

No. 17-3618, 18-1281

---

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

JAMES GASTON  
Plaintiff-Appellant,

v.

PARTHASARATHI GHOSH, et al.,  
Defendants-Appellees.

---

Appeal from the United States District Court for the Northern District of Illinois  
Case No. 1:11-cv-06612  
Honorable Edmond E. Chang

---

**AMICI CURIAE BRIEF OF RODERICK AND SOLANGE MACARTHUR  
JUSTICE CENTER AND UPTOWN PEOPLE'S LAW CENTER  
IN SUPPORT OF PLAINTIFF-APPELLANT**

---

Alan Mills  
UPTOWN PEOPLE'S LAW  
CENTER  
4413 N. Sheridan Road  
Chicago, IL 60640  
(773) 769-1411

Richard H. Frankel  
THOMAS R. KLINE SCHOOL  
OF LAW  
Drexel University  
3141 Chestnut Street  
Philadelphia, PA 19104  
(215) 571-4807

David M. Shapiro  
Daniel M. Greenfield  
RODERICK & SOLANGE  
MACARTHUR JUSTICE CENTER  
Northwestern Pritzker School of Law  
375 E. Chicago Avenue  
Chicago, IL 60611  
(312) 503-0711  
david.shapiro@law.northwestern.edu

Joshua A. Freiman  
RODERICK & SOLANGE  
MACARTHUR JUSTICE CENTER  
718 7th Street NW  
Washington, DC 20001  
(202) 869-3434

Appellate Court No: 17-3618, 18-1281

Short Caption: Gaston v. Ghosh, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☒ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

Drexel University Thomas R. Kline School of Law

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ David M. Shapiro

Date: June 26, 2018

Attorney's Printed Name: David M. Shapiro

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

Address: Roderick & Solange MacArthur Justice Center - Northwestern Pritzker School of Law  
375 East Chicago Avenue, Chicago, IL 60611

Phone Number: (312) 503-0711

Fax Number: (312) 503-1272

E-Mail Address: david.shapiro@law.northwestern.edu

Appellate Court No: 17-3618, 18-1281

Short Caption: Gaston v. Ghosh, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☒ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

Drexel University Thomas R. Kline School of Law

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Daniel M. Greenfield

Date: June 26, 2018

Attorney's Printed Name: Daniel M. Greenfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

Address: Roderick & Solange MacArthur Justice Center - Northwestern Pritzker School of Law

375 East Chicago Avenue, Chicago, IL 60611

Phone Number: (312) 503-8538

Fax Number: (312) 503-1272

E-Mail Address: daniel-greenfield@law.northwestern.edu

Appellate Court No: 17-3618, 18-1281

Short Caption: Gaston v. Ghosh, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☒ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

Drexel University Thomas R. Kline School of Law

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Joshua A. Freiman

Date: June 26, 2018

Attorney's Printed Name: Joshua A. Freiman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

Address: Roderick & Solange MacArthur Justice Center

718 7th Street NW, Washington, DC 20001

Phone Number: (202) 869-3434

Fax Number: (202) 869-3435

E-Mail Address: joshua.freiman@macarthurjustice.org

Appellate Court No: 17-3618, 18-1281

Short Caption: Gaston v. Ghosh, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☒ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

Drexel University Thomas R. Kline School of Law

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Alan Mills

Date: June 26, 2018

Attorney's Printed Name: Alan Mills

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

Address: Uptown People's Law Center

4413 N. Sheridan Road, Chicago, IL 60640

Phone Number: (773) 769-1411

Fax Number: (773) 769-2224

E-Mail Address: alan@uplcchicago.org

Appellate Court No: 17-3618, 18-1281

Short Caption: Gaston v. Ghosh, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☒ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center

Uptown People's Law Center

Drexel University Thomas R. Kline School of Law

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Richard H. Frankel

Date: June 26, 2018

Attorney's Printed Name: Richard H. Frankel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

Address: Drexel University Thomas R. Kline School of Law

3320 Market Street, Philadelphia, PA 19104

Phone Number: (215) 571-4807

Fax Number: (215) 571-4712

E-Mail Address: richard.h.frankel@drexel.edu

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF <i>AMICI CURIAE</i> .....	1
ARGUMENT .....	2
I. Section 1983 adopts respondeat superior liability for private corporations. ....	4
A. The plain language of Section 1983 and the background common law make it clear that <i>respondeat superior</i> liability extends to private corporations. ....	5
B. <i>Monell</i> 's rationale for rejecting <i>respondeat superior</i> liability for municipal governments does not extend to private corporations. ....	7
C. This Court should overrule its prior precedent rejecting <i>respondeat         superior</i> liability for private corporations sued under Section 1983. ....	9
II. <i>Respondeat superior</i> liability is necessary to deter private medical providers from violating the Constitution through horrifying deprivations of treatment. ....	11
A. Wexford Health Sources. ....	12
B. Wexford's peers also provide substandard healthcare. ....	17
1. Corizon Health .....	17
2. Prison Health Services .....	23
CONCLUSION .....	26

