No. 90-1279

Myra Jo Collins

v.

The City of Harker Heights, Texas

Cert to CA5 (Barksdale, Wisdom, Davis)

To be Argued Tuesday, November 5, 1991

CONTENTS

October 21, 1991 Molly

SUMMARY

Petr challenges CA5's dismissal of her section 1983 action against resp on the ground that petr had failed to allege an abuse of govt power. Petr and resp also argue two contentions that were not decided by CA5, whether petr had alleged a constitutionally protected substantive due process interest cognizable under section 1983, and whether the Texas Hazard Communication Act creates a due process liberty interest intended to protect petr's decedent.

I. FACTS AND PROCEEDINGS BELOW

Petr's husband worked for resp in its sanitation and sewer dept. He died of asphyxia while attempting to fix a sewer line. Petr brought a § 1983 action against the City, alleging that the City's custom and policy of deliberate indifference toward the safety of its employees caused her husband's death in violation of his constitutional right to be free from unreasonable risks of harm.[1] The dct [Wd Tex; W. Smith, Jr., J.] granted resp Rule 12(b)(6) dismissal.

CA5 Affirmed: Not all cases alleging the requisite causation between a municipal policy or custom and the alleged constitutional deprivation lie under § 1983. City of Canton Ohio v. Harris, 489 U.S. 378 (1989) established only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. In this Circuit, there is a separate standard that must also be satisfied -- an abuse of government power.

We turn to Collins' complaint, in which, she makes the requisite Monell and City of Canton allegations. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the city -- one of employer and employee, rather than one in which

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[1] Petr received workmen's compensation. Under Texas state law if resp had been a private employer, petr could have sued for gross negligence and exemplary damages, but the city is immune from such a suit. Resp brief p.2 n.3

the City, as government, acted against the decedent as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a § 1983 action --whether there was a deprivation of a constitutional right. [distinguishing City of Canton and relying on DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) and CA5 precedent]

There was no abuse of government power. This is not an instance "when the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself." DeShaney, 489 U.S. 189, 200 (1989). It is not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual. Nor was there a misuse of power made possible only because the City was clothed with authority of state law. Accordingly, this action cannot lie under § 1983.

II. CONTENTIONS

A. Petitioner: [Much of Petr's lengthy brief was repetitive; I have reworked it into two arguments]

1) "Abuse of government power" is not an additional component of a Section 1983 claim. "[B]y the plain terms of § 1983 two, and only two, allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of the federal right. Second, he must allege that the person who has deprived him of that right acted under color of state law or territorial law." Gomez v. Toledo, 446 U.S. 635, 638 (1980). Petr adequately alleged both requirements.

However, CA5 added an additional element, abuse of govt authority or power. CA5 said it derived the additional "abuse of government power" element from City of Canton, 109 S.Ct. 1197 (1989) and Daniels v. Williams, 474 U.S. 327 (1986); neither establishes a new or separate element for a Section 1983 claim. In those cases the Court referred to abuse of govt power only to explain the reasons why mere negligence was not the standard for determining liability for violation of the substantive due process rights to life or liberty-personal security (Daniels) and to assure that deprivation of the federally secured right was "caused" by a municipality's "failure to train" (City of Canton). Thus, by imposing standards of deliberate misconduct in such cases the Court was guaranteeing that such claims would address only abuses of power, as opposed to mere negligent acts committed

by persons who happened to be acting under color of state law, and that the municipality's policy or custom actually "caused" the constitutional deprivation.

CA5 also incorrectly relied on this Court's decision in DeShaney for its addition of an "abuse of government power" element. In fact, DeShaney does not identify an additional abuse of government power element of Section 1983 claims; essentially it reaffirms the principles that a Section 1983 claim can be based only on violations of federal rights that are caused by a person actually acting under color of state law. In DeShaney this Court held that no Section 1983 claim could be asserted because the harm to the abused child by his father was imposed by the actions of a private person who was not acting "under color of state law." In the instant case, Collins' injury was caused by acts performed under color of state law, and no efficient private actor intervened.

