No. 23-2741

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ESTATE OF CINDY LOU HILL, by and through its personal representative, Joseph A. Grube,

Plaintiff-Appellee,

v.

NAPHCARE, INC., an Alabama corporation,

Defendant-Appellee,

and

SPOKANE COUNTY, a political subdivision of the State of Washington,

Defendant.

On Appeal from the U.S. District Court
for the Eastern District of Washington
No. 2:20-cv-00410-MKD
Hon. Mary K. Dimke, *District Judge*

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INTRODUCTION

A jury found NaphCare liable for its sham "Medical Watch" custom that caused Cindy Hill's agonizing, preventable, death. The evidence showed that the only thing medical about "Medical Watch" was its name. Patients on "Medical Watch" were locked in ordinary jail cells. And rather than staff the "Medical Watch" area with medical professionals of any kind, NaphCare offloaded its responsibility onto county-employed jail guards who were neither qualified nor expected to monitor patients' medical symptoms. Instead, the guards periodically passed by to get a quick look at NaphCare's patients "through the cell window" for "however long it took [them] to observe signs of life." 5-ER-729–30. This non-medical "Medical Watch" is where NaphCare regularly sent its patients who needed medical monitoring.

Ms. Hill was one such patient. Following company custom, NaphCare Nurse Hannah Gubitz sent Ms. Hill to "Medical Watch" for abdominal pain so severe it left her screaming on the floor in the fetal position. Once transferred to "Medical Watch," she remained medically unmonitored for over eight hours, as acid and bacteria leaking from a hole in her intestine painfully took her life. The jury found NaphCare

liable for Ms. Hill's suffering and death and decided that its reckless custom reflected complete indifference to her medical safety.

To overturn the jury's decision, NaphCare must show that the only reasonable conclusion from the evidence contradicts the jury's verdict. Because NaphCare cannot show this, it ignores vast swaths of evidence and pushes theories it did not press until the jury found against it. Most notably, NaphCare jettisons its trial theory that Nurse Gubitz acted properly and in accordance with company expectations and now argues that this case involved "a single mistake by one nurse." OB32. In fact, the evidence more than supports the jury's verdict that Ms. Hill died because of the company's dangerous "Medical Watch" practice—one that NaphCare's own expert confirmed it used even "for patients who needed acute medical monitoring." 6-ER-1115.

NaphCare's punitive damages argument likewise depends on a sanitized version of facts that the jury rejected. Ms. Hill suffered a torturous death because of NaphCare's deliberate business decision to save money at considerable risk to patient lives. As the district court correctly concluded, the "reprehensibility" of this conduct fully justified the jury's punitive award. The 8.7-to-1 punitive-to-compensatory ratio

fits comfortably within the range approved by this Court and is a far cry from the 500-to-1 and 145-to-1 ratios the Supreme Court has invalidated. The Court should affirm.

STATEMENT OF ISSUES

I. Whether the extensive evidence was sufficient to uphold the jury's verdict that NaphCare had a custom of using medically untrained guards to monitor patients in need of professional medical monitoring and that the custom caused Ms. Hill's death.

II. Whether the jury's punitive award comports with constitutional due process where it represents a single-digit ratio to the compensatory award, and as the district court affirmed, NaphCare's custom was particularly reprehensible.

STATEMENT OF JURISDICTION

Appellee agrees with Appellant's jurisdictional statement.

STATEMENT OF THE CASE

I. Factual Background[1]

On August 25, 2018, Cindy Hill, a 55-year-old single mother, died a slow, excruciating, preventable death after falling ill at the Spokane County Jail. 4-ER-483–86; 4-ER-575; 5-ER-731; 5-ER-892; 5-ER-915. There, she was under the exclusive care of NaphCare Inc., a for-profit

[1] The facts are recited in the "light most favorable to the verdict." *Wadler v. Bio-Rad Laboratories, Inc.*, 916 F.3d 1176, 1182 (9th Cir. 2019).

corporation with a $47 million contract to provide medical services at the jail. SER-205.

A. NaphCare had a sham "Medical Watch" custom.

When Ms. Hill arrived at the jail, NaphCare was carrying out its medical obligations through a ruse called "Medical Watch." 4-ER-608–14. Medical Watch was where NaphCare sent its patients who needed medical monitoring. 4-ER-613. Despite its name and the medical needs of the people it sent there, Medical Watch was anything but "medical in nature." 4-ER-612.

Medical Watch cells, located in an area of the jail called 2-West, 6-ER-1115, were not "designed in any way for a person who has a medical problem." 5-ER-733. They had "exactly the same setup" as any other jail cell. 4-ER-609. They had no "video monitoring" or "any type of audio or intercom," nor could they be monitored from any nursing (or other) station. 5-ER-734.[2] Moreover, patients on Medical Watch were confined

[2] All cells at the jail had an "emergency call light" that could only be pressed by getting up, walking across the cell, and standing to reach it. 5-ER-735. Of course, not all patients could do that, as evidenced by Ms. Hill's case. 4-ER-615–16.

to their cells alone, without cellmates who could summon aid. 5-ER-733–34; 7-ER-1177.

NaphCare did not compensate for these deficiencies with medical personnel. Quite the opposite: It stationed its nurses in a separate wing of the jail such that no medical personnel were "within sight or hearing" of Medical Watch. 5-ER-807; 6-ER-1111. It also chose not to have any medical personnel regularly round the Medical Watch cells. 4-ER-614; 6-ER-1112. Had NaphCare wanted to post a nurse near the Medical Watch cells, it could have done so. 5-ER-807. Instead, "it was the custom" that "whatever watching there was would be done by non-medical people." 7-ER-1180–81. NaphCare's "regular practice" thus consisted of using county-employed security guards (with no medical training beyond CPR and first aid) to perform Medical Watch in place of nurses. 5-ER-725–29; 5-ER-826.

These guards were not expected to observe any symptoms or conditions of Medical Watch patients. 5-ER-775; 4-ER-612. In fact, when conducting their periodic rounds, the guards were not even instructed or expected to ask patients how they were feeling or communicate with them *at all*. 5-ER-736; 5-ER-775; 5-ER-778. Simply put, "the practice [did

not] involve looking for any medical symptoms [or] assessing for any medical symptoms" and did not involve "any actual medical watching." 5-ER-730. Rather, the guards' practice was to get a quick "visual through the cell window" to ensure the patient inside was not (yet) dead before "mov[ing] on down the hallway." 5-ER-729–30. This "typical and ordinary practice" took "two or three or five seconds." 5-ER-729–30. It was so cursory that the guards could not tell whether NaphCare's patients were in pain, weak, confused, unconscious, or even dying. 5-ER-731; 5-ER-779.

NaphCare sent its patients to this non-medical "Medical Watch" using a form posted outside each occupied cell. 7-ER-1248–49; 5-ER-728. The form listed "important changes to report to medical," 5-ER-793, if, impossibly, the guards happened to see such a change when peeking through the small cell window as they walked past. This form listed examples of serious symptoms that NaphCare patients on Medical Watch might have:

- worsening abdominal pain
- worsening chest pain
- change in speech
- increased drowsiness
- seizure-like activity
- difficulty waking
- difficulty breathing
- unequal pupil size

- unsteadiness while walking
- facial droop
- inability to answer simple questions
- weakness on one side of the body

8-ER-1525.

NaphCare's use of jail guards rather than medical personnel for its Medical Watch patients was a "significant" violation of correctional medical standards. 4-ER-613–14. NaphCare seemed to recognize as much, creating—though not enforcing—a protocol requiring that patients with severe abdominal pain (like Ms. Hill) receive attention from a medical doctor. 4-ER-643; 5-ER-888–89. But following that protocol would have cost the company up to $15,000 in contractually-mandated expenses for any patient it sent to the hospital. 5-ER-822; SER-198. It could have employed its own nurses to medically monitor its patients, but this too would have been a significant cost; so instead, NaphCare sent them to the sham Medical Watch for free. 5-ER-817.

B. NaphCare's "Medical Watch" custom caused Ms. Hill's excruciating death.

NaphCare's Medical Watch practice was in full effect during Ms. Hill's pretrial detention. Her first four days at the jail, spent in general population, were medically uneventful. 4-ER-587–88. On day two, she

told NaphCare nurses that she used heroin, 4-ER-576, but "she had no signs or symptoms" of withdrawal. 4-ER-587. Indeed, she was "doing very well," 4-ER-588, and all five of her assessments in the subsequent days confirmed that her symptoms from opiate withdrawal were "very, very mild." 4-ER-642.

But on the fifth day, Ms. Hill's health took a dramatic turn for the worse. At 8:45am, Hannah Gubitz, NaphCare's experienced "charge nurse," 7-ER-1231–32, found her "laying on [the] floor" of her two-person cell. 8-ER-1518. She was naked above the waist and "curled in [the] fetal position." 8-ER-1518. Her cellmate alerted Nurse Gubitz that Ms. Hill had "severe abdominal pain" and believed "it was most likely her appendix." 8-ER-1518. Ms. Hill asked for a medical assessment but was "too sick to move." 7-ER-1147; 8-ER-1518. After her cellmate "rolled her in a blanket and dragged her to the cell door" near Nurse Gubitz, Ms. Hill "lay next to the toilet screaming." 8-ER-1518. Before Nurse Gubitz could touch her abdomen, Ms. Hill "screamed even louder." 8-ER-1518. She again "screamed in pain on gentle palpation of [the] entire abdomen and back." 8-ER-1518. Over and over, she screamed and repeated to the nurse, "I'm sick, I'm sick." 7-ER-1147.

