No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

PHYLLIS BROWN, Petitioner

v.

DEKALB COUNTY, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court's ruling in *McMillian v. Monroe County*, 520 U.S. 781 (1997), be construed as raising a presumption that States exercise effective control over such autonomous officials as county sheriffs, in order to categorize them as "arms of the State" for purposes of determining liability under 42 U.S.C. 1983?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption, except that the defendants below included Sidney Dorsey, Security Investigation Division, Inc., Mecca Security, Inc., Melvin D. Walker, Patrick Cuffy, Paul Skyers and David I. Ramsey. App. 3a. These parties are not relevant for purposes of the current petition.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Phyllis Brown, respectfully prays that a writ of certiorari issue to review the November 14, 2005, judgment and opinion of the Georgia Court of Appeals in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the Georgia Court of Appeals of November 14, 2005, *Brown, et al. v. Dorsey et al.*, is reported at 276 Ga. App. 851, 625 S.E.2d 16 (Ga. Ct. App. 2005) and is reprinted at App. 3-18a. The Supreme Court of Georgia's denial of certiorari was issued on April 25, 2006, and is reprinted at App. 2a. That court's denial of Petitioner's motion for reconsideration was issued on May 19, 2006, and is reprinted at App. 1a.

The Georgia Court of Appeals' opinion was issued in response to an appeal from an order of the Superior Court of Gwinnett County on September 10, 2003, granting the Motion to Dismiss as a Party of DeKalb County, Georgia, reprinted at App. 21-23a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Georgia Court of Appeals of November 14, 2005. The Georgia Supreme Court denied a request for certiorari on April 25, 2006, App. 2a, and a request for reconsideration of that denial was rejected on May 19, 2006. App. 1a. On July 18, 2006, Justice Thomas granted a request for extension of time to file a petition, up to and including September 7, 2006.

The U.S. Supreme Court has jurisdiction to review final judgments rendered by the highest court of a State by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition implicates the Eleventh Amendment to the Constitution of the United States of America. The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. 11.

This petition also involves 42 U.S.C. § 1983, the federal statute which provides for a private legal remedy to secure rights deprived by others under color of law. It is reprinted at App. 24a.

STATEMENT

1. As recounted by the court below, see App. 3a-6a, Derwin Brown was the sheriff-elect of DeKalb County, Georgia, when he was assassinated on December 15, 2000. Elected in August 2000, he was just days away from taking office. He was murdered at the direction of the then-incumbent Sheriff of DeKalb County, Sidney Dorsey, whom Brown had defeated for re-election. App. 4a & n.2.

Derwin Brown's widow, Phyllis Brown, filed an action against the County, former DeKalb County Sheriff Sidney Dorsey, former Sheriff's Department employees Patrick Cuffy and Melvin Walker, and their co-conspirators, Paul Skyers and David Ramsey. App. 3a. Mrs. Brown asserted claims against the County pursuant to 42 U.S.C. § 1983 for wrongful death,

pain and suffering, and special damages resulting from the violation of Brown's First and Fourteenth Amendment rights. Id. Mrs. Brown alleged that the County is liable to her for the death of her husband because Dorsey used the powers of his office to accomplish his murder. App. 4a (citing *Dorsey v. State*, 279 Ga. 534 (615 SE2d 512) (2005) (affirming Dorsey's convictions for malice murder, two counts of violating the Georgia Racketeering and Corrupt Organizations Act ("RICO"), violation of oath by a public officer, and eight counts of theft by taking for using sheriff department resources to pursue his criminal ends)). Specifically, Petitioner "alleged that Dorsey utilized the sheriff's department's resources and manpower to kill her husband; that Dorsey and the other individual defendants committed the murder under color of state law, and that as the sheriff, Dorsey was the final policymaker for the County in matters concerning use of deadly force by sheriff's department personnel, the direction and control of deputies and jailers, and the direction, control, and use of sheriff's department materials, equipment and resources." App. 6a.