At bottom, CA5's approach to constitutional protection of public employers turns on a distinction between a municipality acting as government in relation to a person, and a municipality acting as that person's employer. But it is irrelevant to the constitutional and Section 1983 analyses that the same actions in the employment setting, if performed by a private employer, would not give rise to an invasion of a constitutional right. That is, after all, what the "under color of state law" requirement of the section 1983 claim is all about.

Nothing in the legislative history or language of Section

1983 precludes it from providing a remedy to public employees whose constitutional rights have been invaded by their public employers. Section 1983 liability of a municipality, acting as an employer, for violating municipal employees' federal rights was clearly established by the Court in Monell. Numerous § 1983 claims arise within the employment context, and are distinguishable only because the govt is the employer. See e.g., Ortega, 480 U.S. 709 (1987) (state hospital officials took documents from physician's desk); Loudermill, 470 U.S. 1487 (1985) (pre-termination hearing required before firing public employees) [citing many many other cases]. The Court has also rejected the right-privilege distinction as a basis for constitutional analysis in public employment cases. See e.g., Connell v. Higgenbotham, 403 U.S. 207 (1971). Nothing in this Court's language or reasoning in Daniels, Monell, or City of Canton suggests that govt employees should enjoy less constitutional protection than other persons.

By failing to recognize an additional abuse of government power element, this Court would not be allowing Section 1983 to become a font of tort law. This Court has already devised protective measures. At present the Court requires that a Section 1983 complaint must assert actions under color of state law. DeShaney, 489 U.S., at 189. Such complaints must also assert a municipal policy or custom of deliberate indifference to the plaintiffs' personal security. City of Canton, 489 U.S. 378. They must assert that the policy was that of the ultimate

municipal decision maker. Jett, 491 U.S. 701. These complaints must also assert that these acts and policy or custom, rather than an intervening efficient private act, caused decedent's injuries.

In addition, the standard of liability required prevents shifting § 1983 claims into garden variety torts. In Daniels this Court held that violations of substantive DP rights were limited to claims based on "deliberate decisions." Daniels, 474 U.S., at 331. Thus, "mere lack of due care ... [constituting] no more than a failure to measure up to the conduct of a reasonable person" is insufficient to make out a substantive due process violation. Id., at 332. In City of Canton the Court adopted the same deliberate indifference standard establishing municipal liability for failures to train. By allowing claims only when based upon proper allegations of "deliberate indifference," there is no possibility that Section 1983 will become a font of ordinary tort liability.

2) Collins properly alleged a constitutionally protected interest cognizable under Section 1983.[2] This Court has held that Section 1983 is a broadly stated remedial statute that should be liberally construed to assure protection of all federally secured rights in the absence of clear legislative history to the contrary. See e.g., Monroe, 436 U.S. 167; Monell,

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[2] CA5 never addressed this issue, holding only that Collins could not prove "abuse of government power." This Court could remand for CA5 to decide in the first instance the question whether Collins alleged a violation of a federally protected right.

436 U.S. 658. To this end the Court has acknowledge that Section 1983 is not displaced by the existence of state remedies that appear parallel to it. See e.g., Monroe.

A. Petr's substantive due process right to life and liberty-personal security was violated. This Court consistently has recognized that at the core of the constitutional doctrine of "due process of law" is substantive protection of all people from "deliberate decisions of government officials to deprive a person of life, liberty or property." Daniels, 474 U.S., at 331. This Court has also held in many cases that government may not arbitrarily deprive someone of life, and has recognized the substantive due process right to a more generalized freedom from deliberate and unjustified intrusions on life and personal security. See e.g., City of Canton; Ingraham v. Wright, 403 U.S. 651, 673 (1977). More commonly decisions addressing substantive due process rights have involved custody situations. Conceptually, however, such substantive due process protection has not been and should not be limited to such circumstances. See e.g., Ruge v. City of Bellevue, 892 F.2d 738 (CA8 1989); Cornelius v. City of Highland Lake, 880 F.2d 348 (CA11 1989).

Moreover, there are graduations of govt restraint on liberty. Public employment usually does not involve custodial constraint on the worker's liberty. There are, however, constraints on the worker's liberty and mobility during working hours. Moreover it is a gross fiction to pretend that govt employees are free to quit there jobs to avoid unapparent risks

to life and safety.

