No. 20-30739

United States Court of Appeals for the Fifth Circuit

ERIE MOORE, JR.; TAMARA GREEN;
TIFFANY ROBINSON,
Plaintiffs-Appellants,
v.
LASALLE MANAGEMENT COMPANY, L.L.C., RAY HANSON; GERALD HARDWELL; ROY BROWN; REGINALD WILLIAMS; KENNETH HART; DANIELLE WALKER; DUAN ROSENTHAL; JEREMY RUNNER; REGINALD CURLEY; CITY OF MONROE; SHERIFF OF OUACHITA PARISH; DONALD MURPHY; CHASE WELLS; TOMMY CROWSON; WILLIAM MITCHELL; ALTON HALE; RICHWOOD CORRECTIONAL CENTER, L.L.C.;
ARCHIE AULTMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana, USDC No. 3:16-CV-1007

Brief of *Amici Curiae* Promise of Justice Initiative, National Police Accountability Project, ACLU of Louisiana, and Tulane Law School Civil Rights and Federal Practice Clinic in Support of Appellants

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 29.2, the undersigned counsel of record provides the following supplemental list of interested persons and entities and certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae

The Promise of Justice Initiative; the National Police Accountability Project (NPAP); the ACLU of Louisiana; and the Tulane Law School Civil Rights and Federal Practice Clinic

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STATEMENT OF *AMICI CURIAE*[1]

The Promise of Justice Initiative (PJI) is a New Orleans-based non-profit that seeks to reform the criminal legal system using civil litigation, strategic criminal representation, organizing, and advocacy. PJI has served countless individuals incarcerated in Louisiana correctional facilities and has used extensive documentation of the inhumane and abusive treatment in these facilities to preserve the rights of incarcerated people in Louisiana. PJI believes that correctional facilities must be held accountable for violence inflicted by their staff.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and detention facility officials through coordinating and assisting civil rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States. Every year, NPAP members litigate the thousands egregious cases of law enforcement

[1] Counsel for *amici curiae* contacted counsel for the parties, and all counsel responded that they do not oppose the filing of this brief. Accordingly, pursuant to Federal Rule of Appellate Procedure 29(a)(2), a motion for leave to file is not required. Additionally, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

abuse that do not make news headlines or capture national attention. NPAP's members also regularly represent prisoners and detainees in civil rights litigation. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law enforcement and detention misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing accountability for law enforcement and detention facilities and appears regularly as *amicus curiae* in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include inmates in privately-owned detention facilities.

The Tulane Civil Rights and Federal Practice Clinic is a non-profit, non-partisan law clinic devoted to protecting the civil rights of indigent clients through the work of third-year students at Tulane University Law School. For over forty years, the Clinic has litigated questions involving civil rights in the state and federal courts, including several matters involving violations of the constitutional rights of incarcerated people and of people with disabilities.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with approximately 1.7 million members dedicated to

the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. For more than 60 years, the ACLU Foundation of Louisiana ("ACLU of Louisiana") has fought to defend all people, including those facing incarceration, abuse, and discrimination. The ACLU of Louisiana serves as counsel in numerous civil rights actions brought on behalf of prisoners who allege violations of their constitutional rights. The district court's application of the *Monell* liability standard to private entities directly impacts Louisiana's incarcerated population; accordingly, the ACLU of Louisiana is vitally interested in this issue.

It is in defense of these rights, and for the reasons set out in the following brief, that *amici curiae* urge this Court to reverse the district court's decision. This Court has never previously held that private corporations should receive the *Monell* protections afforded to municipal authorities. Private corporations should be held liable for employees who violate the Constitution just as they are liable for any other tortious act committed by their employees. Following this principle is especially important in cases such as this one, where private actors are economically incentivized to prioritize self-enrichment, and ignore or obscure unflattering data at the expense of constitutional rights of incarcerated persons.

INTRODUCTION

When the district court denied summary judgment in part to various individual defendants, it recognized that a jury could find that those individuals may have committed torts, including constitutional torts, against the plaintiffs. Ordinarily, under longstanding and foundational tort law principles of vicarious liability, this means that their employer, LaSalle Management Company (also known as "LaSalle Corrections" or "LaSalle"), is liable for its employees' tortious misconduct committed within the scope of employment.

Here, however, the district court granted summary judgment to LaSalle notwithstanding these principles. Because the plaintiffs raise claims under 42 U.S.C. § 1983 for violations of their statutory and constitutional rights, the district court jettisoned this bedrock rule of *respondeat superior* liability for private entities. Instead, it required plaintiffs to show that LaSalle had a custom or policy that caused the illegal behavior. In doing so, it took a rule specific to municipal liability under § 1983 adopted in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978), and expanded it to cover LaSalle, a private for-profit company.

