No. 86-1088

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF CANTON, OHIO,
Petitioner,
v.
GERALDINE HARRIS, WILLIE G. HARRIS, and BERNADETTE HARRIS,
Respondents.

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

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioner

* Counsel of Record

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Respondents argue that certiorari should be dismissed as improvidently granted on the ground that the City's brief offers "new" legal arguments in support of its consistently-held position that it cannot properly be held liable under Section 1983 on the facts of this case. Respondents also argue, in the alternative, that this Court should hold that the City of Canton can be held liable under Section 1983 on the ground that the City's "policy" of "inadequate training" did not provide the jailer with the medical training necessary to recognize a poten-

tially serious emotional disturbance. Finally, respondents argue that the facts are sufficient to support a finding that the City is liable under Section 1983 for its "custom" of not providing adequate medical care to emotionally upset arrestees. None of these arguments has merit.

I. THERE IS NO BASIS FOR DISMISSING THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Totally disregarding this Court's repeated observation "that the 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition,'" *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 922 (1988), quoting *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985), respondents' initial argument is that the writ should be dismissed as improvidently granted. However, respondents admit that the issue "properly before the Court" is whether, in the circumstances of this case, the City of Canton can be held liable under Section 1983 for the acts of its employees. Resp. Br. 16. That is precisely the issue posed in the Questions Presented in our petition for certiorari. Pet. i.

1. Respondents assert that the City of Canton's brief for the first time raises a new "issue not properly presented" to the courts below: whether a city's "inadequate training" can *ever* constitute a "policy" for purposes of Section 1983 municipal liability. Resp. Br. 8, 19.[1] In the first place, this is a mischaracterization of the City's argument: the City is not arguing that "inadequate training" can *never* constitute a policy. Instead, we argue that such a "policy" cannot form the

[1] "Petitioner urges this Court to fashion a . . . rule, under which a deliberately adopted municipal policy regarding training or supervision can never be the basis of municipal liability . . . ." Resp. Br. 19.

basis of liability unless that policy is itself unconstitutional (Pet. Br. 14-20) or, in the alternative, unless there has been a showing that a city "deliberately" adopted such a policy and that the policy was the "moving force" of the violation. Pet. Br. 20-30.

Second, the ultimate *issue* actually presented in this case—the City's liability under *Monell* for the acts of the police officers in question—has been vigorously litigated since the outset of this case. See, *e.g.*, Brief of Appellant City of Canton, No. 85-3314 (6th Cir. 1985); see also *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). Indeed, it is clear from respondents' own brief that while the City's brief set forth new arguments —whether the city can be liable for a policy that is not itself unconstitutional—it raised no new *issue* that was not fully litigated below. Respondents' suggestion that raising a new *argument* is the equivalent of raising a new *issue* is completely unsupported and blurs the distinction between the issue presented and the arguments in support of petitioner's position on those issues.

2. Respondents assert that the City waited until *after* the petition was granted before raising *any* issue about the underlying validity of the "inadequate training" theory as a basis for municipal liability under Section 1983. But the issue was squarely presented in the petition.[2] In fact, in arguing that the petition should be

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[2] The petition for a writ of certiorari stated that:

> [t]he decision of the court of appeals, exposing the City of Canton to substantial liability under Section 1983 for "inadequate training," constitutes a serious misapplication of the principles set forth in this Court's decisions in *Monell* and *Tuttle* for determining what constitutes a custom or policy sufficient to establish municipal liability.

Pet. 8. See Pet. 8-12 (arguing that theory of "inadequate training" was inconsistent with prior decisions of this Court and intent of Congress).

held pending the outcome of *City of Springfield* v. *Kibbe*, 107 S. Ct. 1114 (1987), we stated "[t]he fundamental issue in [*Kibbe*] is identical to the issue presented here, *viz.*, whether the allegedly inadequate training of police officers constitutes a viable theory of municipal liability under 42 U.S.C. § 1983." Pet. 13. Respondents never objected to the issue presented before the Court granted certiorari.[3]

3. The holding of *City of Springfield* v. *Kibbe*, which respondents suggest bears a "striking resemblance" to the instant case, is in fact completely inapposite. In *Kibbe*, the City actually proposed jury instructions setting forth a standard of municipal liability which it subsequently attacked in this Court. Here, not only did the City object to the respondents' proposed jury instructions on municipal liability, but it offered its own proposed jury instruction. The City's proposed instruction,[4] which

