No. 08-1268 APR 13 2009

In The

Supreme Court of the United States

KENT SCHOOL DISTRICT, et al.,

Cross-Petitioners,

v.

TRUTH, an unincorporated association, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION

GERALD J. MOBERG
Counsel of Record
MOBERG & ASSOCIATES
451 Diamond Drive
Ephrata, WA 98823
(509)754-2356

MICHAEL B. TIERNEY
MICHAEL B. TIERNEY, P.C.
2955 80th Avenue SE,
Suite 205
Mercer Island, WA 98040
(206)232-3074

CHARLES W. LIND
Kent School District
12033 SE 256th Street
Kent, WA 98030
(253)373-7842

Counsel for Cross-Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

If this Court reviews the Ninth Circuit's decision, should it also review the lower court's holding that a plaintiff can seek injunctive relief under 42 U.S.C. § 1983 in the absence of a government policy that causes the alleged harm, a holding in conflict with decisions of this Court and the First, Second, Fourth and Eleventh Circuits?

LIST OF PARTIES

Cross-Petitioner incorporates by reference the List of Parties set forth in Truth's Petition.

CORPORATE DISCLOSURE STATEMENT

The Kent School District is a government entity. Neither the District nor the individual Cross-Petitioners have parent companies or non-wholly owned subsidiaries.

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For all of the reasons that will be set forth in the Brief for the Respondents in Opposition to Petition for Certiorari, the decision of the Ninth Circuit does not warrant review by this Court. However, if this Court were to review the lower court's ruling, then this Court should also review the Ninth Circuit's holding that the existence of a government policy causing the alleged harm is not a necessary condition for injunctive relief under 42 U.S.C. § 1983. The official policy requirement is a threshold determination that precedes consideration of the constitutional issues raised by Truth's Petition. Thus, reversal of the Ninth Circuit's ruling on the government policy issue will obviate the need to reach the constitutional issues. However, it will not prevent review of the Equal Access Act issues.

OPINIONS BELOW

Cross-Petitioner incorporates by reference the statement of the Opinions Below set forth in Truth's Petition.

JURISDICTION

Cross-Petitioner incorporates by reference the jurisdictional statement in Truth's Petition, and adds the following: Cross-Petitioners are relying on the

procedures set forth in SUP. Ct. R. 12.5. The date of docketing of Truth's Petition for Writ of Certiorari is March 12, 2009.

STATUTORY PROVISIONS

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Factual Background

In September 2001 two students at Kentridge High School in the Kent School District, Sarice Undis and Julianne Stewart, submitted a proposal to establish a Christian Bible club named "Truth." Pet. App. 3a-4a. The first proposal called for membership to be open to all students. Pet. App. 4a.

At the time of Truth's first proposal, an appeal to the Ninth Circuit was pending in *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003), a case arising in the Western District of Washington where the Kent School District is located. In *Prince*, the district court had ruled that a Christian Bible club could not be established as an official Associated Student Body ("ASB") organization. 303 F.3d at 1077. On September 9, 2002, the Ninth Circuit issued its opinion in *Prince* reversing the district court ruling.

On February 2, 2003, Truth submitted a new club proposal. The second proposal provided for membership to be open to all students, but restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Pet. App. 5a. On April 1, 2003, the ASB Council voted to deny the application. Pet. App. 6a.

On April 3, 2003, Undis, Stewart and Truth filed this action seeking injunctive and declaratory relief as well as nominal damages. Pet. App. 6a.

On April 9, 2003, Assistant Principal Anderson sent Undis and Stewart a letter informing them of their right to resubmit Truth's application with changes as discussed at the ASB Council meeting. Pet. App. 7a. On April 24, 2003, Stewart and Undis submitted a third club proposal. This proposal restricted general membership by making it "contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." Pet. App. 117a. The third proposal also required voting members to sign a statement of faith. Pet. App. 7a. On April 25, 2003, the ASB Council voted to deny the application. Pet. App. 8a.

On May 6, the attorney for Truth wrote the School District asking that, if there were a right to appeal a decision of the ASB, his letter serve as a formal request for appeal. Pet. App. 8a. In response, Anderson wrote Undis and Stewart informing them that they could discuss the denial of club status with the High School Principal and, if unsatisfied, with the District Superintendent; or they could alternatively contact the School District's ombudservices office. Pet. App. 118a. Neither Undis nor Stewart ever sought a final decision from any of these officials. Pet. App. 128a.

