ORAL ARGUMENT SCHEDULED FOR MAY 13, 2021

No. 20-7055

IN THE

United States Court of Appeals for the District of Columbia Circuit

ENZO COSTA; VINITA SMITH; WILLIAM DUNBAR,

Plaintiffs–Appellees,

v.

BARBARA J. BAZRON, Director, Department of Behavioral Health, in her individual capacity; MARK J. CHASTANG, Chief Executive Officer, Saint Elizabeths Hospital, in his individual capacity; DISTRICT OF COLUMBIA,

Defendants–Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:19-cv-03185-RDM, The Honorable Randolph D. Moss

Brief for *Amici Curiae* the Judge David L. Bazelon Center for Mental Health Law, the American Association of People with Disabilities, the National Council on Independent Living, and Mental Health America Supporting Appellees and Affirmance

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Parties, Rulings, and Related Cases

A. Parties and *amici*.

Except for the signatories to this *amicus* brief—the Judge David L. Bazelon Center for Mental Health Law, the American Association of People with Disabilities, the National Council on Independent Living, and Mental Health America—all parties, intervenors, and *amici* appearing before this Court or the district court are listed in the Briefs for Appellants and Appellees.

B. Rulings under review.

References to the rulings at issue appear in the Briefs for Appellants and Appellees.

C. Related cases.

This case was not previously before this Court or any other court other than the district court below. Counsel is unaware of any related cases pending before this Court or any court.

Disclosure Statement

Amici the Judge David L. Bazelon Center for Mental Health Law, the American Association of People with Disabilities, the National Council on Independent Living, and Mental Health America are all incorporated national nonprofit advocacy organizations. No *amicus* has a parent corporation, and no publicly held corporation has a 10% or greater ownership interest in any *amicus*.

Contents

Parties, rulings, and related cases i

Disclosure statement ii

Table of authorities iv

Glossary vi

Amici's identity, interests, and authority to file 1

Introduction and summary of argument 4

Argument 6

I. The district court properly applied *Youngberg* by looking to CDC guidance to determine whether the defendants substantially departed from professional standards. 6

II. The district court correctly identified specific CDC standards that defendants, without justification, failed to follow. 13

III. The district court properly attributed the likely constitutional violations at Saint Elizabeths to the District under *Monell*. 21

Conclusion 24

Certificate of compliance

Certificate of service

Table of Authorities

Page(s)

Cases

Baker v. District of Columbia,
326 F.3d 1302 (D.C. Cir. 2003) 21

Banks v. District of Columbia,
377 F. Supp. 2d 85 (D.D.C. 2005) 23

Harvey v. District of Columbia,
798 F.3d 1042 (D.C. Cir. 2015) 6, 7, 22, 23

Johnson ex rel. Johnson v. Brelje,
701 F.2d 1201 (7th Cir. 1983), *abrogated in part on other grounds by Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992) 7, 14, 20

**Mays v. Dart*,
974 F.3d 810 (7th Cir. 2020), *petition for cert. filed*, No. 20-990 (U.S. Jan. 26, 2021) 9, 10, 13, 19

Monell v. Dep't of Social Servs.,
436 U.S. 658 (1978) 5

Patten v. Nichols,
274 F.3d 829 (4th Cir. 2001) 8

Project Release v. Prevost,
722 F.2d 960 (2d Cir. 1983) 7

**Sharp v. Weston*,
233 F.3d 1166 (9th Cir. 2000) 8, 10, 11, 20

Shaw ex rel. Strain v. Strackhouse,
920 F.2d 1135 (3d Cir. 1990) 6

** Authorities on which we chiefly rely are marked with asterisks.*

Thomas S. ex rel. Brooks v. Flaherty,
902 F.2d 250 (4th Cir. 1990) 7, 10, 11

Thomas S. v. Morrow,
781 F.2d 367 (4th Cir. 1986) 7

Thompson v. District of Columbia,
832 F.3d 339 (D.C. Cir. 2016) 22

**Youngberg v. Romeo*,
457 U.S. 307 (1982) 4, 5, 6, 7, 8, 9, 18, 20

Statute

42 U.S.C. § 1983 21

Glossary

CDC	Centers for Disease Control and Prevention
JA	Joint Appendix
TRO	Temporary restraining order