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[3] In the courts below, petitioner did not directly challenge the theory of "inadequate training," as a means of establishing municipal liability under Section 1983, because the Sixth Circuit already had ruled to the contrary in prior cases. See Pet. App. 5a. Accordingly, petitioner made several narrower arguments before the court of appeals on that issue. But, according to respondents, in order to "preserve" the argument directly challenging the "inadequate training" theory, petitioner was required to engage in the clearly futile task of requesting a panel of the Sixth Circuit to overrule recent, settled law in that Circuit. Not surprisingly, respondents fail to cite any authority for this rule.

[4] See City of Canton Proposed Jury Instruction IX (reproduced in the parties' Joint Appendix, *Harris* v. *City of Canton*, No. 85-3314 (6th Cir.), at 33):

> In order to prove her claim against the City of Canton, Mrs. Harris must establish by a preponderance of the evidence that the City of Canton has implemented or executed a policy or custom of intentionally depriving prisoners of necessary medical attention. . . . [I]f you find by a preponderance of the evidence that the City of Canton has adopted an official policy or custom that deprives prisoners of their Eighth Amendment Right to be free from cruel and unusual punishment and that

the district court rejected, is entirely consistent with the legal position now being argued by the City in this Court.

II. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR ADOPTING AN ALLEGED 'POLICY' OF PROVIDING OFFICERS WITH INADEQUATE TRAINING

In its opening brief, the City of Canton demonstrated that the theories of municipal liability adopted by the court of appeals failed to state a claim against the City. Respondents' brief does little to defend the theory of liability on which the case was remanded for retrial and ultimately offers no reason why the claim against the City should not be dismissed with prejudice.

A. *The City Cannot Be Held Liable Under Section 1983 Based On A Municipal Policy Unless The Policy Itself Was Unconstitutional*

Based on the language, structure and purpose of Section 1983 (Pet. Br. 14-15), petitioner urged this Court to hold—consistent with every decision of this Court on the issue to date (Pet. Br. 15)—that a "policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here," can *never* meet the policy requirement of *Monell*. Pet. Br. 14-20; *cf. Tuttle*, 471 U.S. at 824, n. 7 (withholding decision on whether Section 1983 municipal liability may be established by constitutional policy).

At the outset, respondents argue that the language of Section 1983, which imposes liability on any person who "causes" a deprivation of rights, precludes this Court from holding that only " 'unconstitutional' city policies can lead to municipal liability." Resp. Br. 21. To the con-

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this policy or custom was the proximate cause of the harm or injuries to Mrs. Harris, then you are justified in finding that the City of Canton is liable to Mrs. Harris for the alleged harm.

trary, it is fully consistent with the language of the statute to hold that a city "causes" someone to be subjected to a constitutional deprivation only when implementation or execution of an unconstitutional policy leads to injury. See *Tuttle*, 471 U.S. at 828 (Brennan, J., concurring); see also *id.* at 824, n.8 ("[t]he 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") (emphasis in original).

In other words, the appropriate inquiry is whether the injury is caused by the city's unconstitutional act (*i.e.*, its policy) or simply by an employee's unconstitutional act. See Pet. Br. 14-15. In the latter instance, the city should not be held liable—even if the plaintiff can demonstrate some "link" between the employee's act and a constitutional city policy. The reason is obvious: there will always be *some* link between an unconstitutional act and a municipal "policy" decision.[5] See *Tuttle*, 471 U.S. at 823.

