amicus brief. But, as States, under Supreme Court Rule 37, amici are not required to file a motion for leave to file an amicus curiae brief.

activity by a rogue employee. The Seventh Circuit's rule would expose municipalities to massive judgments, which will jeopardize their financial solvency. That, in turn, would destabilize the financial stability of their home States. Moreover, the States' ability to regulate their own cities and parishes would be undermined, as those municipalities would be increasingly micromanaged by federal courts.

Not only does the opinion below fail to explain what training a municipality must provide to its corrections officers, but it also conflicts with precedents from at least four other Circuits, adding further uncertainty to the law. *Amici* States ask this Court to grant certiorari to ensure that municipalities are held liable only when they are actually at fault for a constitutional violation of their own making and to reaffirm that States retain power to regulate their own subdivisions without undue federal judicial interference.

SUMMARY OF ARGUMENT

The petition for certiorari correctly explains why the Seventh Circuit's decision departs from this Court's jurisprudence and creates a severe circuit split. *Amici* States write to emphasize that the lower court's decision will inflict two major harms on all States and municipalities if allowed to remain on the books.

First, the opinion below dramatically increases the scope of municipal liability, allowing municipalities to face multi-million-dollar judgments because of the criminal actions of a rogue employee. The claim here is based on a "failure to train"

theory—but a lack of training was not the reason that Darryl Christensen assaulted two inmates. The record shows that he knew his actions were wrong. If the threat of decades of imprisonment did not prevent Christensen from assaulting inmates, surely no training session would have made a difference.

The possibility of similar future judgments in other cases will create major financial burdens on municipalities and States. Given that many municipalities lack the resources to cover a large judgment, States must either assume the debt themselves or allow their subdivisions to "restructure" their debt, likely through bankruptcy. Bankruptcies, of course, result in financial harm to a municipality's creditors and citizens—and they decrease future investor confidence. This makes it harder for both the State and its municipalities to raise funds by issuing bonds.

Second, the decision below represents an attack on state sovereignty, as its logical result will be to shift management over municipalities from States to federal courts. The decision below, although it purports to do otherwise, essentially constitutionalizes the Prison Rape Elimination Act. This Act was meant to set only "best practices" standards for State and local jails, leaving ample room to experiment with different policies for preventing sexual misconduct by jail guards. But in light of the decision below, failure to follow these best practices will expose municipalities to ruinous lawsuits, making the standards *de facto* mandatory.

The lower court's decision could also constitutionalize many other federal laws and standards touching upon municipal actions. That would force municipalities to cling tightly to optional

federal practices. The natural result will be a stifling of States' abilities to manage their own subdivisions, an erosion of power that rightfully belongs to the sovereign States.

ARGUMENT

I. THE DECISION BELOW EXPOSES STATES AND THEIR TAXPAYERS TO GRAVE FINANCIAL HARM.

The decision below allows municipalities to suffer liability for the intentional crimes of their employees. One bad actor could subject any municipality to millions of dollars in damages.

The jury awarded each respondent a $2 million judgment against Polk County, in addition to a larger award against Christensen. Pet. App. at 12–13. These enormous judgments would be ruinous if imposed on municipalities in Louisiana.[2]

According to data from the State's Legislative Auditor, all but *three* of Louisiana's more than 200 towns and villages spent less than $4 million *total* in

[2] It is not misleading to use the multi-million-dollar judgment affirmed below as a comparative figure for single incident liability cases. Because such liability necessarily requires deliberate indifference to a "known or obvious risk," *Bryan County v. Brown*, 520 U.S. 397, 410 (1997), it inherently lends itself to cases involving serious and horrific consequences, like this one. When tragic results occur, it is easy to see how juries could award multi-million-dollar judgments against municipalities.

general fund expenditures in 2018.[3] Among the cities and parishes that reported the same data, the vast majority tallied less than $20 million, with many coming in under $4 million. It requires no stretch of the imagination to see how ruinous a $4 million judgment would be to these local governments.

