No. 83-1919

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE CITY OF OKLAHOMA CITY,

Petitioner,

vs.

ROSE MARIE TUTTLE,

Respondent.

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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The State of Oklahoma, by Michael C. Turpen, Attorney General, submits its amicus curiae brief in support of the Petitioner, the City of Oklahoma City, in the above-entitled cause, pursuant to Sup. Ct. R. 36.4.

INTEREST OF THE AMICUS

The Attorney General has filed this amicus brief due to the grave consequences this judgment will have, if upheld, upon municipalities and all supervisory personnel who face the possibility of being subjected to federal jury trials and judgments under 42 U.S.C. § 1983 based upon an allegation of inadequate training or supervision of an employee who commits a single unconstitutional act.

SUMMARY OF ARGUMENT

A jury verdict of $1,500,000.00 in actual damages has been imposed upon the City of Oklahoma City based upon a theory that the City had been "grossly negligent" and been guilty of "deliberate indifference" in the training of an individual police officer. The evidence revealed only one incident of alleged misconduct by the officer.

There was no showing that the officer had been engaged in improper behavior previously, and no proof that any other officer had been inadequately trained.

There was no evidence that the officer acted pursuant to a city policy or custom. In fact, the officer admitted that he violated city policy by his actions, and the plaintiff's own expert witness admitted that the city's policy with respect to the use of deadly force was constitutional.

Since the evidence demonstrated that the officer's action was merely an isolated incident of an individual officer, it was error to impose liability under 42 U.S.C. § 1983 upon his employer, the City of Oklahoma City. The legislative history of § 1983 makes clear that superiors are to be held liable under this statute only if the official policy is

the moving force or if the act is undertaken in accordance with prevailing custom.

The United States Court of Appeals for the Tenth Circuit is virtually alone in its holdings that municipalities or supervisors can be held liable for the actions of a single officer who has been inadequately trained. The better rule, and one consistent with the principles established by the Supreme Court, is that the actions of an officer must have been undertaken pursuant to official policy or custom or that the practices are widespread and known or should have been known to the officials before the governing authority can be held liable. This rule is the view of an overhwelming number of the Circuits and should be the rule in the Tenth Circuit as well.

Municipalities are financially unable to be responsible for each of the

torts of individual officers, and the present case is a threat to the fiscal security of all entities which employ law enforcement officers and other employees who may violate the civil rights of citizens they come in contact with.

ARGUMENT

WHERE THE EVIDENCE REVEALED THAT WHERE THERE WAS NO UNCONSTITUTIONAL POLICY OR CUSTOM, NO SUPERVISORY PARTICIPATION IN THE ALLEGEDLY ILLEGAL ACTS OF AN INDIVIDUAL OFFICER AND NO PRIOR NOTICE OF IMPROPER CONDUCT OR INADEQUATE TRAINING OF THE OFFICER OR ANY OFFICER, THE IMPOSITION OF LIABILITY AGAINST THE CITY WAS IMPROPER AND LEGALLY UNJUSTIFIED.

In the present case, reported below as Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), the Tenth Circuit has upheld the imposition of a judgment in the amount of $1,500,000.00 in actual damages against the City of Oklahoma City (hereinafter referred to as the "City") based upon a single, iso-

lated act of an individual police officer.[1]

The award was based upon instructions which allowed the jury to impose liablity for the City's "gross negligence" and "deliberate indifference" with respect to the training of Officer Rotramel, the officer involved in the shooting. The Tenth Circuit rejected the contention that a pattern, custom or policy of unconstitutional practices must be shown before a municipality can be held liable, stating, "[t]he single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training." 728 F.2d at 461.

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[1] Incredibly, no punitive damages were included in this amount, and should not have been, due to the Supreme Court case of City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

This theory of liability imposed upon Oklahoma City appears to be based upon previous Tenth Circuit Court of Appeals cases. McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976); and Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). In those cases it was held that police chiefs, supervisors and, inferentially, municipalities, can be held liable under 42 U.S.C. § 1983 for a single act of an individual police officer if it can be shown that the officer was not adequately trained or supervised.

In McClelland, the Chief of the New Mexico State Police Department and the Chief of the Farmington City Police Department presented affidavits in support of their summary judgment motions which demonstrated that adequate training had occurred and that departmental procedures then in effect would have secured

the plaintiff's rights if they had been followed. However, the Tenth Circuit held that, if the plaintiff could counter with evidence that the training or procedures were defective, then summary judgment would be inappropriate. 610 F.2d at 697.