B. Proceedings Below

1. Cross-Motions for Summary Judgment and District Court Decision

Upon cross-motions for summary judgment, the district court granted summary judgment to Cross-Petitioners on the constitutional and § 1983 claims because of the absence of any acts attributable to the School District's policy-making authority, pursuant to the doctrine established in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Pet. App. 129a. The individual defendants were likewise not liable under § 1983 because they were sued in their official capacity only, which the district court found to be essentially identical to a suit against the government body. Pet. App. 130a. In making this ruling, the district court addressed and rejected three arguments advanced to establish liability under *Monell*. Pet. App. 122a-128a.

First, the district court found that the School District Board of Directors was the sole policy-maker under Washington law and that the District Board had "never decided one way or the other whether the Club should be granted ASB status," thus failing to establish the existence of an "official policy" within the meaning of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. App. 122a. Second, under the analysis set forth in *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the district court found no evidence that the School Board was deliberately indifferent to the risk of violating

constitutional rights. Pet. App. 124a. Third, using the tests established in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the district court found no evidence that school officials sought to insulate themselves from liability by referring the matter to the ASB. The court specifically found that "the shifting nature of Plaintiffs' proposals warranted repeatedly returning to the beginning of the process, namely the ASB Council's recommendation." Pet. App. 129a. The court further found that, even after the denial by the ASB Council, "Plaintiffs never sought a final decision" from any of the officials identified in the Assistant Principal's May 12, 2003 letter as having authority over the ASB. Pet. App. 128a.

The district court then went on to analyze Truth's Equal Access Act claims. Despite dismissing the § 1983 and constitutional claims, the district court also proceeded to analyze the First Amendment issues in the event its *Monell* ruling was deemed erroneous. Pet. App. 135a.

2. Ninth Circuit Decision

In its initial opinion and each of its subsequent opinions, the Ninth Circuit used identical language to reverse the district court's ruling on the *Monell* issue. Pet. App. 19a-20a, 56a-57a, 91a-92a. In doing so, the court below relied on *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989), where it had previously held that *Monell's* official policy requirement does not apply where plaintiffs seek only prospective relief.

Pet. App. 19a. The panel then went on to analyze both Truth's Equal Access Act claims and its First Amendment claims.

Chaloux was a class action brought to challenge Idaho garnishment statutes. The plaintiffs there did not directly sue the state, which had created the statutes, but instead sought injunctive relief under § 1983 against county sheriffs whose duty it was to enforce the statutes. *Id.* at 249-50. The district court dismissed the action based on the absence of a *Monell* official policy or custom. *Id.* The Ninth Circuit reversed, holding that *Monell* was crafted to "alleviate the imposition of financial liability on local governments." *Id.* at 250. The *Chaloux* court found that the financial justification it perceived as the basis for *Monell* was "notably absent when the relief sought is an injunction." *Id.* at 251.

The Ninth Circuit panel in *Truth* made no attempt to distinguish *Chaloux* or limit its holding and held that it was bound by the precedent. Pet. App. 19a-20a.

C. Reasons for Granting the Cross-Petition if Truth's Petition Is Granted

1. Resolution of the *Monell* Issue Must Necessarily Precede Consideration of the Constitutional Claims

If this Court holds that the existence of an official policy or custom is a required element of Truth's § 1983 claim, then this Court will not reach the

constitutional issues raised. Instead, this Court's review will focus exclusively on the club's Equal Access Act claim.

2. The Ninth Circuit Holding Conflicts with This Court's Decision in *Monell*

The *Monell* decision answered a question of statutory interpretation, determining whether and when a municipal entity is a "person" subject to suit under § 1983. In rejecting respondeat superior liability and in holding that a government entity is a "person" subject to suit only when the harm in question results from an official policy or custom, this Court made no distinction between suits for damages and suits for injunctive or declaratory relief. To the contrary, all forms of relief were included in the holding of *Monell*.

> . . . Local governing bodies, therefore, can be sued directly under § 1983 for *monetary*, *declaratory*, or *injunctive relief* where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers . . .
>
> On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant

> to official municipal policy of some nature caused a constitutional tort.

Monell, 436 U.S. at 690-91 (emphasis added).