2. On January 27, 2003, DeKalb County filed a motion to dismiss it as a party to the action, arguing that this Court has placed strict limitations on local government's liability under 42 U.S.C. § 1983. App. 21a. Following oral argument on the County's motion to dismiss, Mrs. Brown amended her complaint to assert that Dorsey acted, pursuant to his authority as sheriff, "to implement a policy of keeping himself in office by eliminating his competition." App. 6a. On September 10, 2003, the trial court granted the County's motion for the reasons that the Plaintiff, Mrs. Brown, had (1) failed to show that the Sheriff of DeKalb County is a county policymaker and (2) failed to identify either an officially promulgated county policy, or an unofficial custom or practice binding DeKalb County for Defendant Dorsey's actions in the murder of Brown. App. 22a.

The Georgia Court of Appeals denied an application for interlocutory appeal. App. 3a n.1.

On August 6, 2004, Plaintiff filed a motion for Partial Summary Judgment against Defendants Dorsey and Cuffy as to Liability. App. 19a. Noting that evidence establishing that Cuffy and others conspired with Dorsey to murder Derwin Brown was unrebutted, the trial court granted the motion as to those Defendants' liability in their individual capacities. App. 20a. As to liability in their official capacities as former sheriff and sheriff's department employees, however, the trial court noted that "the purpose of bringing suit against any of these individual Defendants in his official capacity is to attempt to establish DeKalb County's liability and to recover from DeKalb County." App. 19a. Accordingly, the trial court denied the motion for summary judgment and flatly stated that "there can be no recovery against DeKalb County." App. 20a.

The case proceeded to trial on damages only against Dorsey, Cuffy, and Skyers. Following a four day jury trial, judgment was entered on the verdict for $326,136,398 in compensatory damages and $450,000,000 in punitive damages. App. 4a.

3. Seeking to recover the compensatory damage award from the County, Mrs. Brown brought an appeal to the Georgia Court of Appeals. App. 3a. On November 14, 2005, that court issued its opinion. See *Brown, et al. v. Dorsey et al.*, 276 Ga. App. 851, 625 S.E.2d 16 (Ga. Ct. App. 2005). App. 3a-18a.

After stating the requirements for a prima facie § 1983 claim, that court reviewed the meaning of "policy" and "custom" before declaring the rule of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), controlling: "municipal liability attaches where – and only where – a deliberate choice to follow a course of action is made among various alternatives

by the official or officials responsible for establishing final policy with respect to the subject matter in question." App. 8a. In affirming the opinion of the trial court, the Georgia Court of Appeals proceeded to answer two questions.

First, the court declined to rule that the Sheriff of DeKalb County "was invested with final policymaking authority sufficient to render the County liable under § 1983 for his evil, ultra vires actions." App. 9a. Noting that "no Georgia appellate court has directly addressed whether the sheriff acts with final policymaking authority for the county or for the state in the context of a § 1983 action," the court proceeded to cite two divided Eleventh Circuit plurality opinions and an off-point Georgia Supreme Court decision to justify its conclusion that the trial court did not err in dismissing the County as a party to Mrs. Brown's action. App. 9-13a.

Specifically, the Georgia Court of Appeals held that "the County has no control over the sheriff's department personnel, including its deputies and jailors. Therefore, the County cannot be held liable under § 1983 for Dorsey's use of those personnel in connection with his heinous plot to kill Derwin Brown." App. 13a. What is more, the Court of Appeals concluded, "[i]n the absence of the ability to control" funds which it allocates to the sheriff, "the County cannot be held liable for the sheriff's use of departmental resources to commit § 1983 violation." Id. In reaching this conclusion, the Georgia Court of Appeals expressly relied on its reading of the controlling federal-law test for section 1983 actions, citing and discussing *Monell v. Dept. of Social Svcs.*, 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); and *McMillian v. Monroe County*, 520 U.S. 781 (1997). See App. 4a, 7a, 8a, 12a,13a.

The Georgia Court of Appeals ruled on a second question as well. "[F]or reasons of judicial economy," the court addressed "the trial court's ruling that Mrs. Brown failed to identify either an officially promulgated county policy or an unofficial custom or practice binding the County for Dorsey's actions in the murder of Brown." App. 14a. Reviewing this Court's holdings in *Monell* and *Pembaur*, the court noted the limitations on respondeat superior theories and held forth on the scope of municipal liability under § 1983 for the actions of individual policymakers. App. 14a-18a. Judge Mikell, writing for the Georgia appeals court, first noted his distaste for this Court's holding in *Pembaur* and his preference for the dissent's opinion in that case. App. 15a. Nevertheless, he acknowledged that "*Pembaur* is binding precedent and squarely on point." Id. He then faithfully restated the rule of that decision, and held that "Sheriff Dorsey had final authority to make policy regarding the use of deadly force by his subordinates." App. 16a.