Ms. Hill's symptoms indicated "something very serious going on in [her] abdominal cavity." 4-ER-592–93. Some "causes of severe abdominal pain" include appendicitis, diverticulitis, pancreatitis, an ulcer, or "any kind of infection." 4-ER-605. A "further in-depth assessment [was necessary] to find out what[] [was] going on." 4-ER-591. But Nurse Gubitz was not licensed to diagnose patients. 4-ER-594. Nursing regulations and the standard of care required someone with her licensure to consult with a higher-licensed professional or send her patient to the emergency department. 4-ER-594–95. Nurse Gubitz did not do either of these things. Instead, she documented that Ms. Hill was suffering "severe abdominal pain," had to "be dragged to door by cellmate," and was "screaming and repeating 'I'm sick' over and over." 4-ER-615; 8-ER-1488. Then, pursuant to "the same NaphCare custom" that she "followed for others," she sent Ms. Hill to Medical Watch. 7-ER-1202.[3]

Guards took Ms. Hill to Medical Watch in a wheelchair. 5-ER-739. The transporting officer described her as visibly "nauseous," "holding on

[3] At around 3:00pm, Nurse Gubitz visited the hallway where Ms. Hill's cell was located for less than 90 seconds. 4-ER-624–25; 7-ER-1185. Despite saying Ms. Hill "refused assessment," she did not complete the documentation required to verify a refusal. 4-ER-624–30; 7-ER-1195.

to her stomach," "hunched over in pain," and "in a weakened state," as she was taken to the solitary cell. 5-ER-739–40. For the next eight hours, Ms. Hill was sequestered alone in a Medical Watch cell without any way to call for help. 5-ER-734; 7-ER-1177; *see also* SER-194–96 (photos of cell). During that time, guards without medical training walked by roughly every 30 minutes to glance through her small cell window. 8-ER-1525; 5-ER-729–30. But consistent with "the usual customs and practices" of Medical Watch for "NaphCare patients," the guards did not make "actual medical observations" or look for "any type of medical symptom or medical problem." 5-ER-774–75; 5-ER-792–94. That's because it was not "the practice of the jail guards to check the NaphCare patients" even for the symptoms listed on the Medical Watch form. 5-ER-793–94; 8-ER-1525.

At 5:24pm, eight hours and fourteen minutes after she was taken to Medical Watch, a guard found Ms. Hill unresponsive on the floor. 4-ER-617. She was sent to the hospital and pronounced dead. 4-ER-508. She died from "[a]cute bacterial peritonitis due to ruptured duodenal-liver adhesions with perforation of duodenum." 4-ER-464. In other words, a hole in her intestine caused acid and bacteria to leak from her digestive

tract into her abdominal cavity, "eat[ing]" away at her from the inside and poisoning her bloodstream, resulting in a severely painful and drawn-out death. 4-ER-468–87. In the hospital, holes in the digestive tract are treated with antibiotics and surgery. 4-ER-487–88. The rate of survival is 90-95%. 4-ER-516.

After Ms. Hill died, NaphCare conducted a "local-level review" and convened "multiple meetings at the corporate level to discuss what happened to [her]." 6-ER-989. It reviewed the "whole spectrum" of care "from the beginning to end," 6-ER-987, including Nurse Gubitz's graphic documentation that she placed Ms. Hill on Medical Watch upon observing her severe abdominal pain. SER-190. The purpose of the corporate review was to "learn if [NaphCare's] system needs to make changes at all," 6-ER-987, or if "any discipline" was warranted. 6-ER-990.

After concluding its review, the company decided to make no "changes to any NaphCare policies or procedures." 6-ER-989–90; *see also* 5-ER-748; 5-ER-780; 7-ER-1200–01. Nor did it discipline Nurse Gubitz or communicate to her, or anyone else, that placing Ms. Hill on Medical Watch was improper. 6-ER-990; 7-ER-1200–01. Indeed, no one from NaphCare ever reached out to Nurse Gubitz or questioned her decision.

7-ER-1200–01; 6-ER-994–95. Instead, "NaphCare continue[d] to send [its] patients up to [M]edical [W]atch to be watched by medically untrained county jail guards." 5-ER-780.

II. Procedural History

Ms. Hill's Estate sued Nurse Gubitz, NaphCare, and Spokane County for violating her rights under the Fourteenth Amendment and Washington law. 3-ER-385–407. Before trial, the district court dismissed Nurse Gubitz pursuant to a stipulated motion, 3-ER-281–82, and entered a default judgment against the County as a sanction for spoliating video evidence. 3-ER-308–52. The claims against NaphCare proceeded to trial. The jury found NaphCare liable and awarded damages, and the district court upheld the verdict. 1-ER-72–75; 1-ER-3.

A. The jury heard abundant evidence of NaphCare's misconduct.

Over six days, jurors heard testimony from eleven witnesses. They painted a clear picture: Ms. Hill suffered and died because of NaphCare's custom of sending patients in need of medical monitoring to the non-medical Medical Watch.

Although NaphCare's appellate strategy is to cast Nurse Gubitz as a "bad apple" who failed to follow company policy, that's neither what its

corporate leaders concluded nor what it told the jury. Indeed, NaphCare's trial position was that Nurse Gubitz's decision to send Ms. Hill to Medical Watch *accorded* with company expectations. As NaphCare's counsel put it, "Nurse Gubitz knew the patient had abdominal pain, and she was concerned about it," so she "took the next step" and sent Ms. Hill to Medical Watch to be "observed" for "continued signs of distress." 4-ER-445.

Nurse Gubitz agreed that she acted pursuant to NaphCare's custom. When asked whether, "as it relates to Cindy Hill, everything that [she] did was done pursuant to the usual and the regular customs and practices of NaphCare," she confirmed, "as far as I know, yes." 7-ER-1201. And as the company's charge nurse (employed at the jail by NaphCare for over two years before Ms. Hill's detention), she knew the company norms. 7-ER-1231–32; 7-ER-1138–39. She also told the jury she moved Ms. Hill to Medical Watch "not" because of withdrawal but "specifically because of severe abdominal pain." 7-ER-1281. Her notes confirmed that she "placed" Ms. Hill on Medical Watch "for severe abdominal pain and having to be dragged to door by cellmate" and "screaming and repeating 'I'm sick' over and over." 8-ER-1488. Nurse Gubitz testified that in

sending Ms. Hill to Medical Watch, she was "follow[ing] the same NaphCare custom that [she] followed for others," including for "patients like Cindy Hill." 7-ER-1202.

NaphCare's own expert, Dr. Alfred Joshua, confirmed it was "true" that Medical Watch was "used for patients who needed acute medical monitoring." 6-ER-1115. He described how NaphCare used Medical Watch for patients "in between," those who either "needed to be sent out [to the emergency department] or not," depending on how they "declared their symptoms" over this "additional time." 6-ER-1114–15. And he told the jury that Nurse Gubitz's decision to send Ms. Hill to Medical Watch "did not" violate "any policies, procedures, or practices that were in place by NaphCare." 6-ER-1082.

Lori Roscoe, a correctional healthcare specialist with doctoral degrees in nursing and healthcare administration, agreed. 4-ER-565. She explained that her review of copious records, reports, depositions, discovery answers, and more revealed "a regular practice for NaphCare to turn its ill patients over to security guards for [M]edical [W]atch" and that this was the company's "regular practice even for acutely ill inmates." 4-ER-613.

Moreover, witness after witness confirmed that after Ms. Hill's death, NaphCare took no action to change its Medical Watch practice, to discipline Nurse Gubitz, or to indicate to *anyone* that her actions were inconsistent with its customs. 5-ER-748–49 (corrections officer); 5-ER-780 (same); 5-ER-827–28 (Acting Jail Director); 6-ER-989–90 (NaphCare's Chief Medical Officer); 7-ER-1200–01 (Nurse Gubitz).

Witnesses also made clear that NaphCare's custom caused Ms. Hill's suffering and death. Medical professionals explained that her symptoms indicated a serious risk warranting immediate medical care. 4-ER-591; 4-ER-595; 5-ER-882–83. An expert surgeon testified that he had never "seen anyone go from a duodenal perforation to abdominal peritonitis to bacterial sepsis to death," as Ms. Hill had, because at the hospital they "stop all of that." 4-ER-486. But instead of sending Ms. Hill to the hospital, Nurse Gubitz followed NaphCare custom and relegated her to the faux Medical Watch. 7-ER-1201.

B. The jury found NaphCare liable for Ms. Hill's preventable suffering and death.

The court instructed the jury to decide whether NaphCare's custom caused its employee to violate Ms. Hill's constitutional rights. 8-ER-1391–92. The court cautioned that the jury was "not required" to award

punitive damages, but that if it found punitive damages appropriate, it "must use reason in setting the amount." 8-ER-1395. The jury found NaphCare liable under 42 U.S.C. § 1983 and state law. 1-ER-71–75. It awarded $2.75 million in compensatory damages and $24 million in punitive damages. 1-ER-73–75.

C. The district court upheld the jury's verdict.

After trial, NaphCare moved to stay enforcement of the punitive award pending its post-trial challenge to the verdict and the constitutionality of the amount. SER-26. The district court temporarily stayed enforcement while carefully noting that the Estate "ha[d] not yet filed its response to NaphCare's constitutional arguments." 2-ER-202. After complete briefing on the issues, however, the district court determined that the jury's verdict was well supported and that the punitive damages were constitutionally justified. 1-ER-2–68.

On liability, the district court held that the evidence was sufficient to establish that Nurse Gubitz sent Ms. Hill to Medical Watch "pursuant to NaphCare's unofficial custom" and that there was a "direct causal link" between that custom and her death. 1-ER-21–33. The district court rejected NaphCare's argument that the jury was also required to find

deliberate indifference, but that if it was required, the evidence showed that too. 1-ER-39–45.

On damages, the district court conducted the requisite due process analysis and held there was "sufficient reprehensibility justifying a significant punitive damages amount," "the custom established at trial [wa]s a dereliction of the very responsibility that NaphCare voluntarily assumed for its financial benefit," and NaphCare's conduct was "particularly egregious." 1-ER-59. It also rejected NaphCare's "novel and sweeping" argument that a federal maritime case precludes the damages ratio in this civil rights case. 1-ER-65.

SUMMARY OF THE ARGUMENT

On appeal, NaphCare accepts that its employee committed a constitutional violation causing Ms. Hill's death. What remains is a challenge to the jury's determination that Nurse Gubitz acted pursuant to a NaphCare custom of using medically untrained jail guards to monitor patients in need of medical monitoring. That verdict is supported by abundant evidence, including testimony from corrections officers, Nurse Gubitz, NaphCare and jail leadership, and experts; the Medical

Watch form; and NaphCare's financial incentives. Rather than facing this evidence, NaphCare largely ignores it.