This Court has never determined whether *Monell*'s municipal liability rule protects private corporations from *respondeat superior* liability. The district

court's decision contains little analysis of either § 1983's text and history, or of whether *Monell*'s rationale applies to private parties. Private corporations whose employees violate the Constitution should be liable in *respondeat superior*, just as any private corporation is liable for the tortious conduct of its employees. When Congress passed § 1983 as part of the 1871 Civil Rights Act, it was already a deep-rooted rule of the common law that a private corporation may be held liable for the torts of its employees. The Act's text and legislative history reveal no intention to deviate from that rule.

The district court's decision is founded on a faulty premise: because *Monell* held that *respondeat superior* does not apply to municipal governments whose officers violate an individual's constitutional rights, *respondeat superior* should not apply to private corporations either. That conclusion relies on a false equivalence between municipal liability and private corporate liability. At the time Congress enacted § 1983, municipalities received different immunity protections from torts than did private companies. Additionally, in *Monell*, the Court found that Congress created a special exemption for municipal governments from *respondeat superior* liability because federalism concerns prompted Congress not to extend vicarious liability to municipalities. Federalism, however, has no relevance to the liability of private corporations. Finally, looking at the post-Civil War Civil

Rights statutes as a whole shows that Congress fully intended for traditional vicarious liability principles to apply to private parties.

The malfeasance of private correctional companies in general—and LaSalle in particular—vividly illustrates the need for *respondeat superior* liability. Private correctional companies such as LaSalle inflict widespread harm, abuse and even death through excessive force and disregard for inmate safety and well-being. Private prison companies experience outsized incidences of misconduct, in part because they understaff their facilities, pay lower wages, provide less training, and seek to cover up misbehavior rather than engaging in meaningful reform. Their motive is cynical—to cut costs and maximize profits at the expense of inmate safety. Unless private prison companies, like any other private entity, are required to bear the costs of their employees' misconduct, this pattern of abuse will undoubtedly continue.

This appeal squarely presents the question of whether private entities performing government functions are exempt from vicarious liability under § 1983, a question this Court has yet to decide. The structure, history and rationale underlying § 1983 all indicate that Congress had no intention to eliminate *respondeat superior* liability for private entities.

ARGUMENT

I. District courts in this circuit are split over whether private companies are exempt from *respondeat superior* liability under § 1983, and this case squarely presents that question.

This Court has not previously determined whether private entities that are subject to § 1983 should be exempt from *respondeat superior* liability. Courts in this district have split on that question, and this case provides this Court with the opportunity to resolve that split and provide valuable guidance to lower courts. The district court below concluded that *Monell*'s holding that municipalities are not subject to vicarious liability should extend to private entities. By contrast, in *Hutchison v. Brookshire Brothers, Ltd.*, the U.S. District Court for the Eastern District of Texas concluded that *Monell* applied only to municipalities and that it does not exempt private companies from vicarious liability. 284 F. Supp. 2d 459, 473 (E.D. Tex. 2003) ("[T]he court holds that neither *Monell* nor its progeny can be read to shield private corporations from vicarious liability when their employees have committed a § 1983 violation while acting within the scope of their employment.").

Similarly, the circuit courts are revisiting this question. Although most circuits have held that private companies are not subject to vicarious liability, those decisions appear to reflexively assume that *Monell* applies to private parties and

contain little analysis. Appellants' Br. 82-84. Recently, the Seventh Circuit has questioned the validity of those rulings and has persuasively explained why § 1983 should be read to impose vicarious liability on private companies. *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 789-95 (7th Cir. 2014).

This issue likely will recur. Louisiana has the second-highest per capita incarceration rate of any state in the country, at 1,052 inmates per 100,000 people. *See* Loyola University College of Law, *Louisiana Death Behind Bars 2015-2019* (June 2021) at 4;[2] Prison Policy Initiative, *States of Incarceration: The Global Context* (June 2018).[3] Texas houses more inmates in private prisons than any state and is second only to the federal government in its use of private prisons. *See* The Sentencing Project, *Private Prisons in the United States* (Mar. 3, 2021), at tbl. 1.[4] Higher incarceration rates create an increased opportunity for misconduct and for inmate deaths. A report issued earlier this month shows that at least 786 people died in custody in Louisiana from 2015-2019, and that the number is likely significantly higher. *Louisiana Death Behind Bars*, *supra*, at 3-4. In light of the split among the courts below, ongoing judicial re-evaluation of this issue, and the

[2] https://www.incarcerationtransparency.org/wp-content/uploads/2021/06/LA-Death-Behind-Bars-Report-Final-June-2021.pdf
[3] https://www.prisonpolicy.org/global/2018.html
[4] https://www.sentencingproject.org/publications/private-prisons-united-states/

inevitable recurrence of alleged misconduct involving private prison companies, this Court should address this question and, for the reasons explained below, hold that private entities are subject to *respondeat superior* liability.