Outside of municipal dissolution or disincorporation, bankruptcy or a State bailout would be the only way to keep an entity afloat following such a massive judgment. For this reason, it is not municipalities alone that will suffer from financially ruinous legal judgments under the lower court's decision. Municipal governments in Louisiana, as in all States, finance many of their expenses through debt. In Louisiana, no local government can contract debt without seeking approval from the State Bond Commission. La. R.S. § 1410.60(A). If municipalities face a sudden increase in expenses because of new exposure to liability, the Commission would see a dramatic rise in local government debt, which itself would cause a cascade of financial uncertainty that could bleed into investment portfolios everywhere.[4]

Deeply indebted municipalities create serious problems for their home States. Most obviously,

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[3] *See* Louisiana Legislative Auditor, *2018 Unaudited Financial Data*, https://www.lla.la.gov/reports-data/local-government-financials/index.shtml.

[4] *See* Robert Pozen & Joshua Rauh, *Opinion: Muni bond investors could lose out as pension crisis cripples many U.S. cities*, MARKETWATCH (June 9, 2020), https://www.marketwatch.com/story/muni-bond-investors-face-a-day-of-reckoning-with-the-pension-crisis-thats-crippling-many-us-cities-2020-06-08.

municipal debt could be backed by the State's own credit, in which case the State—or more accurately, all of its taxpayers—will be responsible for covering the cost of a judgment. In Louisiana, the state constitution provides that the "full faith and credit" of any political subdivision is pledged to bonds issued by that subdivision. La. Const. art. VI, § 33(B). Even though the State is not constitutionally *obligated* to secure such bonds, La. Const. art. VII, § 6(C), it might very well *choose* to back a local government's bond obligations in an effort to prevent, or at least cushion, the waterfall of problems that accompany municipal financial ruin.

In New York City, for example, after ordinary municipal debt had become "unmarketable" in 1975, new debt was backed by the "moral obligation" of the State. *See* Congressional Budget Office, *The Causes of New York City's Fiscal Crisis*, 90 Pol. Sci. Quar. 659–74 (1975). Struggling municipalities have a greater incentive to seek state backing—otherwise they have to offer high yields to attract buyers of their debt.

Even if not legally obligated to repay municipal debt, States will be badly harmed if municipalities cannot make good on their obligations. States must either bail out overly indebted municipalities or allow them to declare bankruptcy, as happened in Detroit in 2013.[5]

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[5] *See* Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 18, 2013, https://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=all&_r=0.

Bankruptcies result in serious losses for those who hold municipal debt—many of whom may be residents of the municipality (and, of course, the State). They destroy public confidence in the financial health of government entities, making it harder for both the State and other municipalities to issue debt in the future. *See*, *e.g.*, Lauren M. Wolfe, *The Next Financial Hurricane? Rethinking Municipal Bankruptcy in Louisiana*, 72 LA. L. REV. 555, 568 (2012) ("Because a state is strongly tied to its municipalities' financial management, the failure of one city could make the entire state look fiscally incompetent. Indeed, the bond rating agencies also threatened to downgrade the state's credit rating if any of its municipalities file for Chapter 9." (footnotes omitted)).

This is an especially important issue for Louisiana. A recent study by Conning Investment Products, a firm which manages numerous municipal bonds, ranked Louisiana second-to-last among States in terms of credit outlook.[6] Given the decline in tax revenue because of COVID-19, state and local finances are already tight in Louisiana (as in many other States). A further restriction on the availability of credit will hamper efforts by Louisiana and its municipalities to provide the services that citizens need.

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[6] *See* The Center Square, *Analysis ranks Louisiana 2nd lowest among states for its municipal bond credit outlook*, https://www.thecentersquare.com/louisiana/analysis-ranks-louisiana-2nd-lowest-among-states-for-its-municipal-bond-credit-outlook/article_a7d2c65a-bba8-11ea-b06a-db6aeacc430d.html.

To boost investor confidence, Louisiana passed La. R.S. § 39:504[7] to ensure continued investment in Louisiana bonds (both State and local) by granting creditors a priority claim on tax revenue—potentially ahead of Louisiana citizens. If municipal credit ratings drop because of large legal judgments rendered against them, pressure to further advantage creditors will only increase, diverting even more taxpayer dollars away from vital services to state citizens. Even *the threat* of significant liability could greatly harm Louisiana's municipal bond market.