These holdings have severe consequences for all persons and entities which have training and supervisory responsibilities with regard to public employees. All that is required of any plaintiff is that he or she raise an issue of fact concerning the training that an individual officer received, and the municipality and the supervising officers must face a federal jury trial, even if the subordinate officer was guilty of an improper action on a single, isolated occasion.

The dangers of such a rule are obvious. A large city such as Oklahoma

City, which trains hundreds of officers each year and each of whom may stay on the force for twenty years, must now be responsible for the training of each officer for the duration of his or her career.

Furthermore, this case demonstrates how a municipality, rather than the offending officer, will be likely to end up holding the bag when blame is assessed. In his deposition, Officer Rotramel stated repeatedly that he had not been properly trained to handle the situation with which he was confronted (Tr. 114, 120, 123, 124, 126). It is inevitable that an officer who is being sued for millions of dollars will seek to exculpate himself by claiming that he had not been properly trained by the city to handle the situation he faced. Inevitably, the jury sympathy will likely be toward the officer and the city will

bear the brunt of the blame, as the present case demonstrates.

Not only are municipalities placed in jeopardy by the present case. The holding herein means that every chief of police, training officer, and supervisor faces liability for the training and supervision of every officer who passes through the training academy. It appears to be manifestly unfair that these persons must guarantee that every officer he or she has taught has been adequately trained, particularly considering the number of trainees which go through the academy.

The impact of the judgment in the present case was immediate in Oklahoma. After the judgment in the present case was rendered, the Cities of Muskogee and Stillwater were sued with actions alleging inadequate training of officers in-

volved in shootings.[2] In the Stillwater case, the Chief of Police of Stillwater was forced to go through a jury trial concerning the shooting death by one officer based upon the allegation that he had been improperly trained and supervised.

Nor have § 1983 lawsuits based on allegedly inadequate training and supervision been limited to police actions. The superintendent of a state training school for retarded children in Oklahoma faces two § 1983 lawsuits surrounding

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[2] Crinder v. City of Muskogee, et al., No. 83-48-C (E.D. Okl.); Knox, et al. v. Vaughn, et al., No. CIV-82-1515-W (W.D. Okl.). The City of Oklahoma City was sued again under the same principle in Gehrig v. The City of Oklahoma City, No. CIV-83-1618-W (W.D. Okl.).

the deaths of children in the institutions.[3] In both lawsuits the superintendent is alleged to have failed to provide adequate training to the persons who were responsible for the care of the children.[4]

The hardships confronting supervisory personnel who must endure the onus and stigma of a federal jury trial every time it is alleged that one of his or

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[3] Garrett v. Rader, et al., No. CIV-83-135-R (W.D. Okl.); Williamson v. Rader, et al., No. CIV-83-162-E (W.D. Okl.). In both lawsuits motions to dismiss the superintendent have been overruled.

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[4] The state director of the prison system has also been sued over his allegedly defective training of a guard who supposedly failed to properly report an altercation between two inmates. Ramsey v. Meachum, No. CIV-83-2285-W (W.D. Okl.)

her employees has not been adequately trained is apparent. The aforementioned Chief of Police of Stillwater, Oklahoma, who was exonerated by the jury with regard to a shooting by one of his officers, stated the matter succinctly, as reported by the Daily Oklahoman:

> "'It makes you wonder why do people accept these jobs,' said Chief [Hillary] Diggs, who had never been sued before in his 30 years on the force. 'Everytime a patrol car rolls out of here, I'm standing in line to be sued along with an officer.'" The Daily Oklahoman, May 9, 1983, p. 2.

The Attorney General respectfully submits that something more than a mere allegation of improper training should be required before municipalities and supervisory personnel are subjected to the rigors of federal jury trials. The Supreme Court has shown increasing sensitivity toward the burdens imposed upon public officials by federal lawsuits. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court observed:

> ". . . [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' . . ." 457 U.S. at 814.

The Attorney General contends that an allegation of negligence in training or supervision is not sufficient to impose federal civil rights liability on municipalities or supervisory personnel.

For a municipality or other supervisory authority to be liable under § 1983, the act must have been undertaken pursuant to "official policy" or "custom." See, Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy", 29 Wayne L. Rev. 1225 (1983).