## TABLE OF AUTHORITIES

### Cases

<i>In re America Service Group, Inc.</i> , No. 3:06-0323, 2009 WL 1348163 (M.D. Tenn. 2009) .....	23
<i>Briscoe v. Lahue</i> , 460 U.S. 325 (1983).....	6
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) .....	6
<i>Gevas v. Wexford Health Sources, Inc.</i> , No. 12-C-1297, 2016 WL 1213667 (N.D. Ill. 2016).....	12
<i>Iskander v. Vill. of Forest Park</i> , 690 F.2d 126 (7th Cir. 1982) .....	3, 9, 10
<i>Kerl v. Dennis Rasmussen, Inc.</i> , 2004 WI 86, 273 Wis.2d 106 (2004).....	6
<i>Kielley v. Belcher Silver Min. Co.</i> , 14 F. Cas. 460 (C.C.D. Nev. 1875) .....	7
<i>Louisville, C. &amp; C. R. Co. v. Letson</i> , 43 U.S. 497 (1844).....	5
<i>Monell v. Dep’t of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978) .....	<i>passim</i>
<i>Parsons v. Ryan</i> , 754 F.3d 657 (9th Cir. 2014) .....	17
<i>Powell v. Shopco Laurel Co.</i> , 678 F.2d 504 (4th Cir. 1982) .....	10
<i>Rehberg v. Paulk</i> , 566 U.S. 356 (2012) .....	6
<i>Shields v. Illinois Dep’t of Corr.</i> , 746 F.3d 782 (7th Cir. 2014) .....	<i>passim</i>
<i>Sproul v. Hemmingway</i> , 31 Mass. 1 (1833).....	7

### Statutes and Rules

42 U.S.C. § 1983 .....	2, 4, 5, 6
Fed. R. App. P. 29(a)(4)(E).....	1

### Other Authorities

DAN ABRAMS & DAVID FISHER, LINCOLN’S LAST TRIAL: THE MURDER CASE THAT PROPELLED HIM TO THE PRESIDENCY (2018) .....	7
Final Report of the Court Appointed Expert, Ron Shansky, MD et al., <i>Lippert v. Godinez</i> , No. 1:10-cv-04603 (N.D. Ill. Dec. 2014) .....	13, 14, 15
First Amended Complaint, <i>John Doe v. City of St. Louis</i> , 4:10-cv-02158-JCH (E.D. Mo. Jul. 12, 2011) .....	21



First Annual Report of Monitor Pablo Stewart, MD, <i>Rasho. v. Walker, Jr.</i> , No. 07-cv-1298 (C.D. Ill. May 22, 2017) .....	16, 17
Richard Frankel, <i>Regulating Privatized Government Through § 1983</i> , 76 U. Chi. L. Rev. 1449 (2009) .....	7
Sharon Dolovich, <i>State Punishment and Private Prisons</i> , 55 DUKE L.J. 437 (2005) .....	11
Special Master Report, <i>Bella v. Idaho State Bd. Of Corr.</i> , No. 1:81-cv-01165-BLW (D. Idaho Feb. 2, 2012) .....	20
O.W. Holmes, Jr., <i>Agency</i> , 4 HARV. L. REV. 345 (1891) .....	7
William Blackstone, COMMENTARIES 432 (1765) .....	7

## STATEMENT OF *AMICI CURIAE*<sup>1</sup>

**The Roderick and Solange MacArthur Justice Center (RSMJC)** is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women. RSMJC litigates appeals related to the civil rights of incarcerated men and women throughout the federal circuits.

**The Uptown People's Law Center (UPLC)** is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the UPLC also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. UPLC has provided direct representation to over 100 prisoners, and currently has nine class action or putative class action cases pending relating to the civil rights of people confined in Illinois prisons.

---

<sup>1</sup> 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.

## ARGUMENT

*Private prisons and prison medical providers are subject to market pressures. Their employees have financial incentives to save money at the expense of inmates' well-being and constitutional rights.*

—*Shields v. Illinois Dep't of Corr.*,  
746 F.3d 782, 794 (7th Cir. 2014)

*We save money because we skip the ambulance and bring them right to the morgue.*

—Nurse, private prison medical company<sup>2</sup>

This case is about the intolerably deficient medical treatment James Gaston suffered at the hands of Wexford Health Sources, Inc., a private corporation in the business of providing correctional healthcare. But it is also about whether private companies paid by the government to perform state actions—including private prison medical companies—should enjoy a special exemption from the ordinary rules of corporate liability when they are sued under 42 U.S.C. § 1983. They should not.

Private corporations whose employees violate the Constitution should be held liable in *respondeat superior*, just as any private corporation is liable for the tortious conduct of its employees. When Congress passed the 1871 Civil Rights Act, including the cause of action codified at Section 1983, it was already a deep-rooted

---

<sup>2</sup> Paul Von Zeilbaur, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, The New York Times (Feb. 27, 2005), <http://www.nytimes.com/2005/02/27/nyregion/as-health-care-in-jails-goes-private-10-days-can-be-a-death.html>.

rule of the common law that a private corporation may be held liable for the torts of its employees. The text and legislative history of Section 1983 reveal no intention to deviate from that rule.

This Court should revisit and overrule its holding in *Iskander v. Vill. of Forest Park*, 690 F.2d 126 (7th Cir. 1982), which rejected *respondeat superior* liability for private corporations sued under Section 1983. *Iskander* is founded on a faulty premise: because *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), 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. *Iskander*, 620 F.2d at 128. That argument is illogical because it relies on a false equivalence between municipal liability and private corporate liability. *Monell* exempts municipal governments from *respondeat superior* liability because federalism concerns prompted Congress not to extend vicarious liability to municipalities when it enacted Section 1983. Federalism, however, has no relevance to the liability of private corporations. *Monell's* reasoning therefore does not encompass such defendants.