II. Section 1983 incorporates *respondeat superior* liability for private parties.

As a matter of straightforward statutory interpretation, § 1983 incorporates traditional tort principles of vicarious liability for private parties that violate federal statutory and constitutional rights. First, there is no dispute that Congress included corporations within the purview of the statute. Section 1983 extends liability to "persons," a term that includes private companies. In *Monell*, the Court explained that by the time Congress enacted § 1983, "it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." 436 U.S. at 687. To demonstrate as much, *Monell* quoted *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 557-58 (1844), where the Supreme Court stated that "[a] corporation . . . is to be deemed to all intents and purposes as a person, although an artificial person." *Monell*, 436 U.S. 687-88. In addition to background common law, *Monell* also held that § 1983's legislative history "show[s] unequivocally" that it was "intended to cover legal as well as natural persons." *Id.* at 683. Within months of enacting § 1983, Congress

enacted a law stating that in all future acts, the term "person" would "extend and be applied to bodies . . . corporate." *Id.* at 688 (quoting Act of Feb. 25, 1871 § 2, 16 Stat. 431).

Second, Congress determined that traditional tort principles would govern the liability of these corporate persons subject to § 1983. As Appellants persuasively argue, Congress enacted § 1983 against the backdrop of the common law and incorporated traditional common-law tort principles into the statute. Appellants' Br. 75-78. One of those fundamental and longstanding principles was that employers were liable for the torts of their employees committed within the scope of employment. *See id.*; *see also Shields*, 746 F.3d at 792 (recognizing that "*respondeat superior* liability, which makes employers liable for their employees' actions within the scope of their employment, is an old and well-settled feature of American law" when questioning whether *Monell* should apply to private parties) (citations omitted).

Acknowledging that traditional tort principles of *respondeat superior* liability apply to private parties is fully consistent with *Monell*'s holding that Congress exempted municipalities from *respondeat superior* liability. The Supreme Court has cautioned that private parties and government parties are not interchangeable when it comes to addressing the scope of § 1983 liability. *See*

Richardson v. McKnight, 521 U.S. 399, 404 (1996) (holding that private prison guards were not entitled to qualified immunity, unlike government employees); *Wyatt v. Cole*, 504 U.S. 158, 167-69 (1992) (refusing to apply qualified immunity to certain private individuals). Rather, assessing whether a particular form of liability applies—such as *respondeat superior* liability—requires looking to the common-law backdrop and to statutory purpose. *Richardson*, 521 U.S. at 404 (looking to history and purpose to determine the scope of private party immunity from liability).

Applying these factors shows that Congress intended to treat private companies differently from municipalities with respect to vicarious liability. First, the scope of common-law tort liability was different for municipalities and for private parties at the time § 1983 was adopted. As explained above, it was well-settled that private entities were subject to *respondeat superior* liability. And while municipalities may also have been subject to *respondeat superior* liability, they also received other liability protections that roughly align with *Monell*'s custom or policy requirement. *See* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2222-2236 (2005) (exploring Nineteenth-Century municipal immunity doctrines and explaining how they approximated

Monell's custom or policy standard); Richard Frankel, *Regulating Privatized Conduct through Section 1983*, 76 U. Chi. L. Rev. 1449, 1467-69 (2010) ("These exceptions [to municipal liability] roughly approximate the avenues for establishing a municipal custom or policy under § 1983.").

Specifically, under the then-popular but now-abandoned government-proprietary distinction, municipalities were considered instruments of the states, created to help further state objectives. They were treated as agents of the state entitled to state sovereign immunity when performing public or governmental duties, and thus were not subject to liability for the torts of their employees. *See id.* However, that immunity did not apply where the municipality authorized, directed, or ratified the wrongful act, failed to properly supervise their employees' behavior, or failed to screen them before hiring—exceptions that track *Monell*'s custom or policy requirement. Achtenberg, *supra*, at 2233; Frankel, *supra*, at 1469; Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 Sup. Ct. Rev. 249, 263 & n.52.

In other words, the common law at the time of § 1983's enactment imposed traditional vicarious liability on private parties but provided a more limited liability regime on municipalities, one that looked very similar to the regime adopted in *Monell*. And that is the form of tort liability that Congress would have incorporated

into § 1983. Congress did not intend to treat private entities and public entities identically, just as the common law did not treat them identically. Rather, Congress determined that private parties should be subject to vicarious liability like they are for any other tort. The district court's holding otherwise was incorrect.