Louisiana has already blocked several requests for municipal bankruptcies in the past few decades, aiming to avert precisely these harms. *See* Wolfe, 72 LA. L. REV. at 561 & n.40–41 (discussing several cases, including an attempt by the Orleans Parish District Attorney's Office to file for bankruptcy precisely because of a $15 million court judgment against it). The State very carefully

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[7] The law states:

> It is the intention of the legislature that bonds issued by a governmental entity under this Part, or under any other statutory authority referenced herein, shall be secured debt entitled to the highest possible protection and priority afforded by the bankruptcy laws of the United States and this state. Therefore, the owner or owners of any such bonds are hereby granted and shall have a statutory lien on and a security interest in such taxes, income, revenues, net revenues, monies, payments, receipts, agreements, contract rights, funds, or accounts as are pledged to the payment of such bonds.

La. R.S. § 39:504(A).

monitors the financial health of its subdivisions, knowing that any potential bankruptcy or default on debt will harm not only the municipality in question, but the entire State.

Other States have flatly forbidden municipalities from filing for bankruptcy, at least in most circumstances.[8] *See, e.g.*, Ga. Code § 36-80-5 ("No county, municipality, school district, authority, division, instrumentality, political subdivision, or public body corporate created under the Constitution or laws of this state shall be authorized to file a petition for relief from payment of its debts as they mature or a petition for composition of its debts under any federal statute providing for such relief or composition."); Iowa Code §§ 76.16, 76.16A. Many other States simply do not have a statute on the books describing whether municipalities may file for bankruptcy.[9]

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[8] Note that deep federalism concerns arise if the *federal* government attempts to regulate the internal financial workings of states, such as with federal municipal bankruptcy laws. *See Ashton v. Cameron Cty. Water Imp. Dist. No. 1*, 298 U.S. 513, 526 (1936) ("If obligations of states or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the state, so often declared necessary to the federal system, does not exist.").

[9] *See generally* K&L Gates, *State Statutes Authorizing Municipal Bankruptcy*, https://www.nappa.org/assets/docs/ArchivedConferenceMaterials/2015ConferenceAustin/nappa_2015%20friday%20mixon%20municipal%20bankruptcy.pdf.

Exposing municipalities to liability for single-incident claims such as this one would also render risk management in state and local finances nearly impossible. Risk management is a major concern for any large entity. Like other States, Louisiana has an office dedicated solely to this task. *See* La. R.S. § 39:1528; *see also, e.g.*, Ohio Rev. Code § 9.821; Tex. Ins. Code § 1803.002; Va. Code § 2.2-1832 *et seq.*; Wash. Rev. Code § 4.92.210. However, debt incurred because of criminal actions of a rogue employee, who knew perfectly well what he was doing was wrong, is nearly impossible to predict. *See* Wolfe, 72 LA. L. REV. at 571. Thus, exposing municipalities to liability in these circumstances will sharply hamper that State's efforts to manage risk responsibly.

Louisiana is not alone in fearing the negative effects of a municipal bankruptcy or near-bankruptcy. In 2011, Jefferson County, Alabama declared bankruptcy, defaulting on over $3 billion in bonds. *See In re Jefferson County, Alabama*, Bankr. N.D. Ala. 2:11-bk-05736 (Nov. 9, 2011). The county had previously called for state aid to prevent a default—but received nothing. Because of the bankruptcy, Jefferson County ultimately laid off more than 700 employees.[10] Independent of the harm of state or local employees losing their jobs, such a reduction in personnel also hampers the ability of a municipality to provide services for its residents—who are citizens and taxpayers of the State.

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[10] *See* Verna Gates, *Bankrupt Jefferson County, Alabama Lays Off 75 More Government Workers*, HuffPost, https://www.huffpost.com/entry/bankrupt-jefferson-county-alabama-lays-off_n_1472652 (May 2, 2012).