The Georgia appeals court thus affirmed one of the two grounds given by the trial court for granting dismissal of DeKalb County as a party, concluding that while then-Sheriff Dorsey was a final policy-maker for purposes of section 1983 liability, he was acting as a state (and not a county) official. App. 17a-18a. Petitioner obviously takes no issue with the lower court's ruling on section 1983 policy-maker jurisprudence; it is only the holding that Dorsey was a state official which is at stake in this petition.

4. Petitioner next sought review from the Supreme Court of Georgia. App. 2a. That petition was denied on April 25, 2006, over the dissent of two justices. Id. A subsequent Motion for Reconsideration was also denied by a divided Georgia Supreme Court on May 19, 2006. App. 1a. This timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

THIS COURT'S REVIEW IS NECESSARY TO CLARIFY THE STATUS, UNDER SECTION 1983, OF LOCAL OFFICIALS' EXERCISING INDEPENDENT AUTHORITY

This petition invites the Court to rectify both the misinterpretation and misapplication of its opinion in *McMillian v. Monroe County*, 520 U.S. 781 (1997). For thirty years this Court has reaffirmed the broad remedy for violations of federal rights that Congress intended when it passed § 1983. See *Monell*, 436 U.S. at 690-91. Indeed, since *Monell* first declared that the governments of state political subdivisions may be held liable for their constitutional torts, this Court's rulings have consistently maintained a rule of municipal liability under § 1983 for "policies and customs" and also for "single, discrete acts" of final policymakers. *Pembaur,* 475 U.S. at 483-84.

Moreover, the Court has "considered several cases involving isolated acts by governmental officials or employees . . .[and has] assumed that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Praprotnik,* 485 U.S. at 123 (plurality opinion, O'Connor, J.) (citing *Owen v. City of Independence,* 445 U.S. 622, 633, 655 n.39 (1980); *Newport v. Fact Concerts, Inc.*, 453 U.S. 257, 259 (1981); *Pembaur*, 475 U.S. at 480); see also *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989). Nothing in *McMillian* changed the fundamental analysis: whether a section 1983 defendant is a state or local

official depends on whether that defendant represented a state or a local government entity when engaged in the events at issue.

In the decade following the *McMillian* decision, however, there has been a sea-change in section 1983 political subdivision liability. Sheriffs, formerly assumed to be county officials, have contested their status as local officials and have frequently succeeded in defeating attempts by plaintiffs to pursue official-capacity claims against them by invoking the Eleventh Amendment and asserting that they are actually state officials for purposes of section 1983 liability. See, e.g., *Grayson v. Peed,* 195 F.3d 692, 697 (4th Cir. 1999) (Virginia sheriffs granted immunity in operation of jails); *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (Georgia sheriffs granted immunity for jail operations); *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005) (Vermont sheriffs granted immunity in cases involving courthouse security and protest permits); *Venegas v. County of Los Angeles*, 87 P.3d 1, 3 (Cal. 2004) (California sheriffs granted immunity when performing law enforcement duties).

Some courts have openly recognized the shifting sands of section 1983 municipal liability before and after *McMilllian.* See *Manders v. Lee*, 338 F.3d at 1328; *Kennedy v. Widdowson*, 804 F. Supp. 737, 741-42 (D. Md. 1992) ("Several federal courts have stated that a sheriff may be considered as a state or local official depending on whether his challenged actions arise out of his traditional law enforcement functions, which are considered statewide in nature.") (citations omitted). But *McMillian* was a continuation of this Court's thirty-years of precedent on county liability under § 1983. It was not intended to change the playing field. *McMillian*, 520 U.S. at 786, 796 (upholding *Monell* and *Praprotnik*).