Amici's Identity, Interests, and Authority to File

The Judge David L. Bazelon Center for Mental Health Law is a national nonprofit advocacy organization founded in 1972 to protect and advance the civil rights of adults and children with mental illness or developmental disabilities. The Bazelon Center envisions a society where Americans with mental disabilities live with autonomy, dignity, and opportunity in welcoming communities, supported by law, policy, and practices that help them reach their full potential.

People with acute mental illnesses are often confined in facilities that do not meet these ideals. As a result, the Center has long worked to ensure constitutionally guaranteed conditions of care for people with mental illnesses held in government custody. Through decades of litigation, the Center has acquired significant expertise on the Fifth and Fourteenth Amendment standards governing the conditions in which involuntarily confined psychiatric patients live. The Center hopes that this expertise will aid the Court's analysis of the district court's well-founded actions in response to the health and safety crisis facing Saint Elizabeths Hospital residents during the COVID-19 pandemic.

Further, because the Center is based in the District of Columbia, it knows well the conditions, policies, and procedures at Saint Elizabeths, the District's only public psychiatric facility. Given Saint Elizabeths' historical shortcomings in addressing the needs of those committed to its care—and especially with the District still in the grips of the coronavirus pandemic—the Center has an acute interest in ensuring the well-being of the Hospital's current and future patients. The Center believes the district court's preliminary injunction will help secure constitutionally sufficient living conditions that will, in turn, better ensure patients' health and safety.

The American Association of People with Disabilities works to increase the political and economic power of people with disabilities, and to advance their rights. A national cross-disability organization, the Association advocates for full recognition of the rights of over 60 million Americans with disabilities.

The National Council on Independent Living is the oldest cross-disability, national grassroots organization run by and for people with disabilities. The Council's membership comprises centers for independent living, state independent living councils, people with

disabilities and other disability rights organizations. It advances independent living and the rights of people with disabilities. The Council envisions a world in which people with disabilities are valued equally and participate fully.

Mental Health America is the nation's leading community-based nonprofit dedicated to addressing the needs of those living with mental illness and promoting the overall mental health of all Americans. Mental Health America's programs and initiatives fulfill its mission through advocacy, education, research, and services. Its national office and its 200-plus affiliates and associates around the country work every day to protect the rights and dignity of individuals with mental health conditions and advocate for increased access to mental health services and supports.

No party's counsel authored this brief in whole or in part, and no person other than *amici* or their counsel contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

Introduction and Summary of Argument

COVID-19 presents a dire threat to people confined to psychiatric facilities. Not only is serious mental illness a risk factor for developing severe coronavirus complications, but COVID-19 can also spread like wildfire in a facility where people live in close quarters and are exposed daily to potential new introductions of the pathogen from the outside. These dangers increase when inadequate testing hides the prevalence of asymptomatic transmission among residents and staff. The district court's injunction properly addresses these risks to patients at Saint Elizabeths by ensuring that the defendants do not depart from professional, constitutionally required standards of care without reason.

Pandemic or not, the Constitution requires that psychiatric institutions provide safe conditions and adequate medical care in accord with professional norms. *Youngberg v. Romeo*, 457 U.S. 307, 322–24 (1982). These institutions must exercise professional judgment when adopting policies that affect patient health and care, and those policies must reflect practices recommended by national and governmental experts. Following practices recommended by national authorities is all the more sensible during a once-in-a-century global pandemic. While

local health officials have no prior pandemic experience to draw on, the nation's experts have spent their entire careers planning for such an unlikely event.

In April and May 2020—the relevant timeframe here—guidance from the Centers for Disease Control and Prevention established professional standards for mental health institutions confronting the pandemic. The district court properly held that, under *Youngberg*, the defendants needed to follow those standards and provide *some* reasoned explanation if they chose to deviate. When District officials did not or could not offer a rationale for deviating from the professional norms the CDC set forth, the district court rightly ordered relief to help keep patients safe.