In Rhode Island, lawmakers were concerned about the potential drop in investor confidence that would accompany a municipal bankruptcy. They passed a law declaring that if a municipality goes bankrupt, creditors who bought its bonds are prioritized over the municipality's other obligations, including pensions. *See* 45 R.I. Gen. Laws § 45-12-1 ("Annual appropriations for payment of financing leases and obligations securing bonds, notes or certificates . . . have a first lien on ad valorem taxes and general fund revenues commencing on the date of each annual appropriation.").[11] While the law will likely encourage investors to continue buying Rhode Island bonds, it resulted in significant cuts to pensioner's benefits.[12]

Unless the Seventh Circuit decision is reversed, many more municipalities—and their home States—will face significant financial struggles. Taxpayers will bear those costs.

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[11] *See also Michael Corkery, Bondholders Win in Rhode Island*, WALL ST. J., https://www.wsj.com/articles/SB10001424053111903885604576486610528775994; Mary Williams Walsh & Michael Cooper, *Faltering Rhode Island City Tests Vows to Pensioners*, N.Y. TIMES, https://www.nytimes.com/2011/08/13/us/13bankruptcy.html.

[12] For an updated survey of additional municipal bankruptcies, see Jeff Chapman, Adrienne Lu, & Logan Timmerhoff, *By the Numbers: A Look at Municipal Bankruptcies Over the Past 20 Years*, PEW CHARITABLE TRUST, https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/07/by-the-numbers-a-look-at-municipal-bankruptcies-over-the-past-20-years.

II. THE DECISION INCREASES FEDERAL POWER OVER THE STATES BY USURPING CONTROL OVER MUNICIPALITIES.

Municipalities are subject to State control, as this Court has long recognized. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political sub-divisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."). "The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." *Id.* All States have an interest in maintaining this prerogative and limiting the power of the federal government to control their municipalities. And principles of federalism dictate that that federal courts should respect the power of States to manage their own municipalities. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

If the Seventh Circuit decision stands, it will upend the balance of power between the States and the federal government. No employer, however careful it may be in hiring and training, can guarantee that none of its employees will act criminally. If federal courts can impose large judgments against municipalities whenever a rogue employee violates the law, municipalities will become wards of the federal courts. *See Connick v. Thompson*, 563 U.S. 51, 68 (2011) (Federal courts do not have "*carte blanche* to micromanage local governments throughout the United States."). There is no dispute that Polk County's jail policies were in

full compliance with Wisconsin laws and regulations. Pet. App. 55. A federal court's imposition of a different, heightened standard on the County's jail policies amounts to an improper transfer of power from Wisconsin to the federal courts.[13]

The decision below has, in essence, made the Prison Rape Elimination Act's standards mandatory, despite the fact that it purports not to do so. *See* Pet. App. 31 (majority); Pet. App. 38 (Easterbrook, J., dissenting in part). The majority below did not describe what "reasonable steps," short of fully following the PREA standards, Polk County should have taken to insulate itself from *Monell* liability. *See* Pet. App. 32. While the PREA standards may be a good model to follow, States must be given freedom to balance the legitimate competing interests of prisoner safety, prison security, and conservation of resources. The decision below erodes that freedom

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[13] The implications of the decision below could very well increase federal power over States in other ways too. For example, when interpreting the meaning of "deliberate indifference" in a § 1983 case against state officials, the Seventh Circuit has borrowed from case law examining deliberate indifference in the *municipal* liability context. *Kitzman-Kelley, on behalf of Kitzman-Kelley v. Warner*, 203 F.3d 454, 459 (7th Cir. 2000) ("In the context of municipal liability, the Second Circuit has approached questions of adequate training under a three-part framework that might serve as a useful guide in assessing the allegations against the individual defendants in a case such as the present one.") (citing *Young v. County of Fulton*, 160 F.3d 899, 903–04 (2d Cir. 1998)). If certiorari is not granted, lower courts could look to the decision below not just in municipal liability cases, but also in cases in which States are defending their own officials from suit.

and essentially mandates the PREA standards for municipal prisons.