With regard to what constitutes "official policy," in Polk County v. Dodson, 454 U.S. 312 (1981), this Court held that a claim had not been stated against a county board of supervisors where the plaintiff alleged that his public defender had injured him while acting pursuant to their rules and procedures. The Court noted:

> ". . . In Monell v New York City Dept. of Social Services, supra, we held that official policy must be 'the moving force of the constitutional violation' in order to establish the liability of a government body under § 1983. Id., at 694 . . . See Rizzo v Goode, 423 US 362, 370-377 . . . (1976) (general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983). . . ." 454 U.S. at 326.

The Could held that the plaintiff failed to state a federal claim when "he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure." 454 U.S. at 326.

In Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Court held:

> "We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. . . ." 436 U.S. at 694.

In defining custom, the Supreme Court in Monell used the definition set forth in Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). There the Court defined the term "custom" as "persistent and widespread . . . practices" or practices that are "permanent and well settled" or "deeply embedded traditional ways of carrying out . . . policy." 398 U.S. at 167-168. See also, Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984); rehearing en banc, 735 F.2d 861 (5th Cir. 1984).

In the present case, the City's policy with regard to the use of deadly force was proper, as even the Respon-

dent's expert witness conceded (Tr. 266). The Tenth Circuit in its opinion noted that Officer Rotramel "admitted at trial that he violated Police Department policy in shooting Mr. Tuttle." 728 F.2d at 458-459. Therefore, the official policy as set forth by the city's regulations concerning the use of deadly force was not the "moving force of the constitutional violation," a requirement for § 1983 liability as stated in Polk, supra, and Monell, supra.

With regard to "custom," since the evidence revealed no other incidents of police misconduct resulting from an alleged lack of training, it is obvious that there were no "persistent and widespread . . . practices" for which the City should be held to be liable under § 1983.

Paradoxically, other Tenth Circuit cases seem to follow this principle and, thus, conflict with the opinion in the

present case and those in McClelland v. Facteau, supra; Kite v. Kelley, supra; and Dewell v. Lawson, supra. In Smith v. City of Oklahoma City, 696 F.2d 784 (10th Cir. 1983), the Tenth Circuit, following the holdings of the Supreme Court, itself stated:

> ". . . Unless a municipality has a policy or custom that was the cause of the constitutional deprivation, the municipality will not be liable under section 1983 for the actions of its employees. . . ." 696 F.2d at 786.

See also, Wise v. Bravo, 666 F.2d 1328, 1335 (10th Cir. 1981) ("There is no allegation that the City 'acted' through its policies, formally or informally adopted, to deprive Wise of any constitutional rights").

In Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981), the Tenth Circuit held that dismissal of an action against a state district court judge was proper where the plaintiff alleged that a court clerk had interfered with his legal

mail. The Court noted that "[a]n isolated instance of a violation of constitutional rights by a subordinate is incapable of rising to an issue regrding the liability of a superior under § 1983." 644 F.2d at 854.

However, on other occasions, the Tenth Circuit seems to revert to the "single incident" rule stated above in Tuttle. In McKee v. Heggy, 703 F.2d 479, 483 (10th Cir. 1983), the Circuit, in a case involving the possible liability of the chief of police of Oklahoma City, held:

> "Thus, defendant Heggy [the chief of police] is liable to Mr. McKee only if Mr. Heggy participated or acquiesced in Mr. McKee's deprivation or if he inadequately trained or supervised the officers who did." (Emphasis added)

The history of § 1983 indicates that it was meant to combat settled practices which denied citizens of their federally protected rights and systematic deprivations of such. See, Note, Developments

in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1137, 1153-56 (1977); Adickes v. S. H. Kress & Co., supra, 398 U.S. at 167-68; Monroe v. Pape, 365 U.S. 167, 237-38 (1961) (Frankfurter, J., dissenting).

The requirement that a city act pursuant to its "policies or custom" before liability can be imposed necessarily implies that the municipality or supervisory personnel have notice of previous improper conduct. In the present case, Oklahoma City has been found liable based on allegedly inadequate training of which it had no notice. Cf., Whitehurst v. Wright, 592 F.2d 834, 838-39 (5th Cir. 1979) (mayor improperly dismissed from § 1983 lawsuit where no showing that mayor had knowledge of policeman's propensity for violence); and Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (supervisory breach of duty exists for failure to control po-

liceman's "known propensity for improper use of force.").