NaphCare also asks this Court to override the jury's verdict on other grounds—none of which have merit. First, it argues that the Estate was required to prove the custom applied to "seriously ill" patients even though that qualifier appears nowhere in the unobjected-to jury instruction. In any case, the evidence showed that NaphCare's custom also encompassed seriously ill patients. Second, it insists that the Estate must point to specific prior incidents to prove the custom. But there's no such requirement where, as here, the widespread custom is itself unconstitutional. Finally, this Court can independently and alternatively uphold the jury's verdict on a deliberate indifference theory of municipal liability.

As for damages, NaphCare's highly reprehensible conduct more than supports the jury's punitive award: Its custom recklessly disregarded the safety of a vulnerable population and caused Ms. Hill's excruciating death. Moreover, the single-digit ratio between the punitive and compensatory damages awards is well within constitutional bounds.

ARGUMENT

I. The evidence was more than sufficient for *Monell* liability.

The jury determined that NaphCare's Medical Watch custom—not a rogue nurse—caused Ms. Hill's excruciating death. NaphCare cannot override that verdict without showing that the evidence permits "only one" reasonable conclusion which is "contrary to the jury's verdict." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). In assessing whether NaphCare clears this high bar, the Court must "view all evidence in the light most favorable" to the Estate, "draw all reasonable inferences" in the Estate's favor, and disregard "all evidence favorable to [NaphCare] that the jury [was] not required to believe." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008). NaphCare does not come close to meeting its burden.

The Estate proved all four *Monell* elements: (1) NaphCare and its employee acted under color of law; (2) that employee committed a constitutional violation; (3) that employee acted pursuant to a NaphCare custom; and (4) the custom caused the violation. 1-ER-114. NaphCare stipulated to the first element, 1-ER-115, expressly conceded the second, OB27, and made no argument about the fourth. It challenges the verdict

on the third element, but the evidence supporting that element is abundant and irrefutable.

A. Nurse Gubitz committed a constitutional violation.

NaphCare "does not appeal the jury's conclusion" that Nurse Gubitz committed a constitutional violation "under this Circuit's current standard." OB27. That should be the end of the matter.

However, in trying to lay groundwork for *en banc* or Supreme Court review, NaphCare purports to "preserve[] its challenge to the propriety" of this Court's objective standard for pretrial detainees' medical care claims. OB27. But the company repeatedly *embraced* that standard below. *See* SER 174–75; SER-111; SER-50; SER-41.[4] Even now, NaphCare merely "submits" that the controlling objective test should be overruled in favor of a subjective test, OB28, without attempting to

[4] The first time NaphCare objected to the objective standard was in its oral Rule 50(a) motion after the close of evidence. 7-ER-1293–94. Perhaps that would have sufficed to preserve the issue had NaphCare also raised its challenge before trial. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion) (failure to challenge instruction does not preclude review of JMOL denial where same legal issue raised at summary judgment); *Benigni v. City of Hemet*, 879 F.2d 473, 476, 479 (9th Cir. 1988), as amended (June 15, 1989) (legal challenge preserved for post-trial appeal where litigant "moved for summary judgment" on "same" argument). Here, NaphCare never moved for summary judgment or otherwise raised the issue before trial.

satisfy the "high standard" required to overturn circuit precedent. *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013).

In any event, NaphCare's contention that there was "no evidence" of Nurse Gubitz's subjective awareness, OB28, is flat wrong. Nurse Gubitz saw Ms. Hill in the "fetal position" repeatedly screaming, "'I'm sick' over and over." 8-ER-1488; 8-ER-1518. She witnessed Ms. Hill's symptoms and did not believe she was exaggerating or "faking in any degree." 7-ER-1147; 7-ER-1149–53; 7-ER-1161. Rather, she "knew" that Ms. Hill "was in acute distress." 7-ER-1201. It was "part of her thought process" that Ms. Hill might have "an urgent condition requiring the intervention of a medical doctor," and "she knew" it could have been appendicitis, an infection, pancreatitis, intestinal ischemia, or an intestinal perforation. 6-ER-1098; 6-ER-1100-01. There is ample evidence from which the jury would have found subjective awareness, were that the law.[5] *See Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir.

[5] That the Estate's counsel remarked during closing that "Nurse Gubitz did not mean for harm to come to Cindy Hill," is not to the contrary. *See* OB28. A prisoner "need not" show that an official "intended any harm" to "satisfy the subjective component of deliberate indifference." *Lemire v.*

2006); *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir. 2002); *Lolli v. Cnty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003).

NaphCare cannot reasonably use this issue as a hook for future review: The argument is inadequately preserved and unsupported by the evidence.

B. NaphCare regularly sent patients who needed medical monitoring to "Medical Watch."

Overwhelming evidence supports the jury's conclusion that NaphCare had a widespread custom of using medically untrained guards to monitor patients in need of medical monitoring. This custom need not have "received formal approval through . . . official decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Nor must it be written down. *Navarro v. Block*, 72 F.3d 712, 715 (9th Cir. 1995), *as amended on denial of reh'g* (Jan. 12, 1996). In fact, the custom may contradict written policy; what matters is the entity's "actual routine practices." *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1075 n.10 (9th Cir. 2016) (en banc); *contra* OB29-30. Here, NaphCare's actual routine

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Cal. Dep't of Corr. & Rehab, 726 F.3d 1062, 1074 (9th Cir. 2013). It "is enough" that the official acted despite "knowledge of a substantial risk of harm." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

practice was using medically untrained guards to monitor patients in need of medical monitoring.

1. The jury's finding that NaphCare had a custom of using medically untrained guards to monitor patients in need of medical monitoring is well supported.

At trial, both parties and the court agreed about the custom at issue: "Using medically untrained jail guards to monitor NaphCare patients in need of medical monitoring by medical professionals." 7-ER-1353-54; *see* 1-ER-114. The jury, exercising its "exclusive power" to "weigh evidence and determine contested issues of fact," *Berry v. United States*, 312 U.S. 450, 453 (1941), found that this custom existed. 1-ER-72. That conclusion is supported by copious evidence—far more than the "sufficient evidence" required to affirm. *Harper,* 533 F.3d at 1021.

Evidence that NaphCare regularly used "Medical Watch" for patients who needed medical monitoring: Witness after witness confirmed this practice, beginning with the Estate's correctional healthcare practices expert, Dr. Lori Roscoe. She reviewed NaphCare incident reports, jail incident reports, policies, a medical death review, written discovery answers, thirteen deposition transcripts of NaphCare and jail personnel, and more. 4-ER-574–75. She investigated "to find out

what the reality was" about Medical Watch and NaphCare's use of the practice. 4-ER-608–09. Her investigation revealed that it was "a regular practice for NaphCare to turn its ill patients over to security guards for [M]edical [W]atch" at the Spokane County Jail and that this was NaphCare's "regular practice even for acutely ill" patients. 4-ER-613. She found that NaphCare "permit[ted] the nurses that it employed" to engage in this practice. 4-ER-613. And she determined that NaphCare did not impose "any restrictions on the types of patients" sent to Medical Watch. 4-ER-612–13.

Of course, the people NaphCare sent to Medical Watch needed medical monitoring by medical professionals, not unqualified jail guards who did no such monitoring. Dr. Roscoe testified that there "needs to be a medical component" to Medical Watch and that it must "necessarily include medical staff people." 4-ER-673; *see also* 4-ER-674 (discussing need for "someone from the medical department [to] interact with the patient, reassess the patients, and monitor the patients" rather than "giv[ing] up their responsibilities" to guards). Without medical professionals, "NaphCare's use of this [M]edical [W]atch practice" put patients "like Ms. Hill at substantial risk of serious harm," 4-ER-631–32,

and "significant[ly]" violated correctional healthcare standards. 4-ER-613–14.

Dr. Roscoe's forceful, unobjected-to testimony amply supports the jury's verdict. *See Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991) (finding sufficient evidence for *Monell* liability where expert testified incident was handled "in accordance with [municipal defendant's] policy or custom"). Yet NaphCare ignores it.

NaphCare's failure to address the testimony of its *own* expert, Dr. Alfred Joshua, is similarly revealing. After reviewing relevant records and depositions, Dr. Joshua acknowledged it was "true" that Medical Watch was "used for patients who needed acute medical monitoring." 6-ER-1115. He said that NaphCare used Medical Watch "for those people in between that [the NaphCare nurses] didn't know whether they needed to be sent out [to the hospital] or not" and needed "additional time" to learn more about how they "declared their symptoms." 6-ER-1114–15. This testimony, broadly referencing "patients" and "people," underscores the widespread nature of this dangerous custom. *See Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1234-35 (9th Cir. 2011) (holding expert testimony about "repeated constitutional violations" supported "informal

but widespread custom"). Dr. Joshua's name appears nowhere in NaphCare's brief.

Nurse Gubitz also testified (both at trial and in her deposition, which was read into the record) that Medical Watch was used for patients needing "acute medical monitoring." 7-ER-1173–74; *see also* 6-ER-1115. NaphCare argues that this Court cannot take Nurse Gubitz at her word, given her subsequent statement that when she said "acute," she meant "sick or ailing *now*" rather than chronically ill. OB36-37.[6] This is inconsequential. Sending presently "sick or ailing" patients in need of medical monitoring to Medical Watch is precisely the unconstitutional custom at issue. And regardless, the jury was free not to credit Nurse Gubitz's post-hoc definition. 8-ER-1379 (instructing jury it could believe "everything a witness says or part of it or none of it").

Adding to the chorus at trial, the Acting Jail Director testified that NaphCare sent "individuals who have some type of a medical condition" to Medical Watch. 5-ER-831–32. Officer Byington, a jail guard who

[6] Contrary to NaphCare's claim that the district court "properly declined to give that statement any weight," OB36, the district court said the dispute over the meaning of "acute" had "no significance to the ultimate disposition" of the case. 1-ER-26 n.9.

followed "the usual customs and practices for [M]edical [W]atch," 5-ER-773–74, likewise said that NaphCare nurses sent patients to Medical Watch when they had "some sort of a medical concern" about them. 5-ER-783. NaphCare does not mention, let alone refute, this testimony.