While *McMillian* mandates an analysis that is both state

and function specific, and, thus, one would anticipate differences in outcomes, judicial application of the various factors in this analysis show no consistency. As a result, in recent section 1983 cases, sheriffs alleged to have violated individuals' federal rights have been variously regarded as state policymakers, see, e.g., *Manders v. Lee*, 338 F.3d at 1328) (sheriff is an arm of the State in establishing use-of-force policy at county jail), county officials, see, e.g., *Brewster v. Shasta County*, 275 F.3d 803, 808 (9th Cir. 2001) (sheriff acts for county when investigating crime and when administering jails), and independent, autonomous officers controlled neither by the state nor the county, see, e.g., *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998) (holding that if a sheriff is not county agent it does not follow that he is a state agent, but is an independently elected official not subject to the control of the county in most respects).

The only explanation for these deviations seems to be disparity in the relevance and weight which various courts attribute to particular factors and considerations in the section 1983 officer status inquiry. In our federal system, uniform results are certainly not required. As this Court noted in *McMillian*, there is no need for "national characterization" of sheriffs. 520 U.S. at 795. There is, however, a need for a uniform test to be applied by both state and federal courts in resolving the ultimate federal issue of section 1983 liability.

42 U.S.C. § 1983 is an extensively litigated statute, with literally thousands of cases brought each year in an effort to remedy the most egregious violations of federally guaranteed rights. It is for these reasons that this Court, in the wise exercise of its plenary review powers, chose to address the unique, Alabama-specific questions raised by *McMillian*. Id. at 786-94. It is for those reasons that the holding of that case was state specific: "*Alabama* sheriffs, when executing their law

enforcement duties, represent the *State of Alabama*, not their counties." Id. at 794 (emphases added). Most importantly, it is also for these reasons that this Court chose to keep the *Monell/Pembaur* rule intact. See id. at 786. Nowhere did this Court suggest an intent to make a wholesale change in the liability of county sheriffs under § 1983. Nevertheless, that has been the unfortunate and confusing result as courts have read *McMillian* too broadly and reconfigured the limits of section 1983 liability for such autonomous local officials as sheriffs.

This petition raises an even more compelling set of issues than *McMillian* did – not only are courts increasingly divided as to the scope of county liability under § 1983, they are also manifestly unclear about the sources of the state immunity which limits liability for some officials. As noted above, the scope of § 1983 liability for sheriffs depends on the legal superstructures established by state law. See *Pembaur*, 475 U.S. at 483, *Praprotnik,*, 485 U.S. at 118, *Jett*, 491 U.S. at 795; *McMillian,* 520 U.S. at 795) (citing *Pembaur, Praprotnik,* and *Jett*). This in no wise makes this a question solely one of state law, however.

Rather, reference to state law characterizations of various categories of officials has merely been the mechanism by which this Court has recognized that the several States have different infrastructures of law enforcement and other responsibilities of government. Whether a local official is liable under § 1983 is necessarily a federal question. It is a federal question which concerns the statute itself as well as the intent of the legislators who passed it. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68-70 (1989). It is likewise a federal question which implicates the Eleventh Amendment shield of state officials from section 1983 liability. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

So even if this petition raised only the question of whether Georgia sheriffs, in the conduct of their law enforcement activities, were state officials for purposes of section 1983 liability, it would still be worthy of this Court's review. Under a proper application of this Court's analysis in *McMillian*, Georgia county sheriffs in the exercise of their law enforcement and management authority (including policies on the use of deadly force and the allocation of personnel and materiel for law enforcement) would not be regarded as state officials. They would be regarded as county officials or as autonomous officials, but not, in any event, cloaked as "arms of the State" under the Eleventh Amendment. In this respect, the Eleventh Circuit and Georgia courts have misapplied the considerations in *McMillian* to hold that Georgia sheriffs, like those in Alabama, are essentially state executive officers for all purposes.

But, much more significantly, at issue in this case is the general liability of counties for the tortious acts of their final policymakers under section 1983, and the proper scope of the analysis, under *McMillian*, for determining whether ostensibly county officials are acting, instead, for the state. As such, this petition implicates substantive aspects of § 1983 – whether it provides a remedy to those who have had their federal rights violated or neglected by a county official. Especially relevant in light of the flurry of litigation which has redefined and limited municipal liability under § 1983, this petition challenges the propriety of counties and sheriffs escaping responsibility for their tortious acts.

A. Sharp Inconsistencies Have Arisen Concerning the Application of *McMillian* and the Use of Eleventh Amendment "Arm of the State" Precedents in Determining Section 1983 Liability.