B. Additionally, the Texas Hazard Communication Act creates a due process liberty interest that may be asserted under Section 1983. 14th Amendment liberty interests are created by state law only when the state statute creates specific substantive predicates that mandate action and an outcome favorable to the protected class if those predicates are followed. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). Through the Texas Hazard Communication Act (THCA), Texas has created a liberty interest that is entitled to full due process protection. The THCA is mandatory, identifies the class of person protected and sets forth substantive predicates that mandate elimination, or at least amelioration, of the risks to decedent's life and personal security.

Given the nature of the risks and injuries to its employees, including decedent, that have resulted from the City's failure to comply with its mandatory obligations, a post-deprivation remedy could not satisfy the City's due process obligations. Moreover, as a liberty interest is engaged, the doctrine of Parrat v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984), is not involved. Under the Mathews v. Eldridge, 424 U.S. 319 (1976) balancing test, decedent's private interest in his life and personal security were as precious as they come, and given the State of Texas' declared legislative policy, the City can assert no legitimate government interest in non-compliance.

Substantive interests that are created or mandated by state

statutes, such as the THCA also give rise to substantive due process protections under the 14th Amend. Analytically, when the state creates a liberty or property interest, there is no reason then to impose on state actors only procedural due process obligations. [This lawyer does not understand his audience]

B. Amici in favor of Petr: Association of Trial Lawyers - The availability of a state tort remedy is "generally irrelevant to the question of the existence of a cause of action under § 1983." Zinermon, 494 U.S. 113, 130-31 (1990). While not all govt conduct actionable under state tort law is also actionable under § 1983 (negligence is the most conspicuous example), govt conduct which may be actionable under state tort law is not automatically precluded under § 1983.

ACLU -- Amici can find nothing in the legislative history of § 1983 to support the proposition that § 1983 was intended as a remedy only for "uniquely governmental" action, but not other kinds of action taken under color of state law. This Court has concluded, based on the legislative history and purpose of the Civil Rights Act, that this distinction is inapplicable to § 1983. Owen v. City of Independence, 445 U.S. 622, 644 (1980).

Petr has alleged a deprivation of a constitutional right. The right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security has long been recognized as one of the rights protected by the 14th A. Ingraham, 430 U.S. 651 (1977). This right to personal security does not impose an affirmative duty on the state to protect the

public from invasions by private actors, but it does require the state to avoid arbitrarily inflicting injury itself. See e.g., Ingraham. The constitutional duty to provide training and supervision is not limited to situations where an individual is in state custody. Holding an individual in custody is only one of many ways in which a municipality may expose an individual to a substantial risk of injury. There are a myriad of city policies, including employment policies, which may create a risk of serious harm.

There is no bright line rule precluding municipal employees from obtaining redress for injuries. That is not to say that the employer-employee relationship is irrelevant to the question of whether a particular failure to train violates the Constitution. In certain circumstances, the employment relationship may be highly relevant. Where, for example, no practical means exist to eliminate the dangers inherent in a particular job, an employee's knowing and voluntary decision to remain on the job and accept the risk of injury clearly impacts upon the reasonableness of the state's action in allowing the risk of injury to exist. On the other hand, the voluntariness of an employee's association with the city may be irrelevant to the reasonableness of the city's action where the employee is unaware of the danger he faces. In such circumstances, an employee cannot accept the risk or protect himself from it any more than a prisoner can protect himself in a dangerous prison cell.

National Education Association - Our point is simply that

the govt's status as employer or proprietor goes only to the existence of a constitutional violation -- and not to the threshold question of the Constitution's applicability.

C. Respondent: 1) A personal injury claim asserted as a due process invasion of bodily security requires that the complaint plead an abuse of government power in order to separate a constitutional violation from an accident where relief is the exclusive province of state law. Petr argues that the heightened fault standard of City of Canton will separate torts from section 1983 violations, but nothing in petr's argument turns on the specific facts of Collins's injury. Under petr's argument had Collins escaped from the sewer with a broken bone, the City's prior behavior would have been no less culpable, and therefore the constitutional violation would have been the same. This concept does maximum damage to both federalism and the Constitution. When a specific constitutional right is not at issue, proof of an abuse of governmental power is an essential ingredient of the constitutional tort.