The malfeasance of private correctional healthcare companies vividly illustrates the need for *respondeat superior* liability. Private correctional companies, including Wexford, inflict widespread pain, suffering, and death through horrifying denials of care. Their motive to refuse care is cynical—to maximize profits by

slashing costs. Without a serious countervailing threat of monetary liability that forces private prison medical companies to bear the costs of their employees' misconduct, the horrors will continue. A special exemption from the usual rule of *respondeat superior* only encourages abuse.

That exemption should not stand. In *Shields v. Illinois Dep't of Corr.*, this Court declined to overrule *Iskander* only because no party asked the Court to do so. 746 F.3d 782, 795 (7th Cir. 2014). This case is the perfect opportunity to jettison *Iskander*'s incorrect holding.

**I. Section 1983 adopts respondeat superior liability for private corporations.**

Properly interpreted, Section 1983 creates vicarious liability for private corporations whose employees subject people to violations of federal right. The statute extends liability to “person” who causes injury by “subject[ing]” a plaintiff, or “caus[ing]” a plaintiff “to be subjected” to a deprivation. 42 U.S.C. § 1983. It was firmly established in the common law of the era that “persons” included corporations and that corporations caused and were responsible for the tortious conduct of their employees under the doctrine of *respondeat superior*. Section 1983 incorporates the common law and applies *respondeat superior* liability to corporations whose employees violate federal law and are sued under Section 1983. In *Monell*, the Supreme Court rejected *respondeat superior* liability for municipal governments based on the legislative history of Section 1983. That same legislative history,

however, provides no evidence that Congress intended to exempt private corporations from *respondeat superior* liability.

**A. The plain language of Section 1983 and the background common law make it clear that *respondeat superior* liability extends to private corporations.**

Both the language of Section 1983 and the common law that surrounded its enactment make clear that when an employee of a private corporation causes a constitutional violation, the corporation is liable in *respondeat superior*. First, the statute extends liability to “persons,” 42 U.S.C. § 1983, and that term includes private companies. *Monell* itself states that by the time Congress enacted Section 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* quotes *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497 (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 (quoting *Letson*, 43 U.S. at 557-58).

Aside from the background common law, the *Monell* Court also concluded that the legislative history of Section 1983 “show[s] unequivocally” that it was “intended to cover legal as well as natural persons.” 436 U.S. at 683. In fact, within months of enacting Section 1983, Congress passed 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).

Section 1983 states that liability is triggered when a person “subjects” a plaintiff to a violation of federal right or “causes” a plaintiff “to be subjected” to such a violation. 42 U.S.C. § 1983. The language of the statute must be understood with reference to the background common law. After all, “the tort liability created by § 1983 cannot be understood in a historical vacuum.” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Rather, “[o]ne important assumption underlying the Court’s decisions in this area is that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.” *Id.*; *see also Rehberg v. Paulk*, 566 U.S. 356, 361 (2012); *Briscoe v. Lahue*, 460 U.S. 325, 330 (1983).

By 1871, the common law was clear: because corporations act through their employees, a tort caused by an employee is a tort caused by the corporation. “The doctrine of *respondeat superior* . . . has been well-settled in the law of agency for perhaps as long as 250 years.” *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶17, 273 Wis.2d 106, 117 (2004) (Sykes, J.). “[R]espondeat 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.” *Shields*, 746 F.3d

at 792. Indeed, the doctrine was “a well-accepted and standard principle of tort law” in 1871. Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1465 (2009); O.W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 356 (1891) (“The maxim *respondeat superior* has been applied to the torts of inferior officers from the time of Edward I. to the present day.”); 1 William Blackstone, COMMENTARIES 432 (1765) (“[T]he wrong done by the servant is looked upon in law as the wrong of the master himself.”); *Kielley v. Belcher Silver Min. Co.*, 14 F. Cas. 460, 461 (C.C.D. Nev. 1875) (*respondeat superior* is “plain and undoubted rule of law”); *Sproul v. Hemmingway*, 31 Mass. 1, 5 (1833) (noting that *respondeat superior* is established principle of the common law). As a trial lawyer, Abraham Lincoln himself had helped to “establish[ ] the concept that companies were liable for the actions of their employees while working.” DAN ABRAMS & DAVID FISHER, LINCOLN’S LAST TRIAL: THE MURDER CASE THAT PROPELLED HIM TO THE PRESIDENCY 47 (2018).

**B. *Monell’s rationale for rejecting respondeat superior liability for municipal governments does not extend to private corporations.***

“A close look at the reasoning of *Monell* provides no persuasive reason to extend its holding to private corporations.” *Shields*, 746 F.3d at 790. First, there is no evidence that the common law in 1871 recognized *respondeat superior* liability for municipal governments, but there is copious and indisputable evidence



(discussed in the previous subsection) that the common law did recognize *respondeat superior* for private corporations.

Second, *Monell* concluded that Congress did not intend to apply *respondeat superior* liability to municipal governments based on legislative history that is irrelevant to private corporations. Specifically, Congress rejected an amendment offered by Senator John Sherman (the “Sherman Amendment”) that would have made municipalities liable for injuries caused by race riots even if a municipal government did everything in its power to suppress the violence. *Monell*, 436 U.S. at 668-69, 691-95. The opponents of the Sherman Amendment argued that principles of constitutional federalism prevented Congress from imposing *respondeat superior* on municipal governments. *Id.* These federalism arguments carried the day: Congress voted the Sherman Amendment down, and Section 1983 as enacted does not impose vicarious liability on municipalities for race riots. *Id.* at 669.