Nor does NaphCare address testimony from Officer Wirth that NaphCare nurses would send patients to Medical Watch who were "highly under the influence of drugs or alcohol or opioids," 5-ER-766–67, despite NaphCare's written policy requiring "constant observation by health care staff" for anyone at risk of withdrawal. 8-ER-1546; *see also* 4-ER-490 (expert testifying that "alcohol withdrawal . . . can kill you"). Once those patients were put on Medical Watch, NaphCare saddled jail guards with performing a "shake and wake" whereby the guards would have to "physically wake [patients] and get an actual verbal awakened response from them." 5-ER-766–67; *see also* 5-ER-790.[7] So here, again, patients that NaphCare itself deemed in need of "constant observation by health care staff," 8-ER-1546, were instead by custom sent to Medical Watch for the "shake and wake" by guards.

[7] Officers only opened the door to check on "shake and wake" patients; they did not do so for other Medical Watch patients. 5-ER-790–91; 5-ER-812–13.

If all that were not enough, the Medical Watch form itself shows that NaphCare's Medical Watch patients needed medical monitoring by medical professionals. NaphCare's Medical Watch form references serious symptoms that only a medical professional can assess, including "unequal pupil size," "seizure like activity," "facial droop," "worsening chest pain," and "worsening abdominal pain" among others. 8-ER-1525. The seriousness of these symptoms and the need for medical monitoring to detect them defeats NaphCare's contention that the form was only used for "*mildly ill* patients." OB37, OB39. And the nature of these symptoms undermines its argument that they are merely "examples of important *changes* to report to medical" and "not examples of symptoms a person might be experiencing when sent to 'Medical Watch.'" OB38 (internal quotations omitted). By directing officers to look for "*worsening* abdominal pain" or "*worsening* chest pain," 8-ER-1525 (emphases added), the form suggests that abdominal or chest pain is already present.

The jury learned that although the County may have originally created the form, *see* OB38, NaphCare's nurses routinely used it to implement the Medical Watch custom and fully integrated it into the company's practice. Nurse Gubitz explained that she sent patients to

Medical Watch by "fill[ing] out the top piece of the [M]edical [W]atch form" and then "provid[ing] that to the officers." 7-ER-1248–49; *see also* 5-ER-728 (officer explaining patients "are put on medical watch by NaphCare" with the "piece of paper that's put on their door"). She expounded that it was her standard practice when filling out the form not to "limit [the symptoms] the officers were looking for" in case there was "any change" in a patient's status. 7-ER-1251. She would then "scan[] and place[]" the form into the patient's medical chart and "add [the patient] to [M]edical [W]atch" in NaphCare's proprietary medical records system. 7-ER-1282; 7-ER-1249; 6-ER-961.

Evidence that Ms. Hill was sent to Medical Watch pursuant to NaphCare's custom: Nurse Gubitz testified unequivocally that she sent Ms. Hill to Medical Watch pursuant to NaphCare's custom. At trial, she agreed that she moved Ms. Hill to Medical Watch "specifically because of severe abdominal pain," 7-ER-1281, and that "everything" she did "was done pursuant to the usual and the regular customs and practices of NaphCare." 7-ER-1201. She confirmed this a second time. 7-ER-1202 (agreeing she followed "the same NaphCare custom" she "followed for others," including for patients "like Cindy Hill"). And she

agreed "it was the custom" that "if a patient was suffering from an acute medical problem and were going to be put on medical watch," then "whatever watching there was would be done by nonmedical people." 7-ER-1180–81.

NaphCare responds that Nurse Gubitz merely "*thought* she had followed NaphCare's practices." OB35. But an officer's "belief" that her conduct is "consistent" with the custom is strong evidence supporting *Monell* liability. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013). Even more so here because, as NaphCare's "day manager" and "charge nurse," a jury could easily infer that Nurse Gubitz was well aware of NaphCare's standard practice. 7-ER-1138–39; 7-ER-1231–32.

Nurse Gubitz's statement that seriously ill patients would be sent to the hospital does not alter this conclusion. *Contra* OB37. That statement contradicted Nurse Gubitz's repeated testimony that she moved Ms. Hill to Medical Watch "pursuant to the usual and the regular customs and practices of NaphCare." 7-ER-1201; *see also* 7-ER-1202. Because the jury was free to believe "everything a witness says or part of it or none of it," it was free to disregard Nurse Gubitz's inconsistent testimony. 8-ER-1379. This Court must also "disregard all evidence"

favorable to NaphCare that the jury was not "required to believe." *Harper*, 533 F.3d at 1021.

Moreover, the circumstances of Ms. Hill's move to Medical Watch show she was sent there per NaphCare's custom. First, Nurse Gubitz used the Medical Watch form to send her there—a form integrated into NaphCare's practice that lists Ms. Hill's primary symptom of "abdominal pain." 7-ER-1177; 8-ER-1525. Second, Officer Wirth did not voice objection or alarm about taking Ms. Hill to Medical Watch despite forming a "judg[ment] in [her] mind at the time" that Ms. Hill "probably should have been sent to the hospital." 5-ER-740–41. Indeed, Officer Wirth testified that Ms. Hill was in such a "weakened state" and in such "pain" that she and another officer had to transport Ms. Hill in a wheelchair and then "pick her up and put her in the [Medical Watch] cell." 5-ER-739–40. That two officers carried out NaphCare's Medical Watch order—as directed and without protest—underscores just how consistent this was with standard routine.

Evidence that nothing medical happened on Medical Watch: Dr. Joshua, NaphCare's own expert, explained that "no nurse would come by on a periodic basis as part of regular rounds for patients who were put

on [M]edical [W]atch." 6-ER-1112. And Nurse Gubitz, NaphCare's employee, agreed that "it was the custom" to have "whatever watching there was [on Medical Watch] done by nonmedical people" even for patients "suffering from an acute medical problem." 7-ER-1180–81.

Dr. Roscoe elaborated that patients on Medical Watch were scarcely monitored at all, and then only by guards who "had no medical training" and did not "watch for medical signs and symptoms." 4-ER-610–11. The guards "looked through the window" for mere seconds and couldn't tell the difference between a sleeping patient and an unconscious patient. 4-ER-611–12. Dr. Roscoe explained, in depth and detail, that her review revealed a complete absence of any medical monitoring on Medical Watch, 4-ER-609–614, and no regular rounding by a nurse or other medical person. 4-ER-614. In short, there wasn't "anything medical in nature about medical watch." 4-ER-612.

Jail employees said the same. Officer Wirth explained that "Medical Watch" involved almost no watching and certainly nothing medical. 5-ER-725–32; 5-ER-736–37. The officers were not qualified or expected to detect *any* medical symptoms and did not try to do so. 5-ER-725–32; 5-ER-736–37. Officer Byington told the jury the officers were not trained,

able, or expected to look for "any type" of medical symptom and did not do "any actual medical observation." 5-ER-774–75. Despite the serious medical symptoms listed on the Medical Watch form, the guards did not check "for any of the[m]." 5-ER-793–94. So, there was not "any way to know" whether Ms. Hill had abdominal pain or any other symptom during her many hours on Medical Watch. 5-ER-793–94. Both officers explained that the practice was so cursory they could not even tell if a patient was dying. 5-ER-731; 5-ER-779.

The Acting Jail Director agreed with his officers: The County "did not" expect its guards to look for medical symptoms. 5-ER-810–11. As he put it, "[t]hat's a job for [NaphCare] medical staff." 5-ER-811.

Evidence that NaphCare approved Nurse Gubitz's conduct and made no changes to its custom after its corporate death review: NaphCare's Chief Medical Officer, Dr. Jeffrey Alvarez, had the responsibility to act when there was a failure of care. 6-ER-989. He was part of NaphCare's "Morbidity and Mortality Review Committee." SER-187. After Ms. Hill's death, the committee reviewed Nurse Gubitz's graphic documentation, which described Ms. Hill as "too sick to move," "curled in [the] fetal position," and repeatedly "scream[ing] in pain" after

having been "dragged to the cell door." SER-190. The committee knew the company's nurse sent Ms. Hill to Medical Watch in this state, SER-190, and that she then died from an overwhelming infection caused by a perforated intestine. 6-ER-989; 6-ER-992–93.

Chief Medical Officer Alvarez and committee members reviewed "the whole spectrum of the continuity of care" from "beginning to end" and considered whether NaphCare's "system needs to make [any] changes at all." 6-ER-987. He recommended no changes to NaphCare procedures nor any discipline of Nurse Gubitz. 6-ER-990. And no changes to "practices or policies" were made. 7-ER-1201. In fact, no one at NaphCare even sought to *question* Nurse Gubitz's decision to send Ms. Hill to Medical Watch. 6-ER-993–95; *see also* 7-ER-1201. NaphCare just "continue[d] to send [its] patients up to [M]edical [W]atch to be watched by medically untrained county jail guards" as before. 5-ER-780.

"[P]ost-event evidence" is "highly probative" for "proving the existence of a municipal defendant's policy or custom." *Henry v. Cnty. of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997), *opinion amended on denial of reh'g*, 137 F.3d 1372 (9th Cir. 1998). NaphCare's failure "to take any remedial steps" after Nurse Gubitz put the company's acutely ill patient

on Medical Watch is therefore strong additional evidence of NaphCare's custom. *Larez*, 946 F.2d at 647; *see also S.R. Nehad v. Browder*, 929 F.3d 1125, 1142 (9th Cir. 2019) (finding sufficient evidence "of an informal practice" where department "took no action" against offending officer). NaphCare does not engage at all with this evidence.

Evidence of NaphCare's financial motive for its Medical Watch custom: The Acting Jail Director explained that NaphCare had just "a few nurses" and insufficient staff of its own to be "doing all those [medical] watches." 5-ER-816. Nor did it have a higher-level medical provider onsite on weekends. 7-ER-1166–68. That left the company two options. It could pay up to $15,000 for any patient its nurses sent out for care. SER-198–99; 5-ER-822. Or it could rely on the county-payrolled guards and pay nothing. 5-ER-817. It chose the latter.

Even if financial motives may not, on their own, establish a custom, *see* OB39, "[c]ourts have regularly found" on robust factual records like this one that corporate entities may be liable for "sanctioning the denial of needed medical care as a result of financial considerations." *Green v. Obsu*, No. ELH-19-2068, 2021 WL 165135, at *15 (D. Md. Jan. 19, 2021); *see also, e.g.*, *Harper v. Wexford Health Sources Inc.*, No. 14-cv-04879,

2017 WL 2672299, at *3 (N.D. Ill. June 21, 2017); *McDonald v. Wexford Health Sources*, No. 09-c-4196, 2010 WL 3034529, at *3 (N.D. Ill. July 30, 2010); *Steele v. Wexford Health Sources*, No. 17-c-6630, 2018 WL 2388429, at *8 (N.D. Ill. May 25, 2018). So NaphCare's fearmongering that "every correctional healthcare provider" would be liable if "financial incentives were sufficient," OB40, has no resonance in a case like this where financial motive is just one piece of evidence, among many.