The history of the statute supports this interpretation. Section 1983 was adopted against the background of the breakdown of law in the Reconstruction South and the ceding of governmental authority to the Ku Klux Klan as a means of terrorizing the newly freed slaves and their supporters. Thus, the policy considerations underlying section 1983 were compensation for injury and "prevention of abuses of power." Robertson v. Wegmann, 436 U.S. 574, 591 (1978).

This Court in Paul v. Davis, 424 U.S. 693, 701 (1976) already rejected any attempt to extend to everyone a right to be free of injury whenever the State may be characterized as the tortfeasor. Petr seeks to distinguish Davis by the introduction of the deliberate indifference standard of fault but in Davis intentional conduct was involved and admitted. More recent cases have been equally explicit about the interrelation of DP and abuse of power. See e.g., Deshaney, 489 U.S., at 196; Daniels, 474 US., at 331. City of Canton is not to the contrary; in that case, as in all of this Court's prior section 1983 cases, the Court was dealing with the wielding of governmental power, not workplace safety.

Circuit Courts have agreed. CA2, CA7 and CADC have also addressed the issue and held that, under similar factual circumstances an employee does not have a cause of action under Section 1983 for on the job injuries. [not for the same reason as CA5] Only CA8 has held that abuse of power is irrelevant to an employment injury. [FN: CA5 may have been overly technical in stating that abuse of power was an independent aspect of a § 1983 action rather than an essential ingredient of a generalized due process claim.]

If petr's theory prevails, "the floodgates will be opened." All public employees suffering on the job injuries will have a way, first to collect workers' compensation and, then, to head for federal court with a Section 1983 action alleging that their employer was deliberately indifferent in its workplace

supervisory policies. Thousands of ordinary torts will suddenly become constitutional torts so long as the employee alleges the magic words "deliberate indifference."

2) The THCA does not create a substantive due process liberty interest. State statutes protecting employees from various harms do not create substantive 14th Am rights enforceable in federal courts. "Even if it can legitimately be argued that Texans enjoy a higher quality of life than other Americans, this happy circumstance is not the result of the Texas legislature creating new federal constitutional rights for its citizens." [There is a reason so many people hate Texas.]

At most all the Texas statute could create for Petr is procedural due process protections. It is undisputed that Texas provides those in petr's position with a workers' compensation remedy for damages. Such a post-deprivation remedy is sufficient to satisfy due process requirements. See Ingraham, 430 U.S., at 674-82. Requiring a pre-deprivation hearing would obviously make no sense under the facts of this case.

D. Amicus in favor of Resp: **National League of Cities** - In ordinary usage, the phrase in § 1983 "subjects or causes to be subjected" implies the exercise of coercion or force characteristic of the relationship between government and the governed, rather than the consensual relationship between employer and employee. City of Canton requires that there be an unconstitutional act committed by an employee of the city underlying the city's liability. And that act must in turn have

been committed with the requisite scienter to establish a constitutional violation. Petr has failed to allege a separate allegation that a government employee violated the Constitution.

The DP clause only forbids the states from actively interfering with guaranteed personal liberties. It does not require a state to provide affirmative protective services to any individual, even if the state is aware of danger to that individual, except in situations of involuntary custody.

The THCA does not protect workers in Collins' position; it only applies to the use or handling of chemicals. Nor does the Act create a protected interest because the Act is not narrowly drawn to mandate the provision of specific benefits or protections by the state, but is applicable to public and private employers alike. In every case in which this Court has found a state statute to confer due process rights, the statute has specifically been designed to govern the relationship between the State and a defined group of individuals, either state prisoners or state employees.

E. Petitioner's Reply: 1) The City's discussion of the core purposes and original understanding of Section 1983 is largely irrelevant, as well as somewhat incorrect.