Respondents place selective reliance on the legislative history of Section 1983 in an attempt to bolster their argument that municipal liability may be based on a city's "default" in failing properly to implement otherwise constitutional policies. Resp. Br. 23, n.16 (citing Representative Sheldon, Cong. Globe, 42d Cong., 1st Sess 367-68 (1871)). But respondents' reliance on references to "default" in the legislative history blurs the distinction between congressional concern with intentional "defaults" in obligations to equally enforce the law (especially with respect to race)—which would represent an unconstitutional custom or policy—and "defaults" in the

[5] Respondents also argue that a bright-line test for municipal liability should be rejected because it lacks "precedent" and has been "explicitly rejected by the seven Justices of this Court who have discussed the issue . . . ." Resp. Br. 17. Respondents' "head-count" is baseless, given that this Court explicitly "has withheld decision on the issue . . . ." Pet. Br. 14; see *Tuttle*, 471 U.S. at 824, n.7.

sense that the state or city fails to ensure that all laws and policies are implemented without error. As this Court recognized in *Monell*, it is only the "default" of an obligation that is constitutional in nature that gives rise to liability under Section 1983.[6] See *Monell*, 436 U.S. at 692-94. Thus, Representative Sheldon's reference to "the default of the State authorities," when read in context, refers only to that systematic maladministration of the law that occurs when "the State governments criminally refuse or neglect those duties which are imposed upon them." Cong. Globe, 42d Cong., 1st Sess. 368.

Respondents use several hypotheticals to illustrate their argument that "[t]here is no valid or meaningful distinction under § 1983 between an unconstitutional city policy and an otherwise improper city policy . . . ." But these hypotheticals do not support respondents' expansive interpretation of municipal liability under Section 1983. For example, respondents pose a situation in which a city "fail[s] to train its [police] officers that certain uses of deadly force are unconstitutional.

There is nothing in this hypothetical to suggest that petitioner's proposed rule is wrong or unworkable.

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[6] Justice Frankfurter, dissenting in part in *Monroe* v. *Pape*, noted that:

> [t]he Forty-second Congress believed that *"denial"* [of equal protection] could be worked by *non-action*, while *"deprivation"* [of due process] required *ill-action;* thus, . . . the scope of federal enforcing power under the Equal Protection Clause reached further . . . than did the equivalent scope of power under the Due Process and Privileges and Immunities Clauses.

365 U.S. 167, 256-57, n.87 (1961) (emphasis added) (citing Cong. Globe, 42d Cong., 1st Sess. 459, 482, 505-06, 514, 607-08, 697, App. 251, 315). Thus, to the extent that Congress was concerned about any "default" on the part of state authorities, it was concerned with the default in equal enforcement of the law that gives rise to a denial of equal protection. The only claim at issue in this case is a single incident of an alleged deprivation of due process.

If, in that hypothetical case, there is *proof of a municipal policy* of promoting—through lack of training or otherwise—the indiscriminate use of deadly force, that policy properly could be found to be unconstitutional (and form the basis of municipal liability). However, if in that hypothetical situation (as in this case), plaintiff presented no evidence with regard to the city's affirmative policy, then there is no proper basis for imposing liability directly against the municipality. Liability should not be based on a jury's determination, in hindsight and without regard to any objective standards, that a city's training was "inadequate" because a constitutional violation may have been committed by a police officer.[7]

If we are correct that the City cannot be held liable unless its policy is itself unconstitutional, then this case is at an end. Neither respondents nor their *amicus* have made any claim that the City had any unconstitutional policy that caused respondents' alleged injuries.

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[7] In a similar vein, respondents offer other hypotheticals in which (1) a city deliberately hires police officers "with a known proclivity for excessive and unprovoked violence" or (2) a city instructs new officers to "do all in their power to capture fleeing felons" and intentionally omits reference to constitutional limits on the use of deadly force. Resp. Br. 22. In those hypothetical cases—which involve a *deliberate municipal choice* to adopt an unconstitutional policy—the municipality might be held liable under the City's proposed standard of liability.

Respondents also are incorrect in suggesting that the City would argue that there is no basis for liability in circumstances in which a city "has no written policy, but trains its officers to enter homes" in violation of the warrant requirement of *Payton* v. *New York*, 445 U.S. 573 (1980). In such a case, not only is the city's policy facially unconstitutional, but the city's conduct (*i.e.*, the training) directly causes the constitutional violation.

B. *The City Cannot Be Held Liable Under Section 1983 Based On A Theory Of Inadequate Training In The Absence Of Proof That The Level Of Training Represented A Deliberate Policy Choice That Was The Moving Force Behind The Constitutional Injury*

Even if this Court were to hold that the City could be liable under Section 1983 for a policy that was not itself unconstitutional, the respondents' proposed standard for municipal liability based on "policy" clearly cannot be sustained.