Second, the history surrounding the adoption of § 1983 demonstrates that Congress did not intend to treat private entities and municipalities identically, and that it intended to subject private entities to *respondeat superior* liability. As Appellants explained, the *Monell* Court concluded that Congress's rejection of the Sherman Amendment showed that Congress did not intend to impose expansive liability on municipalities, because doing so would create significant constitutional and federalism concerns. Appellants' Br. 81-82 (citing *Monell*, 436 U.S. at 676-79, 693-94). Specifically, "Congress believed that it could not impose obligations on municipalities—considered instrumentalities of state government—that would interfere with the state's ability to regulate municipalities." Frankel, *supra*, at 1466. By contrast, regulating private entities raises no such federalism concern. The Seventh Circuit recently emphasized this point in explaining why *Monell*'s limitation on municipal liability should not extend to private companies:

> The rejected Sherman Amendment, which the *Monell* Court relied on to reject *respondeat superior* liability for municipalities, would have made a "county, city, or parish" vicariously liable for acts of violence

> committed by private citizens. *Monell*, 436 U.S. at 667. . . . That proposition simply is not analogous to imposing liability on private corporations for the tortious behavior of their own employees acting within the scope of employment. Nothing in the *Monell* treatment of the legislative history bars *respondeat superior* liability for corporations.

Shields, 746 F.3d at 793. Congress's concern about the Sherman Amendment was one that was specific to municipalities as governmental entities. It has no bearing on whether Congress intended to exempt private parties from existing vicarious liability standards.

Third, the process by which Congress enacted the collection of civil rights statutes following the Civil War further shows that Congress intended to subject private parties to vicarious liability and that it did not require private parties and municipalities to be treated identically. Section 1983 was explicitly modeled on portions of the Civil Rights Act of 1866. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 724 (1989) ("[T]he first section of the 1871 Act was explicitly modeled on § 2 of the 1866 Act, and was seen by both opponents and proponents as amending and enhancing the protections of the 1866 Act by providing a new civil remedy for its enforcement against state actors."); Cong. Globe, 42d Cong., 1st Sess. App. 568 (1871) (statement of Sen. Edmonds) (describing the 1871 Act as "carrying out the principles of the [1866] civil rights bill."). The collection of post-

Civil War civil rights statutes "were all products of the same milieu and were directed against the same evils." *Gen'l Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

It is a settled principle of statutory interpretation that courts should consider interpretations of a prior statute on which the statute at issue is based. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978); *Ehrlenger v. United States*, 409 U.S. 239, 243 (1972) (holding that statutes which are *in pari materia* "should be construed as if they were one law"); Antonin Scalia & Bryan A. Garner, The Interpretation of Legal Texts 252 (2012) ("Statutes *in pari materia* are to be interpreted together, as though they were one law."). Here, *respondeat superior* liability for private parties exists for 42 U.S.C. §§ 1981 and 1982, both of which were part of the 1866 Civil Rights Act. *See, e.g.*, *Arguello v. Conoco, Inc.*, 207 F.3d 803, 809-12 (5th Cir. 2000) (finding that employer could be liable for torts of employees under § 1981 consistent with traditional vicarious liability principles); *see also* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW & PRACTICE § 1.2 & n.36 (2d ed. 2004) ("When a customer complains of racial discrimination by an employee of a retailer [under § 1981], the employer can be held vicariously liable for the acts of the employee if the employee was acting within the scope of the employment."). The fact that Congress incorporated traditional tort principles into

the 1866 Act and made private parties subject to *respondeat superior* liability supports applying the same rule to § 1983, given that it was modeled on the earlier Act and was designed to help effectuate that Act's purposes.

Finally, trying to shoehorn private entities inside the Court's § 1983 municipal liability framework is like trying to fit a square peg in a round hole; the doctrine is ill-suited for private companies. One way of satisfying the municipal custom or policy requirement for § 1983 liability is to point to an act taken by someone with final policymaking authority. *See Piatrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) ("[M]unicipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom."). Who qualifies as a final policymaker for the municipality is determined by looking to state law. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

However, state law will not describe the policymaking structure for a private company, and so it may be impossible to apply the final policymaker standard when private individuals commit constitutional violations. Courts have struggled with this question in § 1983 suits involving private companies and have invented various approaches, none of them satisfactory. *See, e.g.*, Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 Cardozo L. Rev. 35, 57-61 (2004)

(describing different approaches). Most troubling, the final policymaker requirement can allow private companies to escape liability entirely—irrespective of whether the company's policies contributed to the constitutional violation—by claiming that final policymaking authority remains with the city or state with which it contracted. *See id.* (providing examples where courts found that the private company was not a final policymaker under § 1983 and found that the government was not liable either). That the final policymaker analysis simply does not work for private companies reinforces that *Monell*'s custom or policy requirement was never meant to apply to private entities. Instead, Congress intended for private entities to be governed by traditional vicarious liability principles.