The NLC quoting City of Canton asks that when a municipality has not adopted a formal policy, section 1983 actions must be derivative of an unconstitutional act committed by an employee of the city, with requisite scienter to establish a constitutional violation. Nothing in the City of Canton decision so holds. In

City of Canton this Court expressly stated that "the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred." In other words, a municipality is culpable if it has adopted or maintained a policy or custom of deliberate indifference that is causally linked to an injury that implicates a federally secured right. The "culpability" of the other state actors, i.e., the municipality's agents, who are the more direct or efficient cause of the injury, largely is irrelevant. These agents may merely be negligent. See City of Canton. They may also be obeying the municipal policy. See Monell.

The language of § 1983, "subjects or causes to be subjected to" includes municipal employees. According to the 1870 edition of Bouvier's Law Dictionary "subjection" means: The obligation of one or more persons to act at the discretion or according to the judgment and will of others. Private subjection is subjection to the authority of private persons. Public subjection is the subjection to the authority of public persons. A municipal employee is obligated to act at the discretion or according to the judgment or will of the municipal employer.

The City claims that a requirement of deliberate indifference or custom and policy will not protect municipalities from garden variety torts because the lines between ordinary negligence and conscious disregard are fuzzy ones that courts are not equipped to dispose of by motions to dismiss or for sj. This

argument was rejected by then Justice Rehnquist, who stated that "many branches of the law abound in nice distinctions ... the difference between one end of the spectrum - negligence - and the other- intent- is abundantly clear." Daniels, 474 U.S., at 434-35. In evaluating claims under Section 1983, certainly by the sj stage, trial judges will be able to determine whether plaintiff has any evidence of "deliberate indifference," municipal "custom or policy," causation, and damages.

2) The THCA applies to petr. Petr is in the class of individuals protected by the Act; Texas sued the city of Harker Heights on May 31, 1989 for violations of the Act causing decedent's death. The existence of workers' compensation remedies does not defeat Collins' Section 1983 claims. Zinermon, 110 S.Ct., at 982.

III. DISCUSSION

A. Separate Standard Under § 1983 : CA5 affirmed the dismissal of petr's § 1983 claim because she had failed to allege an abuse of govt power. CA5 found that because the relationship between the city and petr was not of government to governed but employer to employee, there could be no cause of action under § 1983. CA5 is wrong.

This Court has held that there are only two requirements necessary to establish a claim under § 1983; the deft must have deprived the plaintiff of a right secured by the Constitution and laws of the United States, and such deprivation must be achieved under color of law. Paul v. Davis, 424 U.S., at 697.

The Court has never limited the section 1983 remedy only to state actors acting in a governmental capacity. In Owen, the Court specifically rejected the "governmental" and "propriety" distinction in determining municipal immunity under section 1983. The Court has repeatedly permitted § 1983 actions between a state employer and employee in those roles, including the original case finding municipal liability under § 1983. Monell; Owen; Bd. of Regents v. Roth, 408 U.S. 564 (1972); cf. Paul v. Davis (stating that Davis would have had a cause of action under § 1983 against the police department if he had been an employee). Nor does resp point to anything in the legislative history suggesting that employees as a class should be denied a federal remedy under § 1983.

Resp attempts to support CA5's decision by quoting the words "abuse of govt power" from various S.Ct. opinions.[3] These quotations are inapposite because this Court does not define abuse of govt power as CA5 does. The phrase "abuse of govt power" has not referred to petr's relationship with the city, but whether the alleged conduct was an abuse of governmental policy-making authority. For example, in Owen, the court referred to the plaintiff, who had been fired by the city from his city job, as being "harmed by an abuse of government authority." 445 U.S., at 622.

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[3] Although no one mentions it, in at least some respects, the city is wielding uniquely governmental power. Under TX law, only the city can build and operate the sewers. Petr simply could not be in this same situation with a private employer.

This Court in the past has required an abuse of govt power to create a constitutional violation; there is no deprivation of a right without some element of an abuse of government power. But the Court has never defined abuse of government power as a threshold barrier to the Constitution's applicability, limiting relief only to circumstances where the plaintiff is harmed by the government in the role of government.