The district court also properly found that the District could be liable for its departures from professional standards under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Monell* makes the District liable for choices made by municipal policymakers, and those choices here fell short of the constitutional requirements *Youngberg* recognized. The plaintiffs need not show "deliberate indifference" on the part of District or Saint Elizabeths authorities.

Argument

I. The district court properly applied *Youngberg* by looking to CDC guidance to determine whether the defendants substantially departed from professional standards.

People involuntarily confined in a mental-health institution have a due-process right to "safe conditions," including "adequate food, shelter, clothing, and medical care." *Youngberg*, 457 U.S. at 315–16. The District of Columbia thus has "an affirmative duty to ensure the safety and general well-being" of every involuntarily committed person. *Harvey v. District of Columbia*, 798 F.3d 1042, 1050 (D.C. Cir. 2015). And this standard is significantly stricter than the one governing prisons: "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321–22. It is thus "unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id*. at 316.

To assess whether a state or the District has met these constitutional obligations, courts use the "professional judgment standard." *Shaw ex rel. Strain v. Strackhouse*, 920 F.2d 1135, 1145 (3d Cir. 1990); *see Youngberg*, 457 U.S. at 321–22. The District violates this standard

when "conditions in [its] institutions" reflect "a substantial departure from accepted professional judgment, practice, or standards." *Youngberg*, 457 U.S. at 322–23; *Harvey*, 798 F.3d at 1051. Qualified professionals making treatment decisions enjoy some "deference" under this approach, *Youngberg*, 457 U.S. at 322–23 & n.30, but not "unfettered discretion," *Project Release v. Prevost*, 722 F.2d 960, 981 (2d Cir. 1983). They do not have "free rein," *Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir. 1986), and their decisions "are not conclusive," *Thomas S. ex rel. Brooks v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990).

Youngberg thus is not satisfied just because a professional made the decision being challenged. In other words, "a 'professional judgment' is not synonymous with a decision made by" a professional. *Johnson ex rel. Johnson v. Brelje*, 701 F.2d 1201, 1209 n.9 (7th Cir. 1983), *abrogated in part on other grounds by Maust v. Headley*, 959 F.2d 644, 647 (7th Cir. 1992). Indeed, in a case like this, a professional almost always makes the challenged decision. *Youngberg* would thus provide no meaningful protection if a defendant could avoid liability just by pointing to a professional decisionmaker.

The defendants here overstate the degree of deference *Youngberg* allows. *See, e.g.*, Appellants' Br. 38. If the Constitution were as deferential as the defendants suggest—if it meant that "because . . . qualified professionals exercis[ed] their discretion . . . the district court should not have inquired further"—the role of "safeguarding . . . constitutional rights" would transfer "from the courts to mental health professionals." *Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000). That is not the approach *Youngberg* contemplates. The Constitution instead seeks to *balance* patients' liberty interests with the state's interests. *See Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001). To strike the proper balance—and because judges, not mental health practitioners, police constitutional boundaries—courts must determine whether the judgments made by defendants' professionals depart too far from accepted standards. *Youngberg*, 457 U.S. at 321; *see* Appellees' Br. 33. Thus, courts must "take action when there is a substantial departure from accepted professional judgment"—or "when there has been no exercise of professional judgment at all." *Sharp*, 233 F.3d at 1171.

Written policies or guidance are valuable in identifying the prevailing "professional . . . standards" against which the defendants' ac-

tions are measured. *See Youngberg*, 457 U.S. at 323. So when documented standards are available, they provide the natural starting point for the Court's analysis. Here, the relevant professional standards are set out in CDC guidelines, which "provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing." *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020), *petition for cert. filed*, No. 20-990 (U.S. Jan. 26, 2021). Looking to CDC guidance is especially sensible because the defendants have no experience with a once-in-a-generation global pandemic, while the CDC's experts have studied and prepared for this scenario for years. *See id.* ("CDC Guidelines, arising from an expert, independent agency, are entitled to great[] weight"). Indeed, the defendants themselves concede "that Saint Elizabeths Hospital should be doing what is consistent with CDC guidance." JA336 (Apr. 22, 2020 Hr'g Tr.); *see also* Appellees' Br. 27.