Contrary to the interpretation of the *Chaloux* court, the holding of *Monell* is not simply a judicially-created device to limit the financial liability of local governments. Instead, the required existence of an official policy carries out the intent of Congress that local governments would be "persons" subject to suit under § 1983 only in limited circumstances. *Monell* clearly defines these circumstances, holding that local governments are "persons" under § 1983 only if an official policy or custom has caused the constitutional harm alleged. Nothing in *Monell* or the legislative history of § 1983 indicates that Congress intended the definition of "person" to vary from case to case depending on how much money was at stake for the local government. Thus, whether the plaintiff seeks declaratory relief, injunctive relief, substantial monetary damages, mere nominal damages, or only attorney fees is irrelevant.

Even if potential financial consequences were a relevant factor, the impact of attorneys' fees in § 1983 cases contradicts the reasoning of the *Chaloux* court. In many § 1983 cases, even those seeking monetary damages, the attorneys' fees awards can far outstrip the other financial impacts on local government. The case at bar presents a perfect example. Here, if Truth is allowed to maintain its § 1983 claim and prevails, the Kent School District will be required to pay the

substantial attorneys' fees generated in the district court and the subsequent appellate proceedings.

No District policy is implicated in this case, and no District official ever rendered a final decision on any of the club's applications. Consequently, the District is not a "person" who has caused a deprivation of rights within the meaning of § 1983. Holding otherwise would greatly distort the scope of the statute, a distortion starkly highlighted by the possibility that the District could be liable in this case for failing to approve a club application that was not yet even in existence when the lawsuit was filed. Nothing in the extensive jurisprudence of § 1983 would support such a result.

3. The Ninth Circuit Decision Conflicts with Decisions of at Least Four Other Circuits

The First Circuit has rejected the argument that a claim for prospective injunctive relief could be maintained in the absence of an official policy. *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 71 (1st Cir. 2002). The *Dirrane* court specifically contradicted *Chaloux*, stating that it was "on its face at odds with *Monell* itself." *Id.*

The Second Circuit also has rejected a claim for injunctive relief in the absence of an official policy and also found the reasoning of *Chaloux* inadequate. *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2nd Cir. 2007).

> To the extent *Chaloux* proposes to exempt all claims for prospective relief from *Monell's* policy or custom requirement, we are not persuaded by its logic. *Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a municipal policy or custom in suits seeking monetary, declaratory, or injunctive relief.

Id. (citations omitted).

In *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995), while not mentioning *Chaloux* specifically, the Fourth Circuit contradicted the Ninth Circuit ruling. The *Greensboro* court held that the plaintiffs were not entitled to injunctive relief under § 1983 because they could not establish the existence of a municipal policy. *Id.* at 966-67.

In vacating a preliminary injunction granted by the district court, the Eleventh Circuit also applied the municipal policy requirement to requests for injunctive relief under § 1983. *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994).

Two other circuits have indicated a reluctance to follow *Chaloux*. In *Leary v. Daeschner*, 228 F.3d 729 (6th Cir. 2000), the Sixth Circuit acknowledged the split among the circuits and assumed, "without deciding, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than

damages." *Id.* at 740, n.4 (citations omitted). The Seventh Circuit also commented on the split among the circuits in *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002), noting that "the predominate though not unanimous view is that *Monell's* holding applies regardless of the nature of the relief sought." *Id.* at 468 (citations omitted).

The *Chaloux* decision has received criticism even within the Ninth Circuit. In her concurring opinion in *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993), Judge Fletcher acknowledged that *Chaloux's* "holding is in conflict with *Monell*." *Id.* at 1477. Judge Fletcher went on to urge the Ninth Circuit to search for an opportunity to revisit *Chaloux* stating that "where a satisfactory alternative presents itself, we should avoid the further propagation of an unsound legal proposition that is at odds with Supreme Court precedent." *Id.* at 1478.

CONCLUSION

If this Court were to review the constitutional and Equal Access Act issues raised by Truth's petition, it would necessarily, as a threshold matter, need to review the "unsound legal proposition" that underlies the Ninth Circuit's *Monell* ruling. Review of that issue by this Court would avoid "further propagation" of that defective doctrine.

Respectfully submitted,

GERALD J. MOBERG
Counsel of Record
MOBERG & ASSOCIATES
451 Diamond Drive
Ephrata, WA 98823
(509)754-2356

MICHAEL B. TIERNEY
MICHAEL B. TIERNEY, P.C.
2955 80th Avenue SE,
Suite 205
Mercer Island, WA 98040
(206)232-3074

CHARLES W. LIND
Kent School District
12033 SE 256th Street
Kent, WA 98030
(253)373-7842

Counsel for Cross-Petitioners