* * *

This Court has relied on evidence of significantly lesser quality and quantity to find the existence of a custom for purposes of *Monell* liability. In *Nehad*, for instance, the Court found sufficient evidence that a department had a custom of unnecessarily using lethal force based on three things: expert testimony that most shootings were avoidable, the department's approval of the shooting, and evidence that the department looked the other way when officers used such force. 929 F.3d at 1141-42. In *Navarro*, even less evidence sufficed: The plaintiffs showed a "custom of according lower priority to 911 calls related to domestic violence" based solely on deposition testimony from a 911 dispatcher who testified that it was the department's "practice" not to classify domestic violence 911 calls

as emergency calls. 72 F.3d at 713, 715. Where the evidence of NaphCare's custom dwarfs the custom evidence in those cases, there can be no question that the jury's verdict must stand.

2. NaphCare focuses on the wrong custom—one it made up post-trial—but even that custom is supported by substantial evidence.

After presenting this Court with a distorted and highly selective rendering of what the jury saw, heard, and learned, NaphCare made up a different custom than the one the jury was instructed on and found. In NaphCare's telling, the Estate had to prove that patients who needed "*urgent* medical care" or were "*seriously* ill" were sent to Medical Watch. OB31-32 (emphases added). But NaphCare is bound by the custom "found by the jury," and its post-trial attempt at reframing it should be rejected. *See Castro*, 833 F.3d at 1075 (rejecting defendants' attempt to reframe custom on appeal differently from that "described in the jury instructions and as reflected in the record").

Back at trial, NaphCare asked the district court to include a description of the custom in the jury instructions. 7-ER-1327. The district court obliged, 7-ER-1346; 7-ER-1353, and NaphCare had "[n]o objections" to the agreed-upon articulation in the operative instruction. 7-ER-1354.

That instruction described a custom "of using medically untrained jail guards to monitor NaphCare patients in need of medical monitoring by medical professionals." 1-ER-114. Period. There is no mention of "seriously" or "urgently" ill patients. Even after the jury was instructed, NaphCare (initially) stuck to this definition, arguing in its Rule 50(a) motion that its "understanding of plaintiff's *Monell* claim" is the "practice of allowing medically untrained jail guards to perform [M]edical [W]atch." 7-ER-1286.

But once the jury found that this very custom existed, *see supra* Section I.B.1, NaphCare changed its mind. In post-trial briefing, it argued for the first time that the Estate had to prove *more*: namely a practice of sending "patients with *urgent* or *emergent* medical needs to Medical Watch." 2-ER-141 (emphases added); *see also* 2-ER-235 (similar). The district court correctly rejected this transparent attempt to redefine the custom at issue. 1-ER-21. This Court should too. *See Castro*, 833 F.3d at 1075.[8]

[8] NaphCare argues that the Estate agrees with its redefinition of the custom based on a statement made during closing. OB37. Not so. First, in the very statement excerpted by NaphCare, the Estate's counsel explains that Medical Watch may be okay for people who *don't need*

But even if NaphCare could belatedly reframe the custom to its perceived advantage, it would still lose because substantial evidence showed that its practice extended even to seriously ill patients. Nurse Gubitz testified that sending someone in Ms. Hill's condition to Medical Watch was in line with NaphCare custom; guards testified that seriously intoxicated detainees were so routinely sent there that the "shake and wake" procedure was established; experts Roscoe and Joshua explained that the custom extended to the "acutely ill" and those in need of "acute medical monitoring;" the Medical Watch form lists exceedingly serious symptoms indicative of possible stroke, heart attack, and other such conditions; and NaphCare's Morbidity and Mortality Review Committee did nothing after learning that someone as severely ill as Ms. Hill was sent to Medical Watch. *See supra* Section I.B.1.

"medical monitoring" and uses the examples of the flu and an upset stomach. OB37 (quoting 8-ER-1404). That is perfectly consistent with the agreed-upon custom in the jury instructions. *Compare* 1-ER-114 (describing practice of using jail guards for people "in need of medical monitoring"). Second, to the extent that the custom described in the jury instructions meaningfully differs from anything said in closing, the instructions govern: "You must follow the law as [the court] give[s] it to you." 8-ER-1375. There is a "strong" presumption that a jury follows "the instructions given to it." *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247 (9th Cir. 2014) (cleaned up).

3. Evidence of specific prior incidents is not required.

NaphCare blithely asserts that no amount of custom evidence can "substitute for proof of prior incidents." OB24, OB32-35. Wrong. There is no such rigid requirement. Where "municipal action *itself* violates federal law, or directs an employee to do so," resolving the issue of fault "is straightforward." *Bd. Of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). In such cases, "once a municipal policy is established, it requires only one application to satisfy fully *Monell*'s requirement." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 n.6 (1986). In contrast, specific prior incidents are most helpful "where the policy relied upon is not itself unconstitutional." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) (plurality); *see also Brown*, 520 U.S. at 405 (noting more "rigorous standards of culpability" apply where entity "has not directly inflicted an injury"). Here, NaphCare's custom falls into the former category.

Nurses who "fail[] to promptly" obtain higher-level medical care when faced with symptoms that create a "substantial risk of suffering serious harm" violate the Fourteenth Amendment. *Sandoval, v. County of San Diego*, 985 F.3d 657, 670 (9th Cir. 2021). As witness after witness testified at trial, NaphCare's custom effected exactly that. *Compare*

Russell v. Lumitap, 31 F.4th 729, 739 (9th Cir. 2022) (holding "substantial risk" where patient's condition is "worthy of comment," impacts "daily activities," or causes "pain"), *with supra* Section I.B.1 (testimony that these types of patients sent to Medical Watch). Put simply, NaphCare's custom of sending patients who needed professional medical monitoring to a location where there are *no* medical professionals and *no* medical monitoring is itself unconstitutional. The district court put it well: "NaphCare's custom violated the Constitution with certainty—patients who needed medical care were denied it." 1-ER-41. While the Estate had to provide evidence of this custom, it did not have to belabor the trial with descriptions of specific prior incidents.

Navarro is illustrative. There, the plaintiffs challenged a department's unofficial "custom of treating domestic violence 911 calls differently from non-domestic violence calls." 72 F.3d at 714-16. The Court determined that the plaintiffs "could prove that the domestic violence/non-domestic violence classification" violated the Equal Protection Clause. *Id.* at 717. Because the proffered custom was itself unconstitutional, the Court did not hunt for specific prior incidents. Instead, it found sufficient evidence of the custom based on a 911

dispatcher who "testified that it was the practice" of the department "not to classify domestic violence 911 calls as . . . 'emergency procedure' calls." *Id.* at 715, 717.

Likewise, in *Nehad*, the plaintiff challenged a department's unconstitutional custom of unnecessarily using lethal force, and the department argued (just as NaphCare argues here) that a "single" incident was "an insufficient basis for a *Monell* claim." *Answering Brief*, 2018 WL 4098233, at *49. But this Court ruled for the plaintiff based on evidence like the evidence in this case. *Compare Nehad*, 929 F.3d at 1141-42 (expert testimony that most shootings were avoidable and police department's approval of shooting), *with* 4-ER-613 (expert testimony that nurses regularly sent sick patients to Medical Watch), *and* 6-ER-990 (NaphCare leadership approving Nurse Gubitz's conduct). That evidence was "sufficient to create a triable issue" as to "the existence of an informal practice or policy." *Nehad*, 929 F.3d at 1142.

When it comes to "policies [or] practices" that are themselves unconstitutional, a "series of constitutional violations" is simply unnecessary. *Est. of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 531 (7th Cir. 2000); *see also Wallis v. Spencer*, 202 F.3d 1126, 1133-34,

1142-43 (9th Cir. 2000) (holding officer testimony sufficient to establish "custom or practice" where they testified conduct was "settled practice" and "not unusual" but did not discuss specific prior incidents).

In holding that the Estate was not required to prove prior instances of harm, the district court cited *Castro* and *Sandoval*. 1-ER-29–31. NaphCare argues that these cases do not excuse the Estate from showing specific prior incidents because they were deliberate indifference cases, not cases involving an affirmative practice. *See* OB33-34. At the outset, that does not explain the existence of cases like *Nehad*, *Navarro*, and *Wallis*. But that argument is also wrong on its own terms.

In *Castro*, there was "substantial evidence" of a custom of using sobering cells without adequate surveillance to detain multiple drunk people. 833 F.3d at 1075-76. The entity defendants argued that the plaintiff could not establish a custom "without proving prior incidents of harm." *Id*. at 1074 n.7. According to NaphCare, *Castro* "simply observed" that the entity defendants failed to preserve that argument. OB34. In fact, this Court explained that "*[e]ven if not waived or forfeited*, the argument is legally inaccurate." *Castro*, 833 F.3d at 1074 n.7 (emphasis added). And while *Castro* was a deliberate indifference case, it made clear

that "prior incidents of harm" were not required to establish *either* "a custom or practice" *or* "deliberate indifference." *Id*. *See also Sandoval*, 985 F.3d at 681-82 (evidence did not include proof of specific prior incidents but nonetheless established *both* custom and deliberate indifference).

This makes sense. If there is no need for prior incidents even in the context of deliberate indifference cases—where more "rigorous standards of culpability" apply, *Brown*, 520 U.S. at 405—then specific prior incidents are certainly not required where the custom is unconstitutional. By NaphCare's reasoning, officers, employees, experts, and others could detail a company's usual, routine, and standard unconstitutional practices *ad nauseum*—yet still fail to prove liability absent proof of what happened to specific John Smiths or Mary Joneses. This is not the law.[9]

[9] NaphCare's other argument—that *Monell* liability attaches "only where" a policymaker made a deliberate decision about the custom, OB31-32—is foreclosed by binding precedent. NaphCare cites *Pembaur*, but *Pembaur* explained that *Monell* liability does not require "an affirmative decision by policymakers" where the "challenged action was pursuant to a [] custom." 475 U.S. at 481 n.10 (cleaned up). It focused on the policymaker route to liability only because there was no custom "at issue" in that case. *Id*. This Court, too, has explained that "a municipality

4. The Estate need not show deliberate indifference; in any case, the evidence supports a finding of deliberate indifference.