Thus, the district court properly looked to the CDC's written guidance to determine the governing standards. It also correctly held that, in the context of a new and growing global pandemic, failing to follow

CDC guidance without explanation was a "substantial departure" from professional norms. *Mays*, *Flaherty*, and *Sharp* all support the district court's approach.

In *Mays*, people held in the Cook County Jail alleged that the jail violated due process by "failing to provide them with reasonably safe living conditions as the [COVID-19] pandemic rages." 974 F.3d at 813. They sought an injunction requiring "certain procedures related to social distancing, sanitation, diagnostic testing, and personal protective equipment . . . to protect them from the virus." *Id.* The district court issued a TRO that it later extended into a preliminary injunction. *Id.* at 813–14. In doing so, the court "made detailed factual findings about the risks of COVID-19, the [jail's] existing policies, and the execution of these policies." *Id.* at 823. And, as here, the district court "closely tailored the relief it ordered to the guidelines promulgated by" the CDC and authorized relief where the Sheriff's policies "fell short of those recommended in the CDC Guidelines." *Id.* at 814, 816.

The Seventh Circuit affirmed most of this relief. The court specifically upheld all the portions of the district court's order that "carefully considered the Sheriff's conduct in light of the CDC Guidelines and

hewed closely to the Guidelines in its explanation of each measure of relief it ordered." *Id.* at 823. The court emphasized that the "district court . . . properly relied on [CDC] Guidelines in the course of its preliminary injunction analysis" because those Guidelines "provide the authoritative source of guidance on prevention and safety mechanisms" for institutions forced to adapt rapidly to COVID-19. *Id.* at 823–24.

Flaherty provides more support for the district court's approach. There, a class of "patients in public psychiatric hospitals in North Carolina" challenged the constitutionality of various confinement conditions. 902 F.2d at 251. The district court found, and the Fourth Circuit affirmed, that state professionals "substantially departed" from "accepted standards." *Id.* at 252. The Fourth Circuit credited the district court's decision to "identif[y] the accepted professional standards" by looking to the government's "written policies" and expert testimony. *Id.* And the panel upheld the district court's findings because there was "ample evidence" that the state "substantially departed from these identified standards." *Id.*

Finally, *Sharp* shows that the district court did not unduly infringe on the defendants' professional judgment. There, a patient al-

leged that "conditions of his confinement violated his civil rights." 233 F.3d at 1168. Facility administrators appealed the district court's denial of their request to lift an earlier injunction, arguing that "the district court failed to properly defer to the judgment of qualified mental health professionals." *Id.* The injunction had identified specific policies and practices in place at the institution that fell below "generally accepted" standards. *Id.* at 1170–71. The district court derived those standards largely based on the "neutral standards promulgated by" the relevant industry group. *Id.* at 1172. Because professionals at the facility departed from those standards, the court held that injunctive relief remained warranted. *Id.*

In upholding that decision, the Ninth Circuit rejected the administrators' argument that "because they are qualified professionals exercising their discretion . . . the district court should not have inquired further." *Id.* at 1171. The panel noted that the administrators, like the defendants here, "appear to suggest that because, in their capacities as mental health professionals, they believe they have complied with the legal requirements . . . , their decisions are beyond review." *Id.* The

Ninth Circuit rejected that view: The Constitution's protections do not "depend on who happened to be in charge of a particular program." *Id.*

The district court's approach here tracks the analysis approved in these cases. The court properly looked to objective, authoritative guidance; carefully assessed the defendants' actions for departures from that guidance; and then determined whether those departures had a reasonable professional basis. That is the correct approach under *Youngberg*. And as discussed next, the court's conclusions at each step were correct.

II. The district court correctly identified specific CDC standards that defendants, without justification, failed to follow.