In sum, § 1983 creates *respondeat superior* liability for private corporations. When Congress enacted the law, corporations were considered "persons" within the language of the statute, and it was well-established that corporations were liable for their employees' torts committed within the scope of employment. The legislative history shows that while Congress may have harbored federalism concerns about imposing extensive vicarious liability on municipalities, it evinced no intent to exempt private parties from traditional tort liability principles. Indeed, the differing liability regimes that existed at the time for municipalities and private

entities supports treating them differently here. Finally, when Congress expressly regulated private parties in the Civil Rights Acts, it subjected them to vicarious liability. The text, context, and purposes of § 1983 all point toward treating private entities just like they would be treated in any other tort case, as subject to traditional *respondeat superior* principles.

III. Imposing *respondeat superior* liability on private companies is necessary to promote effective deterrence and protect constitutional rights.

A. *Respondeat superior* liability will help deter private prison companies from committing constitutional violations through their employees.

There is a good reason why *respondeat superior* liability is such a longstanding tort doctrine: it works. First, it promotes deterrence by incentivizing employers to help reduce the risk of employee misconduct. *See* Dan B. Dobbs, The Law of Torts, § 334 (2000) ("The best deterrence is to impose liability upon the employer, who will then seek to avoid his own liability by exercising his considerable control over employees to discourage their torts."); 5 Fowler V. Harper *et al*., Harper, James & Gray on Torts, § 26.1 at 9 (3d ed. supp. 2008). (stating that the employer is in the best position to reduce accident costs). Second, employers are better equipped than courts to monitor their employees' behavior, meaning that employees will be more responsive to employer efforts to reduce

tortious behavior than to the abstract risk of a tort judgment. *See* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability For Accidents*, 70 Cal. L. Rev. 1345, 1377 (1982). Third, *respondeat superior* can promote deterrence where the individual employee is judgment proof or lacks sufficient resources to pay a damages award, as is the case in many § 1983 actions. *See* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1241-52 (1984) (explaining how employee inability to pay an award will cause employers to under-invest in deterrence measures).

Vicarious liability is particularly important where companies have incentives to cut costs in order to maximize profits. If employers are not liable for the torts of their employees, they have less incentive to provide adequate employee training, pay good wages, or meet basic standards of care. Because "[i]t is also generally cheaper to provide substandard care than it is to provide adequate care," private employees "have financial incentives to save money at the expense of inmates' well-being and constitutional rights." *Shields*, 746 F.3d at 794. Requiring employers to internalize those costs through vicarious liability will reduce the incentive to cut corners and to accept employee misbehavior as a tool for increasing profits. *See id.* ("Insulating private corporations from *respondeat superior* liability significantly reduces their incentives to control their employees'

tortious behavior and to ensure respect for prisoners' rights.").

The need for vicarious liability in the private prison industry is particularly evident. The primary cost for a private prison company is labor, and private prisons often seek to boost profits by reducing labor costs. *See* James Austin & Garry Coventry, U.S. Department of Justice, Bureau of Justice Assistance, *Emerging Issues on Private Prisons* 16 (2001) (explaining that labor can account for seventy percent of a private prison's costs).[5] Research shows that private prisons generally pay lower wages to correctional officers than do public prisons, invest less in employee training, and experience higher turnover. *See, e.g.*, The Sentencing Project, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons* (Aug. 2018) at 10-11 (citing data showing that private correctional officers make more than $23,000 less on average than public sector employees, that contracts with private prisons lack sufficient incentives for job training, and that private prisons experience a higher employee turnover, all of which "may contribute to safety problems within prisons");[6] Margaret Talbot, *The Lost Children*, THE NEW YORKER, Mar. 3, 2008, at 59-67 (citing internal federal government documents and

[5] https://www.ojp.gov/pdffiles1/bja/181249.pdf
[6] https://www.sentencingproject.org/wp-content/uploads/2018/07/Capitalizing-on-Mass-Incarceration.pdf

other reports showing that private prisons "offer significantly lower salaries than public state correctional agencies").[7] Importantly, private prisons reduce staffing to levels well below those at public prisons while at the same time seeking to maximize inmate occupancy. *See* Austin & Coventry, *supra*, at 52 ("[T]he number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities."); Talbot, *supra*, at 66 (citing a study concluding that private facilities offer "significantly lower staffing levels" than public facilities). Inadequate staffing levels further raise the risk of violence inside a prison and the risk that violations of prisoners' constitutional rights will occur.