The jury found for the Estate on a straightforward unconstitutional custom theory that did not require a showing of deliberate indifference. *See* Section I.B.1-3. NaphCare failed to object to the final jury instructions that (properly) did not contain a deliberate indifference element. 2-ER-232; *see also* 7-ER-1319–30; 7-ER-1353–54.[10] On appeal, too, it acknowledges that the Estate's claim does not require a showing of deliberate indifference. *See* OB6-8, OB31. Accordingly, this Court may affirm based on evidence of an unconstitutional custom without so much as mentioning the words "deliberate indifference."

But the Court may also affirm on an alternative basis, namely that NaphCare's deliberate indifference *also* makes it liable. It may do so even though the jury instructions did not include a deliberate indifference element. *Castro*, 833 F.3d at 1071-72; *see also Fairley v. Luman*, 281 F.3d

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may be liable for its custom *irrespective* of whether official policy-makers had actual knowledge of the practice." *Hunter*, 652 F.3d at 1234 n.9 (cleaned up) (emphasis added).

[10] Although NaphCare attempted to backtrack in post-trial briefing, the district court rejected its argument that deliberate indifference was a required element. 1-ER-33–41.

913, 917 (9th Cir. 2002) (affirming verdict where jury "did not specify the constitutional deprivation upon which it based its finding of municipal liability" because "there [was] sufficient evidence for a reasonable jury to find" Fourteenth Amendment violation). This Court "need only determine that there was substantial evidence" of deliberate indifference "to affirm the jury's verdict" on that ground. *Castro*, 833 F.3d at 1072. Here, evidence of deliberate indifference abounds, and the jury's punitive award shows it necessarily would have found deliberate indifference.

The obvious risk of NaphCare's custom shows deliberate indifference. An entity can be liable under a deliberate indifference theory if "circumstantial evidence" shows it had "actual or constructive knowledge that its practices were substantially certain to cause a constitutional violation." *Sandoval*, 985 F.3d at 682-83. There is no need to show that the violation was the "purpose" of the custom. *Id.* at 682 n.17. It is an objective inquiry for entity defendants, *Castro*, 833 F.3d 1076, and is satisfied when the risk "is obvious." *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1256 (9th Cir. 2016). The constitutional violation most relevant here arises when officials "deny" or "delay" needed medical treatment. *Sandoval*, 985 F.3d at 679 (cleaned up).

So, the question becomes: Is the risk of unconstitutional delays or denials of medical care sufficiently obvious where medically unskilled guards are used in lieu of medical professionals to monitor medical patients? To ask the question is to answer it. Where guards do not provide medical monitoring and nurses nevertheless send them patients who need to be medically monitored, the risk is patently "obvious." *Mendiola-Martinez*, 836 F.3d at 1256. NaphCare's status as a sophisticated corporation in the jail healthcare services industry and its "significant" deviation from industry norms, 4-ER-614; 4-ER-631–32, only buttresses this conclusion. *Sharif v. Ghosh*, No. 12-c-2309, 2014 WL 1322820, at *3 (N.D. Ill. Apr. 1, 2014) (noting "departure" from "industry standards" is "relevant" to establishing deliberate indifference against correctional healthcare company); *c.f. Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019) (same for individual deliberate indifference analysis).

NaphCare points to two cases to suggest the risk was not obvious, but both defeat its position. OB44-46. In *Sandoval*, the jail had an "informal verbal pass-off system" that "created confusion" about whether detainees in a particular type of cell needed medical care. 985 F.3d at 681. The county could be found deliberately indifferent for maintaining

that system because one could infer it had constructive knowledge of the system's dangerousness from the "more rigorous policies" it had for other types of cells. *Id.* at 683. NaphCare's constructive knowledge comes from the very same type of evidence: It knew that medical monitoring was required for abdominal pain because it had an unenforced protocol that directed nurses to obtain higher-level care for such pain. 4-ER-643.[11] That it used a pseudo-Medical Watch instead shows deliberate indifference.

NaphCare's reliance on the out-of-circuit *Wexford* decision likewise fails. *See* OB44. There, the plaintiff argued that a "collegial review" policy caused an unconstitutional treatment delay. *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 221 (7th Cir. 2021). Crucially, unlike here, the plaintiff did not argue on appeal that the "risk of unconstitutional delays" was obvious. *Id.* at 237. Moreover, the "only evidence" offered by that plaintiff came from a report explaining how a "materially different

[11] NaphCare's contention that it implemented "the practices that *Sandoval* held up as a model" is easily dismissed because it references practices that have nothing to do with the custom here, like "requiring written logs" and "keeping track of each patient's location." OB46. On the only relevant point—who did the monitoring on Medical Watch—the jury decided the monitoring was by "medically untrained jail guards," 1-ER-114, not by "specific nurses." OB46.

version" of the policy operated at an entirely different facility. *Id*. at 238. That an obvious risk could not be deduced from *that* evidence says nothing about *this* case where *all* the evidence is about NaphCare's custom at the Spokane County Jail—one that significantly violated industry standards. 4-ER-613–14.

By awarding punitive damages the jury necessarily found NaphCare deliberately indifferent. The jury's punitive award provides a second, independent basis to affirm the verdict on deliberate indifference grounds. This Court has said as much. In *Castro*, the jury's punitive award proved it would have also found deliberate indifference because it meant that the jury found the risk "so obvious" and the defendants' conduct "so blameworthy." 833 F.3d at 1072.[12]

Here, the jury was instructed that it should only award punitive damages if NaphCare's conduct showed "a complete indifference to [Ms. Hill's] safety or rights" or if NaphCare acted "in the face of perceived risk." 1-ER-119. The jury was further instructed to consider "the degree

[12] In *Castro*, the punitive award supported the jury verdict that individual defendants were deliberately indifferent. Under the Fourteenth Amendment, the deliberate indifference analysis for individuals is also an objective inquiry. 833 F.3d at 1071-72.

of reprehensibility of [NaphCare's] conduct" and whether it was "particularly reprehensible." 1-ER-119–20. The jury's award, then, *necessarily* means it would have also determined that NaphCare's conduct was deliberately indifferent. *See Castro*, 833 F.3d at 1072; *cf. Benigni*, 879 F.2d at 480 (finding "no prejudice" from failure to give proper qualified immunity jury instruction "because the award of punitive damages" indicates jury would have reached same result "even with that instruction").

NaphCare's post-incident conduct shows deliberate indifference. Finally, "a municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct." *Henry*, 132 F.3d at 520. Here, NaphCare took exactly zero remedial or responsive action even after its corporate leaders reviewed the "whole spectrum" of Ms. Hill's care (such as it was) "from the beginning to end." 6-ER-987.

There is no plain error. NaphCare says that if the Estate urges affirmance on a deliberate indifference theory, then it "renews its argument" that it was "plainly erroneous" not to include a deliberate indifference element in the jury instructions. OB42 n.7. NaphCare bears

the heavy burden of showing "plain error" because it never objected to the instruction when it had the chance. 2-ER-232. And it comes nowhere close to meeting that weighty burden. To succeed, it would need to show (1) there was error; (2) it was obvious; (3) it affected NaphCare's substantial rights; and (4) it seriously impaired the fairness, integrity, or public reputation of judicial proceedings. *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018). The only argument NaphCare tries to develop—that there is insufficient evidence of deliberate indifference, *see* OB42-47—goes to prong three, which asks whether any error "prejudiced" NaphCare's substantial rights. *Hoard*, 904 F.3d at 790. Here, there can be no prejudice because "the jury would have reached the same verdict," *Chess v. Dovey*, 790 F.3d 961, 977 (9th Cir. 2015), given the evidence at trial and the jury's punitive award.

C. NaphCare's custom was the moving force behind Ms. Hill's death.

Although NaphCare challenged causation in post-trial briefing, 2-ER-241–43, it has now abandoned that argument. *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018) ("Inadequately briefed and perfunctory arguments are also waived."). For good reason: As the district court correctly found, the evidence showed that Ms. Hill

would be alive but for NaphCare's custom. 1-ER-31–33; *see also* 4-ER-515–16 ("probability of survival" was "90 to 95 percent"); 7-ER-1201–02 (Nurse Gubitz testifying she sent Ms. Hill to Medical Watch per NaphCare's custom).

II. The punitive award comports with due process.

The jury was instructed to exercise restraint in awarding punitive damages, 8-ER-1394–95, and the "large award" is therefore understood to "have been calculated by the jury to effect the twin goals of punitive damages: punishing unlawful conduct and deterring its repetition." *Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001) (cleaned up). In trying to upend that award, NaphCare's arguments are wrong on both the law and the record. The jury's award is constitutional under the three *Gore* factors.

A. NaphCare's conduct was highly reprehensible.

Reprehensibility is the "weightiest" and "most important" factor in analyzing the constitutionality of a punitive award. *Hardeman v. Monsanto Co.*, 997 F.3d 941, 972 (9th Cir. 2021); *BMW North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). After presiding over the trial, the district court found "sufficient reprehensibility justifying [the jury's]

significant punitive damages award." 1-ER-59. And in reviewing that specific determination, this Court "must accept the underlying facts as found by the jury and the district court." *Leatherman Tool Grp., Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002); *see also Hardeman*, 997 F.3d at 970 (requiring deference to district court's "findings of fact unless they are clearly erroneous"). Here, all five "aggravating factors" relevant to the reprehensibility analysis, *see Hardeman*, 997 F.3d at 972-73, show extreme reprehensibility.

Physical harm: "[C]ausing serious physical harm . . . supports finding that [a defendant's] actions were reprehensible" and that the punitive award was necessary "to deter future harm." *Id.* at 973. As far as physical harm goes, a painful death is as bad as it gets. Ms. Hill's death was slow and excruciating. The "main symptom" leading up to her death was pain. 4-ER-487; *see also* 4-ER-476. From the "acid burning" and "bacteria flourishing" in her body, she would have become confused and fearful as her heart and other organs eventually gave out. 4-ER-509. The district court thus correctly concluded that "[h]ere, the harm was physical and mortal." 1-ER-58. Even NaphCare does not dispute the seriousness of the harm. OB52-54.