The *Monell* Court extrapolated from Congress’ rejection of the Sherman Amendment. *See id.* at 692 n.57. Because Congress harbored federalism objections to the federal imposition of *respondeat superior* liability on municipal governments for race riots, *Monell* reasoned, by analogy, that Congress would not have supported any sort of federally-imposed *respondeat superior* liability for municipal governments. *See id.*

For present purposes, the key point is that none of these concerns had anything to do with private corporations. Congress questioned its power to extend vicarious liability to municipal governments. *Id.* at 668-69, 691-95. Therefore, *Monell* rejects vicarious liability for municipalities under Section 1983. *Id.* at 692 & n.57. But there is no reason to believe that the same federalism concerns extended to private corporations. *See Shields*, 746 F.3d at 746 (“The rejection of the [Sherman Amendment’s] proposal to hold municipalities liable for actions of private citizens it could not control says little about whether a municipality should be held liable for constitutional torts committed by its own employees . . . .”).

In sum, Section 1983 creates *respondeat superior* liability for private corporations because when Congress enacted the law, corporations were considered “persons” within the language of the statute, and it was well-established that corporations acted through their employees and were liable in *respondeat superior* when their employees “subject[ed]” others to injury. While the legislative history of Section 1983 reveals federalism concerns about municipal *respondeat superior*, that legislative history is irrelevant to *respondeat superior* for private corporations.

**C. This Court should overrule its prior precedent rejecting *respondeat superior* liability for private corporations sued under Section 1983.**

In *Iskander v. Vill. of Forest*, 690 F.2d 126, 128 (7th Cir. 1982), this Court rejected *respondeat superior* liability for corporations sued under Section 1983 and held that such corporations may be held liable only if their policies and practices

cause a violation of federal right. *Iskander* is wrongly decided and should be overruled, as this Court suggested in *Shields*.

*Iskander* did not provide a rationale for its conclusion that plaintiff suing private corporations under Section 1983 must make a *Monell*-style policy or practice showing. 690 F.2d at 128. Instead, this Court cited to the Fourth Circuit's decision in *Powell v. Shopco Laurel Co.*, 678 F.2d 504 (4th Cir. 1982).

The reasoning of *Powell* is sparse and unpersuasive. *Powell* states, “[w]e see [*Monell*’s] holding as equally applicable to the liability of private corporations,” 678 F.2d at 506, but the facile equation of corporate and municipal *respondeat superior* cannot withstand scrutiny, as demonstrated above in Section I.B. *Powell* incorrectly states that in *Monell*, “[t]he Court found section 1983 evincing a Congressional intention to exclude the imposition of vicarious answerability.” *Id.* In fact, *Monell* concluded that Congress meant to exclude vicarious liability *for municipal governments*, not for private corporations. *See supra* Section I.B. Moreover, *Powell* failed to examine the common law at the time Congress enacted Section 1983. Had the court done so, it would have concluded that *respondeat superior* for corporations was firmly established in the common law, which Congress incorporated when it enacted Section 1983. *See supra* Section I.A.

**II. *Respondeat superior* liability is necessary to deter private medical providers from violating the Constitution through horrifying deprivations of treatment.**

*Respondeat superior* effectuates a sound principle of deterrence: “[M]aking employers liable for their employees’ torts may result in less tortious behavior overall.” *Shields*, 746 F.3d at 792. The long track record of deficient care provided by Wexford Health Services and other private prison medical providers calls out for the deterrent effect of *respondeat superior*. Perhaps no class of corporation is less deserving of an exemption from the ordinary rule of corporate liability than one that routinely fails to provide the minimum treatment necessary to prevent death and serious avoidable injury.

Deterrence through monetary liability is especially important for correctional medical contractors because they “have financial incentives to save money at the expense of inmates’ well-being and constitutional rights.” *Shields*, 746 F.3d at 794. To cut costs, these companies “create a deliberately unwieldy process for prisoners wishing medical attention” hire providers of dubious competence, and “institute treatment protocols of questionable efficacy that cost less than medically indicated methods.” Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437, 484-85 (2005). It therefore comes as no surprise that companies like Wexford inflict massive harm through abominable care.

### A. Wexford Health Sources

Wexford Health Sources (“Wexford”), which characterizes itself as “the nations [sic] leading innovative correctional health care company,” WEXFORD HEALTH SOURCES INC.<sup>3</sup> is also among the largest. *History*, WEXFORD HEALTH SOURCES INC.<sup>4</sup> In addition to providing healthcare to all Illinois Department of Corrections (“IDOC”) prisoners, *see, e.g., Gevas v. Wexford Health Sources, Inc.*, No. 12-C-1297, 2016 WL 1213667, \*1 (N.D. Ill. 2016), Wexford treats inmates in Indiana, Alabama, Arizona, West Virginia, Pennsylvania, and Maryland. *Our Locations*, WEXFORD HEALTH SOURCES INC.<sup>5</sup> All told, Wexford is responsible for providing healthcare to 97,000 prisoners in 120 prisons and jails. *History*, WEXFORD HEALTH SOURCES INC.<sup>6</sup> Its grand scale has not, apparently, redounded to the benefit of its patients—Wexford’s unwillingness to provide constitutionally adequate health care is the subject of countless lawsuits that have clogged the federal courts. *See, e.g., Dan Christensen, Florida prison healthcare providers sued hundreds of times*, MIAMI HERALD (Oct. 2, 2013).<sup>7</sup>

---

<sup>3</sup> <http://www.wexfordhealth.com/index.php>.

