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90-127⁹ a timely/response received actually seems to apply
Collins v. City of Harker Heights other courts--that is,
Cert to CA5 (Wisdom, Davis and Barksdale) authority before

Petr.'s decedent worked for the city repairing sewers and died of asphyxiation after descending into a manhole, allegedly without proper safety equipment and training. Petr. brought this \$1983 action, contending that the city's failure to have an adequate training policy constituted deliberate indifference to her husband's life and thus deprived him of life without due process. The standard of "deliberate indifference" in the failure to train was set forth by this Court in City of Canton, Ohio as a prerequisite to municipal liability in such circumstances. In Canton, the plaintiff alleged violation of substantive due process by police who failed to give her adequate medical care while she was in custody. In this case, the CA5 held that a municipality could only violate due process when it exercised peculiarly governmental power (such as when it arrested people) and not when it acted in its capacity as an employer toward its employees. Surprisingly, other circuits have reached the same conclusion, including an opinion by a very enlightened panel of the CA2 (Oakes, Newman and Kearse). The only contrary ruling comes from a recent decision of the CA8. Petr. argues that, based on this circuit split, this Court should grant cert. The CA5 and the rspt. both conceded that the CA8 decision creates a circuit split, and on that basis the pool memo recommends a grant in this case. The circuit

split is a bit fuzzy, since the CA8 actually seems to apply the same legal standard as the other courts--that is, requiring an exercise of governmental authority before finding a constitutional tort. Where the CA8 diverged was in thinking that a government might still abuse governmental power in its treatment of its employees. Even if the circuit split is not clear, however, the issue seems important--and, in fact, the majority position requiring an exercise of peculiarly governmental power seems wrong to me.

The only reason for not granting here would be defensive. Since the trend is clearly toward the CA5's position in this case, I don't think there is much to lose if the Court ends up affirming the requirement that a municipality exercise governmental power before becoming liable under §1983. There is a danger, however, that this rationale might be expanded beyond the setting of constitutional torts. In other words, a very broad opinion might suggest that, even where a municipality has, for example, an employment policy of firing workers who express unpopular views, no first amendment violation occurs under §1983 because the city is only acting as employer. I assume, however, that a dissent could guard against such an overly broad ruling, and thus I am inclined to grant review in this case to resolve the uncertainty just in the area of constitutional torts.