Unsurprisingly, that is exactly what happens. "Studies have found that assaults in private prisons can occur at double the rate found in public facilities." Cody Mason, The Sentencing Project, *Private Prisons in America: Too Good to be True*, (Jan. 2012) at 10;[8] C.R. Blakely & V.W. Bumphus, *Private and Public Sector Prisons—a Comparison of Selected Characteristics*, 68 Federal Probation 1, 27-33 (2004).[9] A recent Department of Justice study found that private contractors

[7] A web-based version of the print article is available at https://www.newyorker.com/magazine/2008/03/03/the-lost-children (last visited June 16, 2021).
[8] https://www.sentencingproject.org/publications/too-good-to-be-true-private-prisons-in-america/
[9] https://www.uscourts.gov/sites/default/files/68_1_5_0.pdf

had a higher rate of assaults and of "staff use of force on inmates" than comparable federal Bureau of Prisons institutions. U.S. Dep't of Justice, Office of Inspector General, *Review of the Federal Bureau Prisons' Monitoring of Contract Prisons* (Aug. 2016) at 18.[10] "Researchers also find that public facilities tend to be safer than their private counterparts and that privately operated prisons appear to have systemic problems in maintaining secure facilities." *Capitalizing on Mass Incarceration*, *supra*, at 11. It therefore comes as no surprise that LaSalle employees have been repeatedly accused of violating the rights of inmates under their charge.

B. Evidence indicates that LaSalle is a serial violator of its inmates' constitutional rights.

LaSalle provides a vivid illustration of how companies will tolerate repeated violations of constitutional rights for the sake of enriching themselves. As explained below, although evidence indicates that the company's employees have repeatedly disregarded inmates' constitutional rights, LaSalle has failed to invest in fixing such problems, because there is no financial incentive to do so. Furthermore, evidence indicates that LaSalle has manipulated and falsified data to make it harder for states and municipalities to monitor its behavior.

[10] https://oig.justice.gov/reports/2016/e1606.pdf

LaSalle's emphasis on profits starts at the very top. Clay McConnell, one member of the company's ownership family, stated that the company's goal is for inmate "occupancy to be high" while keeping "employee costs" low. Cindy Chang, *North Louisiana Family is a Major Force in the State's Vast Prison Industry*, New Orleans Times-Picayune (May 14, 2012) (quoting McConnell). Indeed, LaSalle faces intense pressure to cut costs. The company currently operates twenty-five prisons and detention centers, primarily in Texas and Louisiana.[11] It has grown by providing the cheapest bids for state contracts, even outbidding other private prison companies. In Texas, for example, LaSalle has bid as low as $30 per inmate per day, while county jails operate at a cost of around $70 per inmate per day. Cary Aspinwall & Dave Boucher, *'They're gonna kill me': Why did a man die in jail near Fort Worth as untrained guards watched?,* Dallas Morning News (Nov. 18, 2018).[12]

This focus on profits creates incentives for LaSalle to skimp on training, reduce staffing, hire untrained workers, and to fail to invest the resources necessary to protect inmate safety and health. Like other private contractors, LaSalle pays its

[11] https://lasallecorrections.com/locations/ (last visited June 8, 2021).
[12] https://www.dallasnews.com/news/investigations/2018/11/18/theyre-gonna-kill-me-why-did-a-man-die-in-jail-near-fort-worth-as-untrained-guards-watched/

employees lower wages than those paid to state correctional officers. This means that they hire less-experienced and less-qualified workers, and that they often have trouble fully staffing their facilities. In Arkansas, for example, LaSalle pays entry-level correctional officers $11-12 per hour, whereas equivalent state employees are paid nearly $15 per hour. John Moritz, *Private Lockup Firm in Arkansas has Share of Complaints*, Ark. Democrat-Gazette (Sept. 29, 2019). Similarly, "insufficient staffing has been a well-documented and persistent problem at LaSalle-run Texas jails." Complaint, ¶ 154 (ECF-1), *Mathis v. Southwest Correctional, LLC*, No. 5:20-cv-00146-RWS-CMC (E.D. Tex. Sept. 16, 2020) [hereinafter *Mathis*].