1. Respondents argue that liability should be imposed when a municipality violates its "duty" to prevent constitutional violations through "reasonable" (*i.e.*, non-negligent) "selection, training, instruction and supervision" of employees. Resp. Br. 22. Respondents also assert that the municipal "standard of care" that controls city liability—*i.e.*, the adequacy of "medical care by jailers"—should be measured, as a matter of constitutional law, against the "universally accepted norms" of training standards developed in various academic and trade journals. Resp. Br. 24-25 (pointing to "[d]iverse authorities" who have promulgated "standards and training curriculum" for police forces); see also *Amicus Curiae* Brief of the American Civil Liberties Union in Support of Respondents, at 11, 17-18 (arguing that rules imposing municipal liability for "inaction" should be adopted because potential liability encourages beneficial expenditures on police training).[8]

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[8] The ACLU assumes that increased municipal liability based on inadequate training is generally positive because it will result in additional spending on training programs, standards and supervision which will protect constitutional rights. See ACLU Br. 14-23. Even accepting that assumption, which may not be correct, it is plain that Section 1983-induced increases in training costs (and damage awards) will, in light of budgetary constraints, result in decreased spending on other necessary municipal social services and programs. Moreover, this Court in declining to hold cities liable on the basis of respondeat superior rejected the argument that the

Petitioner has demonstrated that such a view of municipal liability under Section 1983 is completely unsupported by the language and history of the statute and by the opinions of this Court. Pet. Br. 20-30. At the outset, the rule advocated by respondents requires no showing of any actual municipal "act" for which the city truly is responsible. Instead, the jury is invited to "infer" that the conduct of the police in the single incident in question may be attributed to the "inadequacy" of training and that the City—through its training "policies"—is therefore responsible for the injury in question. See Resp. Br. 22-23. That clearly is an impermissible inference in a Section 1983 action. See *Tuttle*, 471 U.S. at 808 (error to allow jury to "infer" municipal liability based on policy of inadequate training from single excessive use of force); *id.* at 829 (Brennan, J., concurring) ("the plaintiff must predicate his recovery on some particular action taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee").

Despite its rhetoric regarding the "policy of recklessly failing to train or supervise its police officers with respect to . . . necessary medical care [for] persons visibly suffering from emotional disturbances or distress," Resp. Br. 16, the respondents fail to point to a shred of evidence that any such "policy" existed.[9] Respondents simply cannot and do not dispute that the only evidence

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scope of a city's liability under Section 1983 should be expanded to deter unconstitutional conduct. See *Tuttle*, 471 U.S. at 843-44 (Stevens, J., dissenting).

[9] Even under respondents' theory of liability, it must be necessary to identify precisely how the city's training policy was "inadequate." Respondents' reliance in this Court upon various academic writings should not obscure the fact that the record does not contain a shred of evidence that the City's approach to "emotional" injuries—which relied upon the experience and common sense of its police officers—was inadequate. No direct testimony, expert or otherwise, was offered on this issue. Thus, respondents wholly failed to *prove* at trial that the City's approach was inadequate.

of any City policy was the written policy requiring that arrestees be provided with all necessary medical attention.[10]

2. Assuming that it could be inferred that the officer's training was in fact inadequate, respondents' theory of the case nevertheless fails to meet the requirement of intentional or deliberate conduct that is inherent in the "policy" standard of *Monell*. Pet. Br. 25-27. Because liability based upon the "policy" prong of *Monell* may arise from a single act, this Court should affirm its holding that such liability only arises if there is a "deliberate choice" (*Pembaur*, 475 U.S. at 483) made by a municipal policymaker. See *Tuttle*, 471 U.S. 823 ("the word 'policy' generally implies a course of action consciously chosen from among various alternatives"); *Pembaur*, 475 U.S. at 483-84 ("[w]e hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy"); *id.* at 499-500 (Powell, J., dissenting) ("policy" requires governmental approval of rule of general applicability).