<sup>4</sup> <http://www.wexfordhealth.com/About-Us/History>.

<sup>5</sup> <https://jobs.wexfordhealth.com/locations/locations>.

<sup>6</sup> <http://www.wexfordhealth.com/About-Us/History>.

<sup>7</sup> <http://www.miamiherald.com/news/state/article1955813.html>. Alan Mills, one of the attorneys for amici in this case is also among the counsel for the plaintiff class in *Lippert*.

There may be no better illustration of Wexford's disregard for its patients than a 2014 neutral expert report prepared to “assist the court in determining whether the Illinois Department of Corrections (“IDOC”) is providing health care service to the offenders in its custody that meet the minimum constitutional standards of adequacy.” Final Report of the Court Appointed Expert, Ron Shansky, MD et al., at 3, *Lippert v. Godinez*, No. 1:10-cv-04603 (N.D. Ill. Dec. 2014) [hereinafter “Lippert Report”].<sup>8</sup> That answer is no: the court-appointed experts reported that Wexford “has been unable to meet minimal constitutional standards with regards to the adequacy of its health care program for the population it serves.” *Id.* at 45.

Across more than 400 pages, the neutral experts described the devastating impact of Wexford's irresponsibility. Delay and neglect were endemic. *Id.* at 28–31. The experts reported “numerous examples” of patients presenting with life-threatening conditions who were not transported to a hospital, a failure that often resulted in catastrophic avoidable harm. *Id.* at 32. “[O]ne or more significant lapses in care” played a role in 60% of non-violent deaths, the experts reported. *Id.* at 42. “It was obvious that once patients signed DNR (do not resuscitate) orders, they were often no longer treated for even simple reversible illness,” a chilling practice that compelled the experts to advise Wexford that “‘do not resuscitate’ does not mean, ‘Do not treat.’” *Id.* at 43. Wexford's disregard extended to the post-mortem—the

---

<sup>8</sup> <https://www.clearinghouse.net/chDocs/public/PC-IL-0032-0007.pdf>.

report noted that the corporation had not identified a single misstep in connection with the deaths identified by the experts. *Id.* Several representative examples follow.

An Illinois River Correctional Center patient repeatedly complained of constipation and weight loss, but was not administered a rectal exam for nearly a year, by which point he had lost more than thirty pounds. *Id.* at. 29. Even then, the physician failed to notice a large easily detectable tumor in the rectum. *Id.* Four more months elapsed before Wexford ordered a colonoscopy. *Id.* at 30. By then, it was too late—“he survived less than a year.” *Id.*

A patient at Hill Correctional Center began complaining about chest and neck pain. *Id.* Three months later, he reported that he was coughing up blood and had lost thirty pounds. *Id.* A physician observed a tumor at that time, and ordered a chest x-ray, which noted abnormalities. *Id.* Nevertheless, several more months passed before Wexford ordered a CT-scan, which “showed a very large carcinoma.” *Id.* By that time, the patient weighed a mere 127 pounds, at least 30 pounds less than he had before. *Id.* He died several months later. *Id.*

Several years after successful pre-incarceration surgery to remove a brain tumor, a prisoner entered the Pontiac Correctional Center. *Id.* Within three months, physicians “discontinued his maintenance chemotherapy.” *Id.* A couple months later, the patient was diagnosed with a “recurrence of a low grade” cancer. *Id.* Physicians waited more than two months to schedule surgery, by which time he had

suffered a stroke and other neurological damage. *Id.* His cancer was no longer operable, and he died shortly after. *Id.*

A Menard Correctional Center patient suffering from cirrhosis presented with a severe gastrointestinal bleed. *Id.* at 32. Notwithstanding “evidence of substantial blood loss,” physicians delayed admitting him to the hospital. *Id.* He died two days later. *Id.*

An Illinois River patient was admitted to the infirmary with “rapidly progressive paralysis of the lower half of his body.” *Id.* When the patient could no longer “move his legs,” he requested transfer to the hospital. *Id.* at 32–33. Physicians did not act on that request for two weeks. *Id.* at 33. The patient now requires a wheelchair. *Id.*

A thirty-seven-year-old diabetic at Illinois River reported “symptoms highly suggestive of an acute stroke.” *Id.* Physicians have consistently failed to send him to “an outside hospital for proper diagnosis and treatment.” *Id.* He no longer has the “[a]bility to function independently[.]” *Id.*

The quality of care Wexford provides in Illinois has not, apparently, improved since the Lippert Report issued in 2014. A monitor appointed in connection with a class action alleging dangerously inadequate psychiatric care across all IDOC facilities recently released his first annual report. *See First Annual Report of Monitor Pablo Stewart, MD at 4, 7–8, Rasho. v. Walker, Jr., No. 07-cv-1298 (C.D. Ill. May*



22, 2017).<sup>9</sup> The monitor, a nationally recognized correctional healthcare expert, reported numerous systemic deficiencies, including those that expose patients to “great risk of harm.” *Id.* at 31. When notified of these grave shortcomings, Wexford submitted a remedial plan that was “exceedingly insufficient.” *Id.*