Indifference or reckless disregard for health and safety: The jury found that NaphCare acted with "reckless disregard" or "complete indifference" to Ms. Hill's "safety or rights." 1-ER-119; *see supra* Section I.B.4. The district court, too, concluded that NaphCare's "custom highlights [its] 'indifference to or [] reckless disregard of the health or safety' of inmates in need of medical care." 1-ER-58. On appeal, NaphCare fails to grapple with the implication of the jury's verdict and district court's factual findings, instead glibly asserting that the Estate "failed to show that NaphCare acted with deliberate indifference towards incarcerated individuals." OB52. But "the district court's factual conclusion that [NaphCare] ignored safety risks is not clearly erroneous and . . . supports reprehensibility." *Hardeman*, 997 F.3d at 973; *see supra* Section I.B.

Vulnerability: The district court found "it relevant that 'this is a case of a large corporation and an individual'" and that the individual "was vulnerable and placed in NaphCare's care." 1-ER-58 (quoting *Hardeman*, 997 F.3d at 973); *cf. Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if

the authorities fail to do so, those needs will not be met."). NaphCare does not dispute that this factor, too, clearly shows reprehensibility. OB52-54.

Risk of repetition: The district court observed that "others may be subject to similar risk" because the violation "was committed pursuant to NaphCare's custom." 1-ER-58–59. Indeed, the jury heard that Nurse Gubitz followed the same NaphCare custom for others as she followed in Ms. Hill's case. 7-ER-1201–02; 7-ER-1228. It also learned that NaphCare made no changes after Ms. Hill's death. 6-ER-990; 7-ER-1201. Given NaphCare's "clear failure to remedy or even address" the risks posed by its custom, "the jury could properly have concluded that punitive damages were necessary to prevent" additional suffering or death "from occurring in the future." *Bains LLC v. Arco Prod. Co.*, 405 F.3d 764, 775 (9th Cir. 2005).

No mere accident: Ms. Hill's death was no "mere accident." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). As the district court concluded, NaphCare's custom constitutes "a dereliction of the very responsibility that NaphCare voluntarily assumed for its financial benefit—to provide professional medical care." 1-ER-59; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494 (2008) ("Action taken or

omitted in order to augment profit represents an enhanced degree of punishable culpability."). The risk to Ms. Hill was the obvious and foreseeable result of NaphCare's decision to jeopardize patients' lives by cutting corners.

In short, *all five* reprehensibility factors are present in this case in spades. NaphCare skates over any true analysis of reprehensibility, arguing simply that it did nothing wrong. *See* OB52-53. That argument is incorrect under the "reprehensibility" analysis for the same reasons it is wrong on the merits. *See supra* Section I.[13] Like the jury and the district court, this Court should recognize Medical Watch for what it was—a business decision to roll the dice with the lives of captive patients.

[13] Instead of meaningfully addressing the five factors, NaphCare spends half its reprehensibility discussion quibbling with two purported inconsistencies in the district court's orders, and it's wrong on both. *See* OB53-54. First, there's nothing internally inconsistent with the district court's conclusions that NaphCare "den[ied] medical care to those who needed it," 1-ER-58, but did not "intend[] for inmates to suffer or die," 1-ER-59. The point is that while NaphCare didn't want its patients to die, it put them at unacceptably heightened *risk* of death or other harm. Second, the district court's post-trial order in favor of a stay was issued when the Estate "ha[d] not yet filed its response to NaphCare's constitutional arguments." 2-ER-202.

B. The punitive-to-compensatory ratio is constitutional.

There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Gore*, 517 U.S. at 583. Certainly, when "the ratio is a breathtaking 500 to 1," the award is constitutionally suspect. *Id.* On the other end of the spectrum, "[s]ingle-digit multipliers"—like the 8.7:1 ratio here—"are more likely to comport with due process." *State Farm*, 538 U.S. at 425.

The ratio is within constitutional bounds: The Supreme Court has never invalidated a single-digit ratio on constitutional grounds, and this Court has repeatedly upheld ratios at or near 9:1. *See, e.g.*, *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. Of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (holding "constitutional sensibilities are not offended by a 9 to 1 ratio" in case involving no physical harm); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (affirming 7:1 ratio in discrimination case); *Bains*, 405 F.3d at 777 (approving ratio between 6:1 and 9:1 in case of "highly reprehensible conduct, though not threatening life or limb"). Other circuits regularly uphold similar or higher ratios. *See, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 117 (1st Cir. 2001) (10:1 ratio in § 1983 case); *Casillas-Diaz v. Palau*, 463 F.3d 77, 79-80, 86

(1st Cir. 2006) (same); *Arnold v. Wilder*, 657 F.3d 353, 362, 372 (6th Cir. 2011) (9.6:1 ratio in § 1983 case).

Courts have likewise approved ratios in line with the ratio here in cases involving the death of incarcerated people. For example, in *Morris v. Bland*, 666 F. App'x 233, 241 (6th Cir. 2016), the Sixth Circuit affirmed an overall ratio of 5:1, with individual ratios as high as 10:1, for a prisoner's death from intestinal bleeding. *See also, e.g.*, *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996) (12:1 ratio where guards abused prisoner and refused to provide him medical care); *Johnson v. Howard*, 24 F. App'x 480, 484, 487 (6th Cir. 2001) (10:1 ratio where guard used excessive force); *Murphy v. Gilman*, 551 F. Supp. 2d 677, 685-86 (W.D. Mich. 2008) (10:1 ratio where prisoner died of dehydration).

Myriad state appellate courts conducting federal due process review have upheld high-single-digit ratios in wrongful death cases involving what might be considered "substantial" compensatory awards. *See, e.g.*, *Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 756-58 (Mass. 2013) (7:1 ratio of $18 million punitive damages to $2.64 million compensatory damages); *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 348 (Ark. 2004) (5:1 ratio of $25 million punitive damages to $5 million compensatory

damages), *cert denied*, 543 U.S. 940 (2004); *Boeken v. Phillip Morris, Inc.*, 127 Cal. App. 4th 1640, 1649-50 (Cal. Ct. App. 2005) (9:1 ratio of $50 million punitive damages to $5.5 million compensatory damages), *cert denied*, 547 U.S. 1018 (2006); *Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075, 1089 (N.M. Ct. App. 2010) (10:1 ratio of $10 million punitive damages to $993,000 compensatory damages); *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 538-39 (Tenn. 2008) (5.35:1 ratio of $13.3 million punitive damages to $2.5 million compensatory damages).

These cases make clear that there is no presumptive 1:1 ratio in cases with substantial compensatory awards. *Contra* OB50; *see also infra* at 63-64. At any rate, compensatory damages of $2.75 million for Ms. Hill's suffering and death is not "substantial" for purposes of the ratio because we're talking about "the loss of a . . . woman's life." *Aleo*, 995 N.E.2d at 757. And, if anything, juries may undervalue the lives of prisoners due to their status and lack of economic damages. *See Murphy*, 551 F. Supp. 2d at 685-86 (compensatory damages for prisoner's death "misleadingly low"); *Morris*, 666 F. App'x at 241 (compensatory damages of $500,000 "deflated" due to decedent's lack of lost wages). Because "the monetary value of noneconomic harm might have been difficult to

determine," an even "higher ratio" may "be justified." *Gore*, 517 U.S. at 82.

Indeed, since punitive damages are meant to punish unlawful conduct and deter its repetition, *Swinton*, 270 F.3d at 819, NaphCare should not escape a large award because the price of Ms. Hill's life may have been difficult to value or artificially low. The compensatory damages here were entirely noneconomic due to Ms. Hill's lack of financial means. *See* 8-ER-1442–43 (NaphCare's counsel advocating in closing that any compensatory award should reflect Ms. Hill's chronic health conditions, prior incarceration, drug use, lack of car, and "difficult life"). The jury's determination that NaphCare deserved significant punishment must not be undermined just because Ms. Hill was poor, had health issues, and led a troubled life. Were it otherwise, a company could be deterred less severely if its custom caused the death of a poor person than if that same custom caused the death of wealthy person.

Moreover, even ignoring the deflated compensatory damages and characterizing them as "substantial," the ratio withstands constitutional scrutiny given the reprehensibility of NaphCare's conduct. In *Planned Parenthood*, which involved significant compensatory damages for most

of the plaintiffs, this Court's "constitutional sensibilities [we]re not offended by a 9 to 1 ratio" because the conduct was "particularly reprehensible." 422 F.3d at 963. And in *Bains*, this Court sanctioned up to a 9:1 ratio in "a case of highly reprehensible conduct, though not threatening life or limb." 405 F.3d at 777.

In cases involving reductions to a lower single-digit ratio (*e.g.*, 4:1), the given reason was that the conduct was not particularly reprehensible. *Hardeman*, 997 F.3d at 974-75 (explaining 4:1 ratio appropriate where conduct "not 'particularly egregious'"); *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir. 2020) (4:1 ratio where defendant's conduct "not so egregious"), *rev'd on other grounds*, 594 U.S. 413 (2021). This case is starkly different: "NaphCare's custom as demonstrated at trial was particularly egregious" and exhibited "sufficient reprehensibility such that due process does not require a punitive damages ratio below 8.7 to 1." 1-ER-61.

Finally, while the analysis above assumes the ratio in this case is 8.7:1, it is less than 6:1 when prevailing party attorneys' fees and costs are included. "[T]he majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should

be taken into account as part of the compensatory damages factor in the *Gore* analysis." *Blount v. Stroud*, 915 N.E.2d 925, 943-44 (Ill. App. Ct. 2009) (collecting cases). As the Tenth Circuit has observed, "[n]othing in [*Gore*] would appear to prohibit" their consideration. *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996). Both this Court and others have thus counted attorneys' fees as part of the compensatory award in a ratio analysis. *See, e.g.*, *King v. GEICO Indem. Co.*, 712 F. App'x 649, 650-51 (9th Cir. 2017); *Coker Equip. Co., Inc. v. Wittig*, 366 F. App'x 729, 733 (9th Cir. 2010); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 236-37 (3d Cir. 2005); *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 836 (Wash. 2012) (en banc). This Court should endorse that approach again and count the requested $1,830,922.90 in fees and costs on the "compensatory" side of the ledger. SER-13–14.[14] This is particularly so given the central role of § 1988 fee awards in the enforcement of constitutional rights. *Seattle Sch. Dist. No. 1 v. State of Wash.*, 633 F.2d 1338, 1348 (9th Cir. 1980).