Respondents offer several arguments in support of their theory that liability may be based on a showing that the city has been "grossly negligent" in permitting a program of inadequate training to exist. But respondents' argument places a substantial strain on the ordinary meaning of the term "policy." As this Court has noted,

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[10] As in *Praprotnik*, the most that respondents can prove is that City employees erred in the exercise of the discretionary authority delegated to them under the City's clearly permissible policy. See 108 S. Ct. 915, 927 (1988). *Praprotnik* made clear that an exercise of discretionary authority by a city employee does not reflect city policy under Section 1983; instead, a city is liable only for "acts which the municipality has officially sanctioned or ordered." *Id.* at 924 (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986)).

it is "difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless . . . the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 823. No policymaker in Canton ever made such a choice.[11]

In support of their reading of the statute, respondents make the counter-intuitive assertion that a city's failure to provide adequate training is "no different than any other consciously chosen practice." Resp. Br. 24. The respondents are simply wrong. Deliberately wrongful conduct reflects a higher—not a lower—degree of culpability than negligent conduct or even "grossly negligent" conduct. Moreover, contrary to respondents' assertion (*id.*), there are no "universally accepted norms" of police training by which to measure a city's "negligence" in deviating from "accepted" training practices; normal police procedure in New York or Los Angeles would be inappropriate, unaffordable or even counterproductive for smaller, less urban communities. Respondents' attempt to federalize police training methods through Section 1983 is wholly unwarranted.

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[11] Respondents argue that the "legislative history of the 1871 Civil Rights Act makes clear that Congress believed that liability should be imposed on a city for gross negligence . . . ." Resp. Br. 27-28. As their sole evidence of this "clear" intent, respondents point to Section 6 of the 1871 Act—which they assert imposes liability on persons who "having the power to prevent" injury to federal rights "shall neglect or refuse to do so." Resp. Br. 28. Respondents' selective quotation of Section 6 fails to acknowledge that the quoted language sets the standard of liability only for persons who "hav[e] knowledge" of but "neglect or refuse" to prevent "the wrongs conspired to be done and mentioned in the *second section of this Act.*" Section 6 of the Act, by its terms, has *nothing to do with Section 1* of the Act, which became 42 U.S.C. § 1983. (Section 2 and Section 6 of the 1871 Act, as amended, are codified at 42 U.S.C. §§ 1985 and 1986.)

III. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR ADOPTING AN ALLEGED 'CUSTOM' OF REFUSING TO PROVIDE MEDICAL CARE TO EMOTIONALLY DISTURBED DETAINEES

In its opening brief, the City questioned whether the issue of liability based upon municipal custom properly was preserved by respondents in the district court and on appeal. Pet. Br. 30-31 ("the court of appeals analyzed the case strictly in terms of the 'policy' prong of *Monell*" and "it is not free from doubt whether this issue [of municipal liability based on "custom"] is actually in dispute"). Respondents overlook that question and argue, based upon a reappraisal of the record, that the City should be held liable based upon its "custom" of inadequate training. But respondents' reply to the City's brief (or lack of reply) strongly reinforces our doubt that the "custom" issue is a part of this case.[12] Nevertheless, there is no basis for a retrial on the issue of municipal custom.

1. Respondents agree in principle that a "single incident cannot establish a municipal custom," (Resp. Br. 31) but they seek to avoid the force of that rule by mischaracterizing both the petitioner's argument and the facts of the case. First, respondents warn that the definition of custom "petitioner urges upon this Court" (Resp. Br. 31) should be rejected because under that rule, there can be no liability "until a series of *deprivations* have actually occurred." Resp. Br. 31 (emphasis added). Petitioner makes no such argument. Instead, the City's position is that "a single *incident* is insufficient to establish that the city has deliberately (or even reck-

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[12] As petitioner noted, respondents did not press the "custom" issue in the Sixth Circuit and that court did not hold, or even discuss, whether municipal custom provided an alternative basis of liability. Pet. Br. 30-31. Accordingly, there is no reason for this Court to consider this issue now. See *California* v. *Taylor*, 353 U.S. 553, 556-57, n.2 (1957); *City of Springfield* v. *Kibbe*, 107 S. Ct. 1114 (1987).

lessly) adopted the custom or practice at issue." Pet. Br. 32 (emphasis added). Thus, respondents' argument blurs the distinction between multiple *incidents* of misconduct (which are necessary to reflect a municipal custom) and multiple *deprivations* or *injuries*.