In crafting its initial TRO and then converting parts of that order into a preliminary injunction, the district court "carefully considered" Saint Elizabeths' policies and practices "in light of the CDC Guidelines and hewed closely to the Guidelines in its explanation of each measure of relief it ordered." *See Mays*, 974 F.3d at 823. With *Youngberg* in mind, the court held that "Defendants at least bear the burden of coming forward with *some identified reason* based in professional judgment for failing to comply with CDC COVID-19 guidance," especially given the "tragic backdrop" of deaths and infections at the Hospital. JA882

(emphasis added); *see Johnson*, 701 F.2d at 1209 ("in the absence of *any justification* by defendants . . . the Court must hold that plaintiffs' due process rights [under *Youngberg*] have been violated" (cleaned up)). And the court found three specific areas where the defendants deviated from CDC guidance without explanation. On each, it was correct.

First, Saint Elizabeths did not follow CDC standards for isolating and quarantining patients with suspected and confirmed COVID cases. The CDC emphasized that once "there are cases in the facility," professionals should "restrict residents (to the extent possible) to their rooms except for medically necessary purposes." JA411 (CDC, *Preparing for COVID-19: Long-term Care Facilities, Nursing Homes* (Apr. 24, 2020)). But the court found that Saint Elizabeths failed to do so. *See* JA886. Also, recognizing the importance of segregating potentially infected patients from others in the facility, the CDC instructed health professionals to "avoid placing unexposed residents into a shared space" with "residents who may have been exposed to an individual with COVID-19." JA410 (CDC, *Long-term Care Facilities*). Yet before the plaintiffs sued, "the Hospital was housing individuals with COVID-19 symptoms together with non-symptomatic individuals." JA883. And the Hospital's

evidence did not "demonstrate[ ] that such an evidently perilous practice was a product of professional judgment." JA887.

Relatedly, the CDC stressed that, once facilities separate symptomatic and exposed people from non-symptomatic and non-exposed people, it is critical to isolate people with suspected cases *from each other*. JA410 (CDC, *Long-term Care Facilities*) ("Residents with known or suspected COVID-19 . . . should ideally be placed in a private room with their own bathroom."). Despite this clear guidance, Saint Elizabeths "hous[ed] individuals exposed to the virus in the same space, without isolating patients from one another *within that space* to prevent those who were positive from infecting those who were not." JA886; *see id.* (finding that the "Hospital . . . substantially departed from professional judgment by not isolating exposed patients from one another"). Though given a chance to do so, "Defendants fail[ed] to explain what 'professional judgment' would support" that decision. *Id.*

Second, Saint Elizabeths veered from CDC guidance on hospital unit cross-staffing. CDC experts recommended that, as much as possible, health care providers should not work across multiple units during the same shift. Facilities should "[a]ssign dedicated [health care pro-

viders] to work only in th[e] area of the facility" designated "to care for residents with confirmed COVID-19." JA410 (CDC, *Long-term Care Facilities*). Informed by expert testimony, the court found that Saint Elizabeths failed to implement "appropriate restrictions on staff assignments," which "constituted a substantial departure from professional judgment." JA890. Indeed, the defendants "offered no evidence" that the Hospital's cross-staffing practices were the "product of considered professional judgment." *Id.* Further, "when Saint Elizabeths staff *did* exercise professional judgment"—namely, by adopting policies more restrictive of cross-unit staff movement after the plaintiffs sued—"it aligned with the recommendations set forth by the CDC and *amici*." JA892. But the court found that "[t]here is no evidence . . . that prior to th[e] litigation a professional at Saint Elizabeths had exercised any considered judgment with respect to [the cross-staffing] issue"; that the "Hospital's more cautious approach to cross-unit movement [was] a recent development" which was also "at least in part, a product of this litigation"; and thus injunctive relief remained warranted. *Id.*

Third, Saint Elizabeths failed to follow CDC guidance that long-term care facilities implement "point prevalence surveys" of residents

and staff—essentially, ongoing facility-wide testing—to detect COVID infections and control the virus's spread. *See* JA720A (CDC, *Testing for Coronavirus (COVID-19) in Nursing Homes* (archived version May 2, 2020)). If testing capacity allowed, the CDC directed facilities to consider and conduct "facility-wide" point prevalence surveys "of all residents" and health-care providers "in facilities with suspected or confirmed cases of COVID-19." JA720A–720B (CDC, *Nursing Homes*).