In Owen v. City of Independence, 445 U.S. 622 (1980), the Supreme Court held that a municipality cannot invoke the defense of good faith in a § 1983 action. However, in a dissent, Justice Powell noted that the framers of § 1983 objected to and defeated the Sherman Amendment, which would have imposed liability "without any showing that a municipality knew of an impending constitutional deprivation." 445 U.S. at 673. Justice Powell observed that the "42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand." 445 U.S. at 674-75.

The Attorney General of Oklahoma contends that, in the present case, where Oklahoma City's policy was constitutional, where there was no supervisory participation in any alleged illegal

conduct, where the city had no notice of any previous illegal conduct by the officer or that its training was in any way inadequate, an assessment of liability against the city was unjustified.

In Hays v. Jefferson County, Kentucky, 668 F.2d 869, 873 (6th Cir. 1982), the Sixth Circuit reversed a jury verdict against a county and a police mayor, stating that "the case law has limited § 1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train, or control was involved." The Court further observed:

> "Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is esentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g., Leite v. City of Providence, 463 F.Supp. at 590, or would properly be characterized as substantially certain to result, Rheuark v. Shaw, 477 F.Supp. 897 (N.D. Texas 1979)." 668 F.2d at 874.

See also, Note, Civil Rights: Municipal Liability Under 42 U.S.C. § 1983 for the Training, Supervision, and Control of Employees, 22 Washburn L. J. 121 (1982); Note, Simple Negligence Insufficient to Support Liability of High Police Officials and Municipalities for Inadequate Training, Supervision and Control of Individual Officers Under 42 U.S.C. § 1983 or Directly Under the Fourteenth Amendment to the United States Constitution, 51 Cincinnati L. Rev. 484 (1982).

In Languirand v. Hayden, 717 F.2d 220, 229 (5th Cir. 1983), a police shooting case, the Fifth Circuit noted that the case involved "one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol." The Circuit held that this was insufficient to establish liablity, "in the absence of similar incidents in

which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." 717 F.2d at 228.

In the present case, nothing of the sort described above was involved. The plaintiff failed to demonstrate that any other incident of improper training or supervision occurred. See also, Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) ("Generally, a failure to supervise gives rise to § 1983 liability, however, only in those situations in which there is a history of widespread abuse.").

In Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984), rehearing en banc, 735 F.2d 861 (5th Cir. 1984) the Fifth Circuit stated:

> "A city may well have a policy with respect to police recruitment and training that is itself unconstitu-

> tional and injurious, but occasional acts of untrained policemen are not otherwise attributed to city policy or custom." 728 F.2d at 768, n. 3.

See also, Gilmere v. City of Atlanta, Ga., 737 F.2d 894, 904 (11th Cir. 1984); and Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984) (issue is whether city maintained a practice of allowing the use of excessive police force that was a persistent and widespread practice).

Other cases of this Court reinforce the viewpoint that a municipality should not be held liable for the isolated acts of individuals. For example, respondeat superior cannot be a basis for § 1983 liability. Monell v. New York City Department of Social Services, supra, 436 U.S. at 691. In Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981), in rejecting the contention that municipalities be assessed punitive damages in § 1983 actions, the Court stated that

cities should not bear the "burden of exposure for the malicious conduct of individual government employees. . . ."

In McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981), the Eleventh Circuit upheld the granting of a motion for summary judgment in favor of the city and the chief of police in a § 1983 lawsuit concerning police brutality. The motion was accompanied by evidence that the chief was not personally involved in the incident, "that police department rules prohibited use of unnecessary force, and that no custom existed which condoned such misconduct." 662 F.2d at 1388. The Circuit noted that "[i]n order for a municipality to be liable under section 1983 there must be some personal involvement or evidence that 'execution of a government's policy or custom, whether made by its lawmakers or by those edicts or acts may fairly be said to represent official policy,' in-

flicts the injury." 662 F.2d at 1388. See also, Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984).