Respondents are wrong in their assertion that, in a case involving a *Tennessee* v. *Garner*-claim that police shot a non-dangerous felon, petitioners would exclude evidence of prior shootings where no one was injured. Resp. Br. 31. To the contrary, such misconduct, if known to municipal policymakers, could clearly serve as a basis for finding a "custom" of violating the constitutional standard in *Tennessee* v. *Garner*, 471 U.S. 1 (1985).

2. On the issue of whether there was sufficient evidence to support submission to the jury of respondents' claim based on custom, respondents state:

> [t]he actual practice of the police and the jailer is not to provide medical care to persons suffering from emotional disturbances or disorders . . . . Emotional disorders are not given medical treatment except in extreme (and undefined) circumstances . . . .

Resp. Br. 36-37. There is no citation to the record to support these allegations of "custom." In fact, the record is devoid of any support for such a finding.

At the outset, it is undisputed that there was *no evidence* whatsoever of prior incidents or prior practices of failing to provide necessary medical care. Moreover, there was no evidence that any official or policymaker in the City of Canton believed that the practice or custom concerning the provision of medical care for detainees was any different than what the City's regulation required.

The *only evidence* relied upon by respondents to support their claim that there was a "custom" of not referring "emotional" injuries for treatment was the testimony of a single patrolman, Officer Norcia. Tr. 3-236-

3-238.[13] In that testimony, Officer Norcia stated that, in dealing with "hysterical" individuals, "we were . . . taught to try to calm them down . . . ." Tr. 3-235. When asked "what [you were] advised or instructed to do" "if you are unable to calm the person down," Officer Norcia stated:

> Well, we'd have to—if it got to the point where they were—where we felt they were a danger to themselves, we would have to seek medical attention for them.

Tr. 3-236. From this single answer, respondents conclude that "it is apparent that as a matter of custom and practice, emotional disorders are routinely ignored." Resp. Br. 37. This conclusion is absurd.

First, there is no such "apparent" conclusion to be drawn from any reasonable interpretation of this testimony. Officer Norcia did not testify that persons who are emotionally upset because of their arrest were "ignored." Instead, Officer Norcia offered the common-sense observation that persons who are emotionally upset because of their detention by police generally do not require hospitalization. Medical care is necessary only in extreme circumstances. Resp. Br. 37. In short, there is *not one word* in the record that supports the assertion that "emotional disorders are routinely ignored."

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[13] The extraordinary weight placed by respondents on this snippet of testimony (in the cross-examination of a non-policymaking official) is illustrated by the fact that those pages of testimony are cited *seven times* by respondent. See Resp. Br. 2, 4, 36, 37.

The only other testimony cited by respondents on the custom issue is that of Police Captain Alan Maxson, another non-policymaking officer. Tr. 4-318-4-319. In response to the question "what things are done" with a "very emotional, hysterical type person," Captain Maxson stated that "they generally cool off on their own" but if the "situation persists, we take them to the hospital." *Id.* No reasonable person could rely upon this statement to find a custom and practice of "routinely ignor[ing]" serious emotional disturbances.

Second, even if Officer Norcia said—as a general rule—that *he personally* would "ignore" crying or other emotional reaction to arrest, that is no evidence of *the City's* custom or practice. Officer Norcia is not a policymaker and no one, including respondents, suggested that there was any basis for Officer Norcia—a patrolman—to testify concerning the City's general customs or practices.

Finally, even if the testimony were sufficient to prove what respondents assert that it proves—that the City did not hospitalize arrestees who were emotionally upset, except in extreme circumstances—such a "custom" would not give rise to Section 1983 liability. Not only is such a custom not unconstitutional, it is an entirely reasonable and prudent response for the City to require the police to exercise their good faith discretion, in light of common sense and experience, in order to determine whether an "emotionally upset" arrestee requires immediate hospitalization.

* * * * *

At bottom, respondents' argument with respect to municipal "custom or practice"—like their argument with respect to municipal "policy"—fails to demonstrate that the City itself was in any way responsible for the alleged deprivation. At best, respondents argue that individual City employees might have erred in their exercise of discretion not to seek medical attention for Mrs. Harris during her 30-40 minutes in police custody. But there is no basis for holding that the City "subjected" respondents "to the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the order of the court of appeals remanding for a new trial should be vacated and the cause remanded for dismissal of the complaint.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioner

* Counsel of Record

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