Wexford’s substandard care extends beyond Illinois. For example, Arizona prisoners charged that they were provided with abysmal healthcare throughout the Arizona Department of Corrections (“ADC”). *See Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014). Bolstering these allegations are ADC’s own complaints about “serious and systemic deficiencies in Wexford’s provision of health care to ADC inmates.” *Id.* at 668. ADC has criticized Wexford for non-compliance with Department policies including: “[a] ‘quantitative decrease in routine institutional care’”; “‘inadequate staffing levels’”; and “‘[i]ncorrect, incomplete, inconsistent medication administration or documentation of care provided[.]’” *Id.* In a separate incident, a Wexford provider contaminated an Arizona prison’s insulin supply, thereby exposing more than 100 inmates to hepatitis C. Caroline Isaacs, American Friends Service Committee—Arizona, *Death Yards: Continuing Problem’s with Arizona’s Correctional Health Care* 9 (Oct. 2013) [hereinafter *Death Yards*].<sup>10</sup> Notwithstanding this widespread danger, Wexford did not alert government health

---

<sup>9</sup> <https://www.clearinghouse.net/chDocs/public/PC-IL-0031-0026.pdf>.

<sup>10</sup> <https://www.afsc.org/sites/default/files/documents/DeathYardsFINAL.pdf>.

officials for more than a week. *Id.* And at one Arizona prison, patients were forced to “lick powdered medication from their own hands after Wexford ran out of plastic cups and did not attempt to resupply them.” *Id.*

An audit in Mississippi was “harshly critical” of Wexford for “failing to provide timely, adequate medical care.” *See* Bob Ortega, *Critics cast doubt on new Arizona prison health-care contractor*, The Arizona Republic (Apr. 6, 2012).<sup>11</sup> A New Mexico audit reported “extensive medical-staff shortages.” *Id.* Virginia officials also criticized Wexford for staff shortages. *Death Yards, supra*, at 9. And in Florida, Wexford was fined for delaying the provision of medical care. *Id.*

**B. Wexford’s peers also provide substandard healthcare.**

Wexford is not alone. The private prison healthcare industry as a whole often provides dangerous and unconstitutional medical care.

**1. Corizon Health**

Corizon Health, “foremost provider of correctional healthcare in the United States,” operates in operates in 22 states, serving 220,000 patients annually. *See About Corizon Health – Who We Are*, CORIZON HEALTH;<sup>12</sup> *About Corizon Health – Partner Locations*, CORIZON HEALTH<sup>13</sup>. From 2012 to 2015, Corizon’s revenue grew

---

<sup>11</sup> <http://www.azcentral.com/arizonarepublic/news/articles/2012/04/05/20120405arizona-prison-health-contractor-critics-cast-doubt.html>.

<sup>12</sup> <http://www.corizonhealth.com/index.php/S=0/About-Corizon/Who-We-Are-History-and-Today>.

<sup>13</sup> <http://www.corizonhealth.com/About-Corizon/Locations>.

by 15.6% to \$1.55 billion. Rupert Neate, *Welcome to Jail Inc: how private companies make money off US prisons*, THE GUARDIAN (Jun. 16, 2016).<sup>14</sup> Corizon currently has \$2 billion in contracts in Missouri and Kansas alone. Andy Marso, *What is \$2 billion buying Kansas and Missouri in prison health care? Few people know*, THE KANSAS CITY STAR (Jan. 21, 2018).<sup>15</sup> Notwithstanding its self-proclaimed reputation as the “the best” in the industry, *see About Corizon Health – Who We Are*, CORIZON HEALTH,<sup>16</sup> Corizon, like Wexford, has been beset with charges that it provides substandard care to its patients across the nation.

In Florida, for example, shortly after Corizon began providing care for the vast majority of the State’s prisoners, “inmate deaths spiked to a 10-year high” and the “number of seriously ill prisoners sent for outside hospital care . . . drop[ped] by 47 percent.” Pat Beall, *Privatizing Prison Health Care Leaves Inmates in Pain, Sometimes Dying*, Palm Beach Post (Sept. 27, 2014).<sup>17</sup> Florida Department of Corrections Secretary Michael Crews warned Corizon that “[t]he level of care continues to fall below the contractually required standard.” *Id.*

---

<sup>14</sup> <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit>.

<sup>15</sup> <http://www.kansascity.com/news/politics-government/article195673934.html>.

<sup>16</sup> <http://www.corizonhealth.com/index.php/S=0/About-Corizon/Who-We-Are-History-and-Today>.

<sup>17</sup> <https://www.mypalmbeachpost.com/news/privatizing-prison-health-care-leaves-inmates-pain-sometimes-dying/dL1RshgbLhhXvwnv1ov31H/>.

Corizon did not diagnose a patient with cancer, even as lumps formed on her arm and back, and excruciating pain prevented her from dressing or bathing. *Id.* In response to complaints of pain so intense that the patient wanted to cut off her own arm, Corizon prescribed self-massage, rest, Tylenol, and warm compresses. *Id.* Corizon did not even bother to test for cancer until the prisoner was near death. *Id.* By that time, it was too late—she died days later. *Id.*

When another patient complained of excruciating pain from bone cancer, Corizon prescribed over-the-counter pain killers. Pat Beall, *Privatized care: Ibuprofen as bone cancer destroys inmate's spine*, The Palm Beach Post (Sept. 27, 2014).<sup>18</sup> When the pain did not abate, the patient was instructed to “come back after [you are] paralyzed...because there’s nothing wrong with you.” *Id.*

A prisoner without a hip joint was denied a hip replacement. Pat Beall, *No hip joint or painkiller, inmate lives in a wheelchair*, The Palm Beach Post (Sept. 27, 2014).<sup>19</sup> And then Corizon stopped his pain medication cold turkey. *Id.* The pain was so intense that the patient was forced to sleep in a wheelchair; he could not bear the pain of climbing into his bunk. *Id.* The prisoner confessed to “wish[ing] God would take [him].” *Id.*

---

<sup>18</sup> <https://www.mypalmbeachpost.com/news/privatized-care-ibuprofen-bone-cancer-destroys-inmate-spine/DGSMNTIfBD1QzQqhFB5jjN/>.