The district court found that the defendants did not meet this standard and failed to explain why. "Defendants do not dispute that [the court-appointed expert] *amici* have correctly identified the urgent need for [point prevalence survey] testing to stem the spread of virus [at] the Hospital; that the CDC also recommends [point prevalence survey] testing as part of a test-based infection control strategy; and that the initial [point prevalence survey] testing helped identify a significant number of asymptomatic, COVID-positive staff." JA895. Yet Saint Elizabeths (a) did "not explain why the Hospital waited over a week" to conduct point prevalence survey testing for staff, (b) did not "plan[] on conducting [point prevalence survey] testing of staff" until the court "require[d] that they do so," and (c) was silent on whether it "plan[ned]

to continue periodic testing after the TRO expires." JA896. The court also emphasized that when Saint Elizabeths *did* conduct point prevalence survey testing, it found "twenty-one COVID-19 positive employees" of whom "most (if not all)" were asymptomatic. *Id.* The court thus found "that Defendants' delay in testing all staff and their lack of a plan to continue testing all patients and staff constitutes a substantial departure from professional judgment" warranting continued injunctive relief. JA896–97.

The district court's careful approach to crafting a remedy shows that it "defer[red] to the judgment exercised by" professionals at Saint Elizabeths. The court declined to intervene when Saint Elizabeths complied with CDC guidance or provided a reasoned explanation, based on professional judgment, for deviating from it. *See Youngberg*, 457 U.S. at 322. For example, though the court granted the plaintiffs' requested relief on point prevalence survey testing, it denied other testing-related relief, finding that the defendants "followed the CDC-recommended protocol for returning symptomatic patients to the general population," and that the Hospital's initial failure to "timely or routinely test[] patients with COVID-19 symptoms . . . was not the result of

a lapse in professional judgment" but rather "the nation-wide shortage in testing capacity." JA893–94. These findings show that the court did not merely focus on departures from CDC guidance, but specifically addressed whether professional judgment supported the departure.

In the end, the district court granted only some of the injunctive relief the plaintiffs sought. *See* JA274–77 (Am. Compl. ¶¶ 236(a), 236(c)–(m)); *cf. Mays*, 974 F.3d at 816–18 (upholding preliminary injunction that was "considerably narrower than [what] Plaintiffs requested"). And the particular relief it granted rested on specific factual findings, including the defendants' failure or inability to justify their departures from the professional standards that, as everyone agrees, provide the baseline here.

Finally, the defendants are wrong to rely on the CDC's answers to "Frequently Asked Questions" to justify their departures from the expert agency's guidance. *See* Appellants' Br. 37–42. On the ultimate question of whether "CDC's interim infection prevention and control recommendations for COVID-19 apply to psychiatric hospitals or other behavioral health facilities," the CDC answered "Yes." JA848 (CDC, *Healthcare Infection Prevention and Control FAQs for COVID-19* (up-

dated May 11, 2020)). And the CDC reiterated that "[t]o keep patients and healthcare personnel . . . healthy and safe, CDC's infection prevention and control guidance applies to all settings where healthcare is delivered." *Id.*

The defendants emphasize the CDC's statement that facilities may need to "tailor certain . . . recommendations to their [specific] setting." *See* Appellants' Br. 35–38. But the CDC itself noted that this is true of "any guidance" it issues. JA848. Put differently, the CDC's acknowledgment of hospitals' possible need to "tailor certain recommendations to their setting" is not carte blanche to stray from professional norms *without reason*. Rather, the FAQs merely recognize, as the district court did, that deviations may be appropriate if "professional judgment in fact was exercised." *Youngberg*, 457 U.S. at 321; *Johnson*, 701 F.2d at 1209 n.9. But courts will intervene when mental health facilities veer from professional standards without showing that such a departure reflected professional judgment. *See Sharp*, 233 F.3d at 1171.