As noted above, there are clear splits in the circuits and even among state and federal courts with concurrent jurisdiction over § 1983 as to whether certain classes of local officials (including sheriffs, county marshals and district attorneys) are actually exercising state authority, and are thus immune. This split in authority cannot be reconciled based on divergent state law treatment of these particular offices. Rather, profound disagreements have arisen among the federal courts of appeals and some state appellate courts in the application of this Court's section 1983 and Eleventh Amendment "arm of the State" jurisprudence in identifying state officials. The result has been that some courts, including the one from which review is sought here, have vastly expanded this Court's ruling in *McMillian* and tended to categorically hold that local officials such as sheriffs are state officers.

1. The schisms in application of *McMillian* run along two main axes. The first involves a general tendency to expand section 1983 liability to include local officials, like sheriffs, who also exercise some slice of state authority, despite this Court's admonitions to the contrary. See *Northern Ins. Co. of N.Y. v. Chatham County, Georgia*, 126 S. Ct. 1689, 1693 (2006); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (sovereign immunity does not extend to entities even when they "exercise a 'slice of state power,'" unless they are truly arms of the State). Related to this concern is the extent to which, if at all, the considerations discussed in *McMillian* should be overlaid with this Court's Eleventh Amendment "arm of the State" jurisprudence, including the very specific factors recited in *Regents of Univ. of*

Cal. v. Doe, 519 U.S. 425 (1997), cited in *McMillian*, 520 U.S. at 786, and earlier decisions such as *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994).

This Court has sent mixed signals on the propriety of importing Eleventh Amendment "arm of the State" analysis into section 1983 officer status determinations. In *Will v. Michigan Dep't State Police*, 491 U.S. 58 (1980), this Court noted that: "This does not mean. . . that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." Id. at 66-67. As a consequence of this studied ambiguity, some lower courts have conducted the dual analysis of officer status (under both *McMillian* and Eleventh Amendment "arm of the State" precedents), while others have eschewed it.

This is significant because the considerations enunciated by this Court in *McMillian* for section 1983 officer status are not necessarily congruent with the factors for "arm of the State" analysis. Compare *McMillian*, 520 U.S. at 785-92 (emphasizing state law characterization of sheriff's office and state control over sheriff's activities), with *Hess*, 513 U.S. at 47-51 (degree of financial independence of entity matters more than extent of state control over the entity's activities). And while an entity cannot be regarded as an "arm of the State" if it merely exercises a "slice of state power," see *Lake Country*, 440 U.S. at 401, some courts interpreting *McMillian* have granted immunity to section 1983 actions when a local officer appears to be undertaking an ostensibly state function, irrespective of any other factors.

2. For the broad contours of post-*McMillian* section

1983 officer status, the main lines of fracture are the Fourth, Seventh, and Ninth Circuits on one side of the divide, and the Second and Eleventh Circuits on the other. Each court of appeals' jurisprudence illustrates a different approach to this Court's ruling in *McMillian* and allied Eleventh Amendment "arm of the State" cases. For almost all of these courts, the local official which has most often been implicated in section 1983 cases, and which presents the most anomalous status, has been the county sheriff.

a. In the Fourth Circuit, to take one example – the consideration of the status of North Carolina sheriffs – there have been open questions as to the effect of this Court's case-law on the relevant status inquiry under section 1983. The prevalent law in the Fourth Circuit has been that North Carolina sheriffs are county officers for all purposes. See *Harter v. Vernon*, 101 F.3d 334, 343 (4th Cir. 1996). *Harter* was decided before this Court's ruling in *McMillian*, and some governmental authorities – seeking to disclaim section 1983 liability – argued that its reasoning was abrogated by *McMillian* and by this Court's "arm of the State" decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), and some district courts concurred in that analysis. See *Henderson Amusement v. Good*, 172 F. Supp.2d 751, 763 (W.D.N.C. 2001). Nevertheless, the Fourth Circuit held that its ruling in *Harter* was fully consistent with *McMillian* and *Regents*. See *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 221, 227 (4th Cir. 2001). Other federal courts of appeals have aligned with the Fourth Circuit's tack in restrictively applying *McMillian* and this Court's "arm of the State" jurisprudence. See, e.g., *Cozzo v. Tangipahoa Parish Council-President Government*, 279 F.3d 273, 281-83 (5th Cir. 2002) (concluding that Louisiana parish sheriffs are not an arm of the State and not entitled to Eleventh Amendment immunity).