<sup>19</sup> <https://www.mypalmbeachpost.com/news/hip-joint-painkiller-inmate-lives-wheelchair/5NZdpy3X0BZQbIKMLHWNjJ/>.

The story is much the same in Idaho where Dr. March Stern, a nationally recognized correctional healthcare expert, “found serious problems with the delivery of medical and mental health care . . . resulting in serious harm” to prisoners. *See* Special Master Report at 3, *Bella v. Idaho State Bd. Of Corr.*, No. 1:81-cv-01165-BLW (D. Idaho Feb. 2, 2012)<sup>20</sup> [hereinafter Stern Report]. Corizon’s failures were “frequent, pervasive, [and] long standing.” *Id.* They included delayed or “substandard” responses to medical crises. *Id.* at 14. In sum, Corizon’s irresponsibility resulted in “dangerous” conditions that effectively “deprive[d] patients of their constitutional right to access to care.” *Id.* What’s more, Corizon did not appear motivated to improve—after being informed that it had failed 23 of 33 categories in a 2010 audit, Corizon failed an additional three categories in 2011. Stern Report, *supra*, at 3.

Maine released a report in 2011 that faulted Corizon for systemic failures in the provision of care. *See* Office of Program Evaluation & Government Accountability of the Maine State Legislature, *Health Care Services in State Correctional Facilities—Weakness Exist in MDOC’s Monitoring of Contractor Compliance and Performance; New Administration is undertaking Systemic Changes* 1–2 (Nov. 2011).<sup>21</sup> For example, Maine officials criticized Corizon for

---

<sup>20</sup> <http://www.idahoprisonhealthreport.com/assets/documents/SternReport.pdf>.

<sup>21</sup> [http://www.maine.gov/legis/opega/GOC/GOC\\_meetings/Current\\_handouts/11-15-11/MEDSERV%20Final%20Report%202011-10-11.pdf](http://www.maine.gov/legis/opega/GOC/GOC_meetings/Current_handouts/11-15-11/MEDSERV%20Final%20Report%202011-10-11.pdf).

delayed and sometimes nonexistent responses to appointment requests. *Id.* at 11. With regard to medication management, Maine officials described deficiencies that included “incorrect medications being given to prisoners, inconsistency with following stop and start dates of prescriptions and other poor practices,” and “medication being distributed late [and in] incorrect dosages.” *Id.* Corizon was also faulted for its failure to maintain accurate medical records. *Id.* at 11–12. And Maine criticized Corizon for “inadequate” training of medical staff. *Id.* at 13. Some medical personnel lacked even first aid training. *Id.*

In Missouri, an HIV-positive prisoner was denied life-saving antiviral medication for weeks. Diane Balogh, Press Release: ACLU of Eastern Missouri (Aug. 30, 2012).<sup>22</sup> An eye infection went untreated during the same period. First Amended Complaint at 5–6, *John Doe v. City of St. Louis*, 4:10-cv-02158-JCH (E.D. Mo. Jul. 12, 2011).<sup>23</sup> Instead, Corizon medical personnel prescribed Tylenol. *Id.* at 6. As a result of Corizon’s disregard, the patient is permanently blind in one eye. *Id.* at 7.

In Arizona, a former Corizon physician recounted that most of her referrals to specialists would be denied. Jimmy Jenkins, *On The Inside: The Chaos of Arizona*

---

<sup>22</sup> [https://www.aclu-mo.org/sites/default/files/field\\_documents/doe\\_v.\\_city\\_of\\_st.\\_louis.pdf](https://www.aclu-mo.org/sites/default/files/field_documents/doe_v._city_of_st._louis.pdf).

<sup>23</sup> [https://www.aclu-mo.org/sites/default/files/field\\_documents/60\\_-\\_first\\_amended\\_complaint.pdf](https://www.aclu-mo.org/sites/default/files/field_documents/60_-_first_amended_complaint.pdf).

*Prison Health Care*, KJZZ (Dec. 18, 2017).<sup>24</sup> One patient “would have episodes where he would have over 10 seizures in a row, and we couldn’t control him with all of the anticonvulsants. He was on like three or four.” *Id.* However, Corizon still refused to refer him to a neurologist because “[i]t cost too much money[.]” *Id.* Corizon would even tell the physician to cancel referrals that Corizon itself had approved. *Id.*

In California, Corizon was twice ordered by a court to provide proper treatment to a pretrial detainee suffering from a respiratory condition. Simone Aponte, *2 Investigates: Inmate’s Death at Santa Rita Jail Raises Questions About Private Medical Company*, KTVU (last updated Dec. 9, 2016, 10:39 AM).<sup>25</sup> Notwithstanding a recommendation to treat the condition surgically, Corizon elected to prescribe nasal spray and Claritin. *Id.* The patient died of an acute respiratory attack. *Id.*

In Arizona, Corizon replaced Wexford after the latter was accused of providing deficient care. *See supra* at 16-17. After reviewing Corizon’s performance, the authors of a report on correctional healthcare in Arizona noted “if anything, things have gotten worse” since Corizon replaced Wexford. *Death Yards, supra*, at 4. The report faulted Corizon for “system-wide dysfunction,” including

---

<sup>24</sup> <http://kjzz.org/content/572976/inside-chaos-arizona-prison-health-care>.