This is consistent with the prevailing rule that official policy such that imposes liability under § 1983 cannot ordinarily be inferred from a single act. Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 911 (3d Cir. 1984) ("A policy cannot ordinarily be inferred from a single instance of illegality such as a first arrest without probable cause."). See also, Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981). There must be a showing that the supervisory authority encouraged the specific incident of misconduct, in some way directly participated in it or at least authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending insub-

ordinate. Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984). There is no liability where the constitutional violation was not a direct result of specific administrative policies under the control of the governmental authority. Marchant v. City of Little Rock, Ark., 741 F.2d 201, 205 (8th Cir. 1984). See also, Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979).

Furthermore, the instructions in the present case allowed the jury to assess liability based upon a single, isolated incident. At the end of Instruction 15, the jury was instructed, in part, as follows:

> "IN SUMMARY, IF YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE IN THE CASE AFTER APPLYING THESE INSTRUCTIONS THAT THE PLAINTIFF HAS PROVED HER CLAIM THAT THE DECEDENT WAS DEPRIVED OF HIS RIGHTS TO LIBERTY AND LIFE WITHOUT DUE PROCESS OF LAW AND WAS SUBJECTED TO UNREASONABLE FORCE IN HIS APPREHENSION, THEN YOUR VERDICT WILL BE FOR THE PLAINTIFF AND AGAINST THE DEFENDANTS. . . ." (Tr. 642-643)

In Instruction 18, it was stated, in part:

> ". . . FURTHERMORE, THE POLICY OF PLACING POLICE OFFICERS ON DUTY WHO WERE INEXPERIENCED AND UNQUALIFIED TO ACT IN A PARTICULAR SITUATION IN APPLYING THE USE OF A DEADLY WEAPON CONSTITUTES DELIBERATE INDIFFERENCE TO THE RIGHTS OF THE DECEDENT." (Tr. 647)

While the instructions state that Oklahoma City "cannot be held liable for simple negligence" (Instruction 18, Tr. 648), "negligence" is not defined elsewhere in the instructions.

The result reached in the present case is in direct opposition to that of a recent Eleventh Circuit case, Gilmere v. City of Atlanta, Ga., 737 F.2d 894 (11th Cir. 1984). In that case, Atlanta police officers shot and killed the decedent during an altercation. The Circuit reversed a district court judgment against the city, observing that "the City had no official policy or custom to select and train its police officers im-

properly." 737 F.2d at 903. The Court also held that the district court's finding that the police department's training of the officer had been so lacking as to constitute "gross negligence" or "deliberate indifference" was erroneous, stating:

> "'Gross negligence' or 'deliberate indifference' is simply not the proper test for adjusting a due process section 1983 claim against a municipality." 737 F.2d at 904.

The District Court in the present case, as did the district court in Gilmere, apparently adopted the "deliberate indifference" standard from the case of Estelle v. Gamble, 429 U.S. 97 (1976). In Gilmere, the Eleventh Circuit noted that Gamble "had nothing to do with municipal liability" and since Gamble precedes Monell, the Supreme Court "could easily have incorporated the 'deliberate indifference' standard into the municipal liability calculus had it wished to do so." 737 F.2d at 904.

The application of the cruel and unusual punishment standard of Estelle v. Gamble to a police shooting case is incorrect since the Eighth Amendment protects only those who have been convicted of a crime. Ingraham v. Wright, 430 U.S. 651, 671, n. 4 (1977). For example, the amendment does not protect pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979); Thibodeaux v. Bordelon, 740 F.2d 329, 333-334 (5th Cir. 1984).

CONCLUSION

The present case has potential for great ramifications upon the functions of local government. Unless the potential for liability of municipalities, governing bodies and supervisory personnel is clarified and until adequate safeguards exist in this Court's interpretation of 42 U.S.C. § 1983, local officials face the prospect of being run through the gauntlet of a federal jury

trial every time the issue of adequacy of training and supervision is raised.

Furthermore, this case has the potential for fulfilling Justice Powell's prophecy regarding the impact that Owen v. City of Independence, supra, has upon municipal decision-making and resources. See, 445 U.S. at 665-70. Justice Powell also noted the irony in the fact that municipalities, which are now liable under § 1983 while state and federal governments are not, see, 445 U.S. at 670, n. 12, are the least able to bear the costs of such lawsuits. 445 U.S. at 670.

For the reasons stated, the Attorney General of the State of Oklahoma joins with the Petitioner, the City of Oklahoma City, in requesting this Court to

reverse the judgment below entered against Oklahoma City.

Respectfully submitted,

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