[14] This amount does not include the considerable fees incurred defending this appeal.

NaphCare makes two contrary arguments, neither of which have merit: First, NaphCare asserts the existence of a fictional 1:1 ratio as the presumptive maximum for purposes of due process. OB50-51. It does so by selectively quoting *State Farm* while ignoring its most important teachings and the many cases that religiously apply it. For starters, the triple-digit ratio there, 145:1, was more than sixteen times the single-digit ratio here. 538 U.S. at 412. And the Court's suggestion that "perhaps" 1:1 is "the outermost limit" applies only to relatively non-reprehensible conduct with substantial compensatory awards. *Id.* at 425.[15] Moreover, the Court in *State Farm* did not decide on a ratio; it remanded to the Utah Supreme Court, which then imposed a 9:1 ratio in "unwavering fidelity to the letter and spirit of the [Supreme Court's] mandate." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410-11 (Utah 2004). After that, certiorari was denied. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 543 U.S. 874 (2004). At any rate, NaphCare's "presumptive maximum" argument is just "a bright-line ratio" by another

[15] Indeed, the Court had just explained that higher ratios "may comport with due process" in cases with egregious acts and low damages and only posited a potential 1:1 ratio in "[t]he converse" situation (*i.e.*, non-egregious acts and large compensatory damages). *State Farm*, 538 U.S. at 425.

name, which the Court in *State Farm* "decline[d] again to impose." 538 U.S. at 425.

Second, NaphCare makes an equally meritless argument that, putting due process completely aside, a "common law" cap of 1:1 should apply in this (and therefore in every) civil rights case. OB51.[16] Like the district court, this Court should conclusively reject NaphCare's "novel and sweeping theory." 1-ER-64–65. The basis of NaphCare's faulty argument rests on *Exxon Shipping*, a maritime case where the Court was "reviewing a jury award for conformity with maritime law." 554 U.S. at 502. Its holding was specifically limited to "*such maritime cases*." *Id.* at 513 (emphasis added); *see also* Erwin Chemerinsky, *A Narrow Ruling on Punitive Damages*, 44 Trial 62-63 (Sept. 2008) ("[T]he Court was clear that it was dealing only with punitive damages in maritime cases."). And in the intervening sixteen years since the 2008 *Exxon* decision, NaphCare cannot point to a single case applying it in the § 1983 context or, indeed,

[16] NaphCare presses this argument despite telling the district court it "was wrong" to argue "this maritime thing." SER-21.

to any case outside maritime. Every court to have addressed that argument has explicitly rejected it.[17]

And rightly so: *Exxon*'s maritime limit makes no sense in the § 1983 context. Unlike maritime law, where the "paramount goal" is "uniformity and predictability," *Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-60 (9th Cir. 1997) (cleaned up), § 1983's primary aim is "compensation and deterrence." *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1103 (9th Cir. 2014). A strict 1:1 limit in civil rights matters would do the opposite with profound societal implications—particularly where compensatory damages are low and a matching punitive amount would be a slap on the wrist. NaphCare does not engage with the aims of § 1983 despite this Court's caution that any attempt to apply a federal common law rule for punitive damages to constitutional torts "would have to make such modification or adaption to the common law as might be necessary

[17] *See, e.g.*, *Hardy v. City of Milwaukee*, 88 F. Supp. 3d 852, 879-80 (E.D. Wis. 2015) ("readily reject[ing]" for "multiple reasons" invitation to extend *Exxon* to § 1983 case); *Henderson v. Young*, No. 05-cv-234, 2008 WL 11454792, *8-9 (N.D. Cal. July 17, 2008) (rejecting "unthinking[] incorporat[ion]" of *Exxon* to § 1983 because "the context and purpose of § 1983 counsel strongly against the extension"); *Valarie v. Mich. Dep't of Corr.*, No. 2:07-cv-5, 2008 WL 4939951, *7 (N.D. Mich. Nov. 17, 2008) (conducting "close analysis" of *Exxon* and concluding "that Plaintiff is not limited to a 1:1 ratio").

to carry out the purpose and policy of § 1983." *Mendez v. Cnty. of San Bernadino*, 540 F.3d 1109, 1122-23 (9th Cir. 2008) (cleaned up), *overruled on other grounds by Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014).

In fact, the only case NaphCare cites for the proposition that *Exxon*'s limit should extend to § 1983 cases undermines its argument. That case states that "[t]he Supreme Court has not addressed whether there is a nonconstitutional limit on punitive-damages awards under § 1983." *Beard v. Wexford Health Sources, Inc.*, 900 F.3d 951, 956 (7th Cir. 2018) (Easterbrook, J.). The opinion wonders about how to divine such a limit, which might involve empirical analysis of jury verdicts, looking to historical or state common law, and/or "consider[ing] how other federal laws handle damages." *Id.* at 956-57. *Beard* did not answer this question—in dicta or otherwise. It simply "raise[d] the subject." *Id.* at 957.

Because NaphCare provides no support for why—and more critically, *how*, given the operational complexities flagged by this Court and the Seventh Circuit—this Court should be the first anywhere to import the law of the sea to the law of civil rights, this Court need not

consider it. *Cal. Pac. Bank*, 885 F.3d at 570 ("Inadequately briefed and perfunctory arguments are [] waived."); *see also* Fed. R. App. P. 28(a)(8)(A). But if this Court does reach the issue, for the many reasons just described, it should reject NaphCare's ploy to evade the jury's fair and reasoned determination.

C. No comparable penalties exist to aid in the Court's analysis.

NaphCare completely misconstrues the third and final guidepost of the *Gore* test. OB54-58. This factor examines the difference between the punitive damages awarded by the jury and any civil fines or penalties authorized or imposed by statute. *Hardeman*, 997 F.3d at 975. This involves looking for "*legislative judgments* concerning appropriate sanctions for the conduct at issue" if any exist. *Gore*, 517 U.S. at 583 (cleaned up) (emphasis added).

Here, the district court correctly concluded that there are no comparable civil statutory sanctions. 1-ER-63.[18] Where "there is no truly comparable civil penalty," courts simply "do not consider this factor."

[18] The Civil Rights of Institutionalized Persons Act is probably the closest analog, but it only authorizes equitable relief and doesn't provide for monetary penalties. *See* 42 U.S.C. § 1997, *et seq.*

Ramirez, 951 F.3d at 1037 (cleaned up). This guidepost therefore does not support reducing the punitive award. *See, e.g.*, *Hardeman*, 997 F.3d at 975 ("[T]his guidepost is not particularly helpful here."); *Riley v. Volkswagen Grp. of Am., Inc.*, 51 F.4th 896, 904 (9th Cir. 2022) ("[T]his factor does not require" reduction of 8:1 ratio where "civil penalties in [] statutes" were "not directly analogous"). If anything, "that Congress has not seen fit to impose any recovery caps in cases under . . . 1983[], although it has had ample opportunity to do so," counsels in favor of upholding the award. *Swinton*, 270 F.3d at 820.

In a brazen act of misdirection, NaphCare argues that the Estate was required to "offer a[] similar case of punitive damages for *Monell* liability." OB54. This "errant[]" play did not fool the district court, and it should not fool this Court either. 1-ER-61–62. Not only does *Gore* not provide for this mode of analysis, *see supra* Section II, but the Supreme Court has explained that this is precisely the *wrong way* of going about things. Punitive damages awards depend "on a host of facts and circumstances unique to the case" because they "are the product of numerous, and sometimes intangible, factors." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). So in *TXO,* the Court

expressed great "skeptic[ism]" about comparing punitive awards from other cases "[a]s an analytical approach to assessing a particular award." *Id.* at 458. And then in *Gore* and *State Farm,* the Court subsequently adopted a three-prong inquiry that notably omits any reference to punitive awards in other cases, directing courts instead to look to *statutory* penalties if any exist. *Gore*, 517 U.S. at 583-84; *State Farm*, 538 U.S. at 418.

Consistent with that reasoning, this Court "find[s] little comfort in trying to discern parameters from other cases." *Swinton*, 270 F.3d at 819. And it has specifically counseled *against* using the very type of "scatter graph" NaphCare urges this Court to consider: Such graphs "push[] the decision toward a mathematical bright-line, a path that we eschew in accord with the Supreme Court guidelines." *Id.* Eschewing the graph makes particular sense here because the majority of § 1983 *Monell* defendants are municipalities that are immune from punitive damages and could never show up on any scatterplot. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). NaphCare, a large for-profit corporation, is different.

Even if this Court had not expressly cautioned against "scatter graph[s]," *Swinton*, 270 F.3d at 819, NaphCare's is wildly underinclusive. Appellate courts frequently uphold ratios at least as high as the one here for § 1983 claims, including cases with significant compensatory awards. *See supra* Section II.B. Moreover, cases involving mistreatment in detention facilities regularly generate comparable ratios. *See supra* Section II.B. And multimillion-dollar punitive awards are not uncommon in cases involving serious injury or death. *See, e.g.*, *Hardeman*, 997 F.3d 941 ($20 million where defendant caused cancer); *Est. of Moreland v. Dieter*, 395 F.3d 747, 756 (7th Cir. 2005) ($15 and $12.5 million for death of prisoner); *Boeken*, 127 Cal. App. 4th at 1649 ($50 million where plaintiff contracted cancer); *Union Pac. RR*, 149 S.W.3d at 348 ($25 million for death); *Aleo*, 995 N.E.2d at 756-58 ($18 million for death); *Flax*, 272 S.W.3d at 538-39 ($13.3 million for death).

So, far from an "outlier," OB56, the punitive award is consistent with awards approved by this Court and many others and fully comports with due process.

CONCLUSION

The Court should affirm.

Date: May 3, 2024

Respectfully Submitted,

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Pursuant to Federal Rule of Appellate Procedure 32 and 9th Circuit Rule 32, I certify that:

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Date: May 3, 2024

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I hereby certify that on May 3, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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