<sup>25</sup> <http://www.ktvu.com/news/2-investigates-inmates-death-at-santa-rita-jail-raises-questions-about-private-medical-company>.

“delays and denials of care, lack of timely emergency treatment, failure to provide medication and medical devices, low staffing levels, failure to provide care and protection from infectious disease, denial of specialty care and referrals, and insufficient mental health treatment.” *Id.*

## 2. Prison Health Services

Before Corizon swallowed up Prison Health Services (“PHS”) in 2011, the latter was among the largest correctional healthcare providers in the country. *See In re America Service Group, Inc.*, No. 3:06-0323, 2009 WL 1348163 \*2 (M.D. Tenn. 2009). In 2005, for example, PHS’s parent company reported revenue of \$690 million, reflecting growth of over 600 percent in a decade. Paul Von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, THE NEW YORK TIMES (Feb. 27, 2005).<sup>26</sup> The quality of its care did not, apparently, keep pace.

For example, when a 44-year old nuclear scientist suffering from Parkinson’s was detained in a New York jail, PHS deprived him of the vast majority of medication he required to control his disease. *Id.* When he “slid into a stupor, soaked in his own sweat and urine” shortly after, nurses employed by PHS “dismissed him as a faker.” *Id.* Ten days later, without another visit by the doctor, he died. *Id.*

---

<sup>26</sup> <https://www.nytimes.com/2005/02/27/nyregion/as-health-care-in-jails-goes-private-10-days-can-be-a-death.html>.



Personnel then “doctored records to make it appear he had been released before he died.” *Id.*

In another New York jail, a 35-year old woman complained of chest pains. *Id.* The medical director prescribed Bengay and arthritis medication in response. *Id.* When the woman begged to be hospitalized, medical personnel considered her pleas “a ploy to get drugs.” *Id.* When help was called, it was too late—she “was on the floor of her cell, shaking from a heart attack that would kill her within the hour.” *Id.*

Another detainee in New York “died when her withdrawal from heroin went untreated for two days as she lay in her own vomit and excrement.” *Id.* She was overheard “moaning and crying for help” but PHS “nurses did not call a doctor or even clean her off.” *Id.*

In investigating these deaths and others, *The New York Times* reported that “state investigators say they kept discovering the same failings: medical staffs trimmed to the bone, doctors underqualified or out of reach, nurses doing tasks beyond their training, prescription drugs withheld, patient records unread and employee misconduct unpunished.” *Id.*

And a New York state commission was unsparing in its criticism of the company, describing it as “reckless and unprincipled in its corporate pursuits, irrespective of patient care.” *Id.* The commission noted that the “lack of credentials, lack of training, shocking incompetence and outright misconduct” in

one deadly case that it reviewed were ““emblematic of P.H.S. Inc.’s conduct as a business corporation.”” *Id.*

PHS’s failings were not confined to New York, apparently. Georgia and Maine officials fired PHS after the company understaffed prison clinics. *Id.* And in Alabama, PHS provided a single doctor for a prison with more than 2,000 inmates. *Id.* A physician formerly employed by PHS in Alabama noted that “she sometimes lacked even soap to wash her hands between treating patients.” *Id.* In Pennsylvania, court monitors described “dangerous delays and gaps in treatment and medication.” *Id.* In Maryland, a prison guard “complained that she had to fight nurses to get sick inmates examined.” In Nevada, a PHS medical director was criticized after he “refused medications for AIDS and mental illness, calling inmates junkies.” *Id.*

\* \* \*

Like the facts in *Shields*, the facts in this case and the many episodes described above are “excellent example[s] of the problems generated by barring *respondeat superior* liability for corporations under § 1983.” *Shields*, 746 F.3d at 795. Section 1983 establishes *respondeat superior* liability for companies like Wexford, which should bear the costs of the constitutional violations that their employees cause.

## CONCLUSION

This Court should overrule *Iskander*, apply *respondeat superior* to corporations sued under 42 U.S.C. §1983, and reverse the judgment of the district court in this case.

Respectfully Submitted,

s/David M. Shapiro

David M. Shapiro  
Daniel M. Greenfield  
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER  
Northwestern Pritzker School of Law  
375 E. Chicago Avenue  
Chicago, IL 60611  
(312) 503-0711  
david.shapiro@law.northwestern.edu

Joshua A. Freiman  
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER  
718 7th Street NW  
Washington, DC 20001  
(202) 869-3434

Alan Mills  
UPTOWN PEOPLE'S LAW CENTER  
4413 N. Sheridan Road  
Chicago, IL 60640  
(773) 769-1411

Richard H. Frankel  
THOMAS R. KLINE SCHOOL  
OF LAW  
Drexel University  
3141 Chestnut Street  
Philadelphia, PA 19104  
(215) 571-4807

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a) and Circuit Rule 29, I certify as follows:

1. The foregoing amicus brief complies with the type-volume Circuit Rule 29 because this brief contains 5,461 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) 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 2011, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

s/David M. Shapiro

David M. Shapiro

**CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS**

I hereby certify that on June 26, 2018, I electronically filed the foregoing Brief with the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/David M. Shapiro

David M. Shapiro