Additionally, LaSalle has minimized or reduced training costs and actively seeks to utilize untrained officers. It has exploited a legal loophole allowing companies to hire untrained guards if they are hired on a temporary basis for twelve months or less. Aimee Ortiz, *For-Profit Jail is Accused of Abuse After Death of Woman with H.I.V.*, N.Y. Times (Sept. 17, 2020).[13] A 2018 investigation revealed that LaSalle had "hired more than 370 jailers with temporary licenses at less than a dozen facilities around the state since 2017." Aspinwall & Boucher, *supra*. By comparison, "[h]alf of the agencies that have used temporary jailers

[13] https://www.nytimes.com/2020/09/17/us/lasalle-corrections-inmate-death.html

since 2017 employed four or fewer." *Id.*

LaSalle's efforts to lower costs by reducing training and staffing levels have resulted in irreversible harm that was easily preventable. During this time that it was hiring untrained officers, four LaSalle guards shackled, pepper-sprayed and piled on top of inmate Andy DeBusk, contributing to his death. *Id.* Although the LaSalle facility had regulations on the use of pepper-spray and asphyxiating holds, the officers in question "had virtually no training." *Id.* The DeBusk case is just one of many complaints about LaSalle's "lax training." *Id.*

Because LaSalle keeps staffing low, it has failed to meet state standards requiring staff to conduct cell checks every hour. Moritz, *supra.* This occurred at a time when one inmate committed suicide in his cell and another died from an apparent seizure. *Id.* LaSalle is known for failing to comply with state standards and guidelines. "Texas jails run by LaSalle, including the Bi-State jail, have been on the state's noncompliance list every year from 2015 to 2019." Arya Sundaram, *How Texas Jails Avoid Investigations of Inmate Deaths*, Texas Observer, Oct. 29, 2020.[14]

Unfortunately, the tragic events resulting in Erie Moore's death are not an

[14] https://www.texasobserver.org/how-texas-jails-avoid-investigations-of-inmate-deaths/

isolated or unique example of misconduct in LaSalle facilities. In 2015, LaSalle officers pepper sprayed Michael Sabbie rather than refer him for medical care, ultimately resulting in his death. Moritz, *supra*. Another diabetic inmate died in custody in 2016 amidst allegations that correctional officers and medical staff failed to provide her with needed medical care. *Id.* A nurse at Bi-State gave sworn testimony that correctional officers used pepper spray on "hundreds of people" at the prison. Report and Recommendation (ECF-122) at 129, *Sabbie v. Southwestern Correctional, LLC*, No. 5:17-cv-00113-RWS-CMC (E.D. Tex. Mar. 6, 2019) [hereinafter *Sabbie* R&R].

Other examples abound. Holly Barlow-Austin, an HIV-positive detainee, was housed at LaSalle's Bi-State prison. She died after only two months. Despite her medical vulnerabilities, Barlow-Austin was housed in "deplorable and inhumane conditions," deprived of water, and denied required HIV medications, all of which contributed to her untimely death, according to a federal lawsuit. Ortiz, *supra*. Although she was effectively managing her HIV prior to her incarceration, by the time she was taken to the hospital right before her death, "she was blind and gaunt—utterly unrecognizable from the relatively healthy and nourished woman who walked into the jail two months before." *Id.* Guards who were supposed to be performing regular checks never looked into her cell, and those who did ignored

her deteriorating medical condition and obvious need for help. *Id.* Numerous other inmates have died after guards used force against them or where they failed to receive sufficient medical care. *Mathis*, *supra*, ¶¶ 132-147 (citing examples of inmate deaths at LaSalle facilities).

Nor does LaSalle appear to respond to complaints or take corrective measures to prevent recurrence. Despite the tragic and preventable death of Erie Moore in 2015, LaSalle continues to face allegations of officer misconduct. In 2016, several guards at Richwood pepper sprayed inmates who were handcuffed and on their knees, while other guards stood by without intervening. Janet McConnaghey, KNOE News8, *Former Richwood Guard Gets Almost 4 years in Pepper Spraying* (Sept. 5, 2019).[15] They then sought to cover up the incident to avoid detection. *Id.* One guard admitted that they took five inmates to an area that was not visible to security cameras, pepper sprayed the inmates, and then passed the spray can to other guards to use. *5 years for ex-guard who used pepper spray in inmates' eyes* (June 6, 2019).[16] To cover up their misdeeds, the five guards then filed false reports justifying their use of pepper spray. *Id.*

[15] https://www.knoe.com/content/news/Former-Richwood-guard-gets-almost-4-years-in-pepper-spraying-559486331.html
[16] https://www.wwltv.com/article/news/crime/5-years-for-ex-guard-who-used-pepper-spray-in-inmates-eyes/289-170b470c-169e-4300-8e3c-d71b60504aef