CA5 never reached the issue whether plaintiff was deprived of a constitutional right.[4] Because that issue is far more difficult, and I imagine this Court will use the opportunity to cut back further on what constitutes a constitutional violation, I urge remanding. However, just in case, I will discuss the issue in some detail.

B. Deprivation of a Constitutional Right : 1. **Substantive Due Process** -- To properly allege a substantive due process claim, the plaintiff must first demonstrate whether the asserted interest is encompassed within the Fourteenth Amendment's protection of "life, liberty and property." At one point in the complaint, petr pleads the right to be free from injury resulting in death. If petr is pleading loss of life, she undeniably meets the constitutional threshold. Loss of life is plainly mentioned in the text, and "[i]t is well established that this liberty includes freedom from unjustified intrusions on personal security." Davidson v. Cannon, 474 U.S. 344, 352 (1986)

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[4] It is undisputed that the actions were taken under color of law.

(Blackmun, J. dissenting); Ingraham, 430 U.S., at 673.

However, petr's complaint focuses on the right to be free from unreasonable risks of harm. This formulation is problematic, but I think still is encompassed in the 14th A. In the "custody cases" Daniels, Davidson, and City of Canton, the Court recognized that the petr's injuries implicated the liberty interest, although the state in all three of those cases created a situation with an unreasonable risk of harm, not the harm itself. Daniels (prison official left a pillow on the steps); Davidson (prison official failed to protect inmate from another inmate); City of Canton (officials failed to provide medical attention).

The problem with this formulation of the harm should not go to whether a liberty interest is implicated -- that question is simply whether a protected interest was violated. Petr's formulation of the interest suggests problems, not at this stage, but in determining whether resp caused a deprivation of the liberty interest.

To prove that there has been a deprivation, caused by the resp, petr must show that the city itself, not just its employees, caused the deprivation. "[I]t is when execution of a government's policy or custom ... inflicts the injury that the govt as an entity is responsible under § 1983." Monnell, 436 U.S., at 694. Petr, then, must show that "there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton, 109 S.Ct., at 1203.

Additionally, in Daniels, the Court held that there is no deprivation of a protected interest if an official is merely negligent in causing the injury. To rise to the level of a constitutional violation the petr must allege a policy of reckless disregard, deliberate indifference or gross negligence.[5] Davidson, 474 U.S., at 344 (Blackmun, J. dissenting); Daniels, 474 U.S., at 328; City of Canton.

Requiring a city policy or custom of recklessness or deliberate indifference constitutes the requirement of abuse of govt power. If the state has a policy of placing a person into a situation of known danger, the Constitution proscribes and limits such action because it is an abuse of govt policy making authority. In contrast, when the city through its employees simply commits an isolated tort, there is no abuse of govt power.

Although, CA5 found that petr had made all the allegations described above, Joint Appendix 48, resp argues that these allegations are still insufficient to survive a 12(b)(6) motion. Resp, reformulating CA5's decision, does not argue that abuse of govt power is a separate threshold requirement but that there is no violation of a person's due process rights if the govt is an employer. According to resp, there is no deprivation of a protected interest if the official is merely violating workplace rules. That is, even deliberately indifferent or reckless actions by govt officials as part of a city policy do not amount

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[5] As you recall, you have stated that negligent activity in some circumstances can amount to an abuse of state power. Davidson, 474 U.S., at 353.

to an abuse of power in the context of the workplace.

Resp and amici assert that this result is required by DeShaney. I do not think DeShaney compels this conclusion. In DeShaney, the Court held that the Due Process Clause does not require the state to protect the life, liberty, and property of its citizens against invasion by private actors unless the state is in a special relationship, such as custodial, with the plaintiff. 489 U.S., at 189. There is no third party intervenor here. The city employees following the policy of the city sent petr into a gas-filled sewer, property owned by the city, without a gas mask, or any knowledge of the danger. Unlike in DeShaney, the city did indeed play a part in the creation of the danger and did everything to render him more vulnerable to it. Id., at 189.

However, while DeShaney does not mandate resp's result, the Court could certainly fashion resp's new limitation to § 1983 liability from dicta in various cases, including Davidson, Daniels and DeShaney. I do not recommend any additional barriers to § 1983 cases.