The level of micromanagement that would result from broadly applying the majority opinion below is difficult to overstate. Everybody is presumed to know that a guard may not violate the law by sexually assaulting an inmate in jail. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) ("Every citizen is presumed to know the law." (cleaned up)). Demanding that municipalities properly "train" their employees to avoid such behavior is essentially a demand that they train their employees to avoid doing anything illegal. A training program aimed at addressing this problem would not only be ineffective at stopping a determined criminal—Christensen admitted that lack of training was not the reason for his acts, *see* Pet. App. 47 (Brennan, J., dissenting)—but would take up an inordinate amount of both the trainees' and their supervisors' time. Every criminal act would need to be outlined and explicitly forbidden during the training process. Such an extensive "training" program would obviously hamper municipalities from actually providing services to their citizens.

The "failure" to train in this instance is quite different from the example of training police officers in the proper use of force, given as a hypothetical example of a single incident failure-to-train claim in *Bryan County v. Brown*, 520 U.S. 397, 409 (1997) (discussed in *Connick*, 563 U.S. at 63–64). Because it is predictable that "an officer lacking specific tools to handle [a situation such as a fleeing felon] will violate citizens' rights," failure to train police on the proper use of force in such situation could, possibly,

give rise to *Monell* liability after only a single incident. *Bryan County*, 520 U.S. at 409. But despite the majority opinion's assertions about the danger of male guards, Pet. App. 26, a city can expect male guards to understand that it is against the law to sexually assault a female inmate.[14]

This difference highlights the increased supervision that municipalities will face from federal courts if the decision below stands. Under *Bryan County* (and *Monell* and *Connick*), municipalities must train employees where, lacking clear guidelines, the employees may predictably violate citizens' constitutional rights. Under the majority's new paradigm, municipalities will have to create not only "sexual abuse prevention program[s]," *see* Pet. App. at 21, but abuse-of-all-sorts prevention programs. Even declaring behavior to be a felony will not be enough: Employees must be specifically trained not to engage in that behavior. While explicitly teaching every criminal law to every employee to guard against violations might be

[14] The majority opinion below contends that it is "as obvious as obvious could be" that male guards supervising female inmates creates a power dynamic—which in turn creates a high risk of sexual abuse. Pet. App. 26. The majority opinion suggests that, despite that fact that sexual assault of an inmate is a felony in Wisconsin, *men* simply cannot be trusted to guard women. If the majority opinion is suggesting that hiring female guards to guard female inmates would be preferable, the opinion may run afoul of Title VII's prohibition of sex-based hiring discrimination. *See* 42 U.S.C. § 2000e-2; *see also* Federal Bureau of Prisons, Staff Gender, https://www.bop.gov/about/statistics/statistics_staff_gender.jsp (observing that more men than women apply to work in prisons).

"ideal" training in some sense, it is not a realistic expectation to place on municipalities, nor on States.

This Court has recognized that the risks of hiring a bad actor are not the sort of "obvious" risks that give rise to *Monell* liability. *Bryan County*, 520 U.S. at 410–11. The decision below, in essence, conflated liability for hiring a bad actor with liability for failure to train. Because it is not always "obvious" that potential employees are bad actors, the Seventh Circuit's rule will increase the likelihood that counties will suffer liability even when they were neither malicious nor deliberately indifferent. This in turn undercuts federalism, allowing federal courts to extract large judgments from counties that should be—absent malice or deliberate indifference—under the rule of the States, not the federal government. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ("[M]unicipal liability is limited to action for which the municipality is actually responsible.").

Making the standard for federal liability malice, indifference, *or* failing to recognize a bad actor would quickly shift municipalities to being under the *de facto* control of federal courts, rather than the States. *See Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) ("[T]hreatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism."); *United States v. Baltimore & O.R. Co.*, 84 U.S. 322, 329 (1872) ("The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large."); *cf. City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (States have "freedom under our dual system

of federalism to use their municipalities to administer state regulatory policies."). The lower court's ruling risks subjecting municipalities—and their home States—to financial ruin and federal control.

CONCLUSION

This Court should grant certiorari, reverse the decision of the Seventh Circuit, and confirm that *Monell* liability does not attach to a municipality based on a "single incident" theory of liability when a rogue employee knowingly engages in criminal conduct.

Respectfully submitted,

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