The district court properly applied *Youngberg* by identifying discrete ways in which the defendants disregarded CDC guidance without

adequate justification, and, in doing so, violated the plaintiffs' right to safe conditions.

III. The district court properly attributed the likely constitutional violations at Saint Elizabeths to the District under *Monell*.

The district court held that the plaintiffs were likely to succeed in establishing municipal liability under *Monell* because "Defendants did not dispute that Director Bazron has final policy making authority over the Hospital or that she has been personally involved in overseeing the pandemic response," JA903, and the "record supports the inference that Director Bazron 'knew or should have known of the risk of constitutional violations,'" JA904. This holding, based on the defendants' concessions and the court's factual findings, is correct.

Monell makes the District liable under 42 U.S.C. § 1983 whenever its "policy or custom . . . caused the constitutional violation alleged." *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). "There are a number of ways in which a 'policy' can be set." *Id*. For example, municipal liability can arise from (1) "the explicit setting of a policy by the government," (2) "the action of a policy maker within the government," (3) "the adoption through a knowing failure to act by a

policy maker of actions by his subordinates that . . . have become 'custom,'" or (4) "the failure of the government to respond to a need . . . in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations." *Id.* (citations omitted).

In other words, plaintiffs are not limited to showing "omissions" that "rise to the level of deliberate indifference." Appellants' Br. 45. To be sure, that is one way to show municipal liability. Indeed, not long ago, this Court found that "[t]he District has a longstanding practice of deliberate disregard of the medical needs of involuntarily committed mental patients"—a practice that it "should have known . . . was likely to result in the violation of rights." *Harvey*, 798 F.3d at 1053–54. But municipal liability can be established in other ways as well—and it was here. *See* Appellees' Br. 46–47.

Under *Monell*, municipal liability can arise from the actions of an official with "final policymaking authority over the particular area, or particular issue." *Thompson v. District of Columbia*, 832 F.3d 339, 347–48 (D.C. Cir. 2016) (cleaned up). Here, the defendants conceded that "Director Bazron has final policy making authority over the Hospital."

JA903. And rightly so. *See Banks v. District of Columbia*, 377 F. Supp. 2d 85, 91 (D.D.C. 2005) (holding that the Director of the Department of Mental Health "is a final policy-maker"); Appellees' Br. 45 & n.2. The evidence also showed (and the defendants did not dispute) "that Director Bazron [was] personally involved in the Hospital's response to COVID-19 crisis." JA903. She thus had authority over the particular area or issue in question. *See Thompson*, 832 F.3d at 347–48.

That the plaintiffs' claims involve failures to provide constitutionally required care does not mean this is an "inaction" case that requires deliberate indifference. *Contra* Appellants' Br. 45–46. The parties agree that Saint Elizabeths *did* respond to COVID-19. *See, e.g.*, JA891 (describing the practices Saint Elizabeths enacted on cross-staffing). The problem is that "[t]he policies Defendants adopted in response to this risk w[ere] not reasonably calculated to prevent it." JA268 (Am. Compl. ¶ 210). The District is liable under *Monell* for its deficient response, which breached its "affirmative duty to ensure the safety and general well-being" of the plaintiffs and others. *Harvey*, 798 F.3d at 1050.

Conclusion

For the reasons above and in the plaintiffs' brief, the district court's order should be affirmed.

March 25, 2021

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume limitation because it contains 4,349 words, excluding the material exempted by Rule 32(f).

2. This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

March 25, 2021

/s/ *Tobias S. Loss-Eaton*
Tobias S. Loss-Eaton

Certificate of Service

Today, March 25, 2021, I caused this brief to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of this filing to all registered CM/ECF users.

/s/ *Tobias S. Loss-Eaton*
Tobias S. Loss-Eaton