Resp's first argument in favor of such a limitation is that the requirements of City of Canton, Monell, and Daniels will not prevent petr from suing for de minimis injuries if the city has the requisite culpability. Resp is right that City of Canton does not prevent those suits; those suits are not permitted under § 1983 because they do not implicate a liberty interest. A de minimis intrusion into bodily security is a "level of imposition with which the Constitution is not concerned." Ingraham, 430

U.S., at 674.

Resp also claims that "the floodgates will be opened" because plaintiffs with injuries caused by negligence will just plead deliberate indifference, and cts are unable to differentiate between the "fuzzy lines" of ordinary negligence and reckless disregard. The possibility that lawyers could lie in the complaint, and the dct would be required to differentiate between frivolous and valid claims and various standards of review is obviously not a reason to foreclose an entire class of plaintiffs from a federal remedy.[6]

I would be more sympathetic to an argument that the govt should not be subject to § 1983 liability when it acts as a private party, if it were willing to be treated as a private party. Resp, unlike a private employer, cannot be sued under TX law because of immunity. Resp is not asking to be treated as a private employer, but to be able to avoid liability for a policy resulting in fatal injuries. I fail to see why the same behavior by the city should be categorized as govt qua govt for immunity purposes, but not for § 1983 purposes.

I recognize that the facts of this case do suggest an ordinary tort rather than a constitutional violation, but I think

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[6] Resp also makes a number of federalism claims. "It is not enough to argue before a court that a particular construction of § 1983 is inconsistent with "principles of federalism"or "federal-state comity." To do so is to put the cart before the horse, for the only principles of federalism and comity that justify restricting the scope of § 1983 are those found in the Constitution or § 1983 itself." Blackmun, Section 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away?, 60 **N.Y.U.L.Rev.** 1, 23 (1985).

this case can be disposed of with the other tools the Court has created to prevent § 1983 claims. At sj stage, it is likely petr will be unable to prove a policy or custom, or if that is proven, that the city was anything more than negligent.

2. **Procedural Due Process:** Petr also claims a procedural due process right based both on the liberty interest described above and on the THCA. This issue was also passed on by CA5. If you choose to decide it rather than remand, I recommend that you find petr's allegations sufficient to survive a 12(b)(6) motion.

As I described above, I believe petr has a due process interest in life. I also believe the state has created a liberty interest in a safe work place under the THCA. Petr points out that there is mandatory language in a number of places in the Act.[7] Resp' amici argues that the Act does not apply to petr. Petr points to language in the Act stating that it applies to all employees "who may be exposed to hazardous chemicals." Petr's brief A4. Additionally, petr asks this Court to take notice of a Texas state action against the city for violations of the Act causing decedent's death. If this is true, the state's own interpretation of its law to apply to petr would appear to be dispositive.[8]

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[7] For example, in section 15(a) the Act states that "employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act." Petr's brief A14.

[8] The Ct granted this motion, but the TX case has not arrived yet from the Clerk's Office.

After finding that there is a protected interest, the Court must decide what procedures constitute due process of law. Ingraham, 430 U.S., at 672. Resp, relying on Parrat and Hudson, argues that any due process requirements were met because workers compensation was available after the accident.

This, however, is not a situation where the state cannot predict and guard in advance against a deprivation. It is true that the city could not have a predeprivation hearing to inform petr that it was going to violate Texas law and the Constitution. But a hearing is not the only possible process. Texas itself in the THCA has described in detail how the city could have provided process in advance. At the very least, Collins could have received advance warning of the dangers.

Nor has the compensation here been adequate; petr has received no compensation for the loss of Collins' life. Because the deprivation of Collins' liberty was predictable, predeprivation process was not impossible, and the conduct was not unauthorized by the resp, petr was due more than postdeprivation workers compensation. See Zinermon, 110 S.Ct., at 989-990 (1990).

IV. CONCLUSION

Because nothing in this court's prior precedent suggests that employees are eliminated as a class of plaintiffs under § 1983, I recommend that CA5's decision be REVERSED.