Evidence also suggests that LaSalle manipulates data or skirts reporting requirements in order to evade investigation by government authorities. In Texas, all inmate deaths must be reported to a government agency to allow the agency to determine if the facility is non-complaint and must take steps to fix its problems. Sundaram, *supra*. To circumvent this requirement, LaSalle's Bi-State prison has abruptly released dying prisoners into the custody of a hospital to avoid having to report the deaths. *See id.* As a result, the state has not investigated deaths resulting from harm occurring at LaSalle's facility, simply because LaSalle sent inmates to an outside location to die. *Id.*

In another example, an employee whistleblower described how LaSalle imposed a "freeze out" policy in order to undercount positive Covid cases among inmates. In one facility, it ordered that the air conditioning be turned up to maximum so that detainees running fevers would appear to be healthy and Covid-free. Government Accountability Project, Letter to the U.S. House Committee on Homeland Security (July 10, 2020), at 10.[17]

Not only does LaSalle omit information, but employees have also explained

[17] https://whistleblower.org/wp-content/uploads/2020/07/071020-letter-to-Congress-from-GovAcctProj-re-whistleblowers-ICE-Detention-COVID-FINAL-Submitted.pdf

that LaSalle falsifies data. In the lawsuit arising out of the death of Michael Sabbie at LaSalle's Bi-State prison, employees testified that they were ordered to sign forms indicating that they had completed the required training when they in fact had not. *Sabbie* R&R, *supra*, at 51. In some cases, they were required to sign the forms before any training even began. *Id.* An external evaluator concluded that "training was not being conducted, training was being falsified, and employees were given credit for training they did not attend." *Id.* In the Sabbie case, guards also filed false reports stating that they had checked on Sabbie every thirty minutes when in reality those checks did not occur. *Id.* at 44-46, 91, 128-129.

Although LaSalle now uses the Richwood facility to incarcerate immigration detainees, the allegations of misconduct have not abated. In 2019, one detainee committed suicide after being placed in solitary confinement as retaliation for participating in a hunger strike. Gaby Del Valle, *ICE Has Been Ramping Up Its Work with a Private Prison Company Connected to Horrific Allegations* (Oct 29, 2019).[18] Immigrants at Richwood and other LaSalle facilities allege that they are "berated by guards, given moldy food, and placed in solitary confinement for protesting the conditions they face." *Id.* Guards have beaten detainees, including

[18] https://www.vice.com/en/article/ywa4v5/ice-has-been-ramping-up-its-work-with-a-private-prison-company-connected-to-horrific-allegations

breaking one detainee's rib, according to allegations. *Id.*

LaSalle also failed to take precautions to protect its employees and its inmates from Covid-19. In April 2020, two Richwood correctional officers died from Covid-19 they likely contracted in the Richwood facility. Nomaan Merchant, *2 Guards at ICE Jail Die after Contracting Coronavirus* (May 3, 2020).[19] This came soon after LaSalle specifically instructed its employees not to wear protective masks or gloves "to avoid spreading panic to detainees," according to one Richwood employee. *Id.* Some of the undersigned organizations continue to receive complaints from inmates in LaSalle facilities concerning the use of pepper spray on inmates, poorly trained correctional officers, extended and excessive solitary confinement, and inadequate staffing.

More recently, whistleblowers have reported that LaSalle medical personnel gave unwanted hysterectomies to detainees without their consent at LaSalle's Irwin Detention Center in Georgia. Jonathan Blitzer, *The Private Georgia Immigration-Detention Facility at the Center of a Whistleblower's Complaint*, The New Yorker (Sept. 19, 2020).[20] When detainees protested their conditions of confinement, the

[19] https://www.kxan.com/news/2-guards-at-ice-jail-die-after-contracting-coronavirus/

[20] https://www.newyorker.com/news/daily-comment/the-private-georgia-immigration-detention-facility-at-the-center-of-a-whistle-blowers-complaint

warden ordered employees to shut off the water to one wing of the prison, forcing one detainee to drink from the toilet. *Id.*

One would hope that the defendants' shocking and violent conduct leading to Erie Moore's death was an aberration. Unfortunately, such behavior is all too common. This is not surprising, because LaSalle has little incentive to change if it will not be held accountable for the actions of its employees. To stop private companies from repeatedly violating the Constitution, this Court should find that LaSalle is subject to vicarious liability for the actions of its employees under § 1983.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and hold that the private entity defendants in this case are subject to *respondeat superior* liability under § 1983.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fifth Circuit Rule 29.3 because this brief contains 6,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* in Support of Appellants with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 21, 2021.

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