The Seventh Circuit has articulated a much narrower approach in applying this Court's decision in *McMillian*, particularly in reference to the status of sheriffs in Illinois. This approach has tended to entirely discount any "arm of the State" analysis for county officials. In the Seventh Circuit, pre-*McMillian* authority had ruled that Illinois sheriffs were county officials, except when executing judicial writs of assistance. See *Scott v. O'Grady*, 975 F.2d 366, 370-71 (7th Cir. 1992). In *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), that court of appeals held that Illinois sheriffs are not state officers when they exercise their general law enforcement authority, and that such a ruling was consistent with this Court's decision in *McMillian*, a contrary Illinois Supreme Court opinion notwithstanding. See id. at 684-86 (discussing *McMillian* and distinguishing *Moy v. County of Cook*, 640 N.E.2d 926 (Ill. 1994)). This ruling was extended by the Seventh Circuit in *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000), to apply to the conduct of Illinois sheriffs in operating county jails. See id. at 975-77.

The Ninth Circuit case-law follows somewhat the same trajectory as that in the Fourth and Seventh Circuits: both pre- and post-*McMillian* precedents from that court of appeals had confirmed that California sheriffs were local, and not state, officials for virtually all suits under section 1983. See, e.g., *Henry v. County of Shasta*, 132 F.3d 512, 517-23 (9th Cir.1997) (pre-*McMillian*); *Cortez v. County of Los Angeles*, 294 F.3d 1186 (9th Cir. 2002) (post-*McMillian*). In *Cortez*, the Ninth Circuit affirmed that California sheriffs are county officials in the administration of county jails. See id. at 1188; see also *Streit v. County of Los Angeles*, 236 F.3d 552, 564-65 (9th Cir. 2001). The Ninth Circuit has gone even farther and held that a California sheriff exercising virtually any law enforcement authority (including crime investigation) is acting as a county

official. See *Brewster v. Shasta County*, 275 F.3d 803, 807-08 (9th Cir. 2001), cert. denied, 537 U.S. 814 (2002).

The *Streit*, *Brewster* and *Cortez* decisions have created an irreconcilable conflict with California state courts which have held that county sheriffs are state officials in the conduct of their law enforcement, investigatory, and jail management functions. See *Venegas v. County of Los Angeles*, 87 P.3d 1 (Cal. 2004). In *Venegas*, the California Supreme Court construed *McMillian* as making the section 1983 status question for sheriffs as turning entirely on state law. Id. at 6. The California Supreme Court, over the dissent of three justices, expressly repudiated the Ninth Circuit's holdings in *Brewster*, and also took issue with the proper application of *McMillian* and its relation with this Court's Eleventh Amendment "arm of the State" precedents. See id. at 9-10 (discussing *McMillian*'s respondeat superior analysis and the effect of *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1984)). This conflict in authority means that it is possible today to sue a California sheriff in federal court, under section 1983, while the same suit would be unsustainable in state court.

b. On the other side of the ledger, the Second and Eleventh Circuits have broadly construed *McMillian* and "arm of the State" precedents to sweepingly characterize many local officials (not just sheriffs, but district attorneys as well) as state officers for purposes of section 1983 liability. As for the Second Circuit, in *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005), in holding that Vermont sheriffs were state officers in their management of courthouse security, that court of appeals summarized the relevant factors mentioned in *McMillian*:

> how the state's laws and courts categorize the official; whether the official is elected and by whom; the scope of the official's duties; to

> whom the official is fiscally responsible, if anyone; which governmental entity sets or pays the official's salary; which governmental entity provides the official's equipment, if any; and the scope of the official's jurisdiction. For a law-enforcement official, the most important factor in making this determination is whether he or she has the authority to investigate and enforce the state's criminal law.

Id. at 71 (citing *McMillian*, 520 U.S. at 787-91). The Second Circuit's formulation of the *McMillian* factors was apparently intended to obviate any recourse to this Court's "arm of the State" jurisprudence.

That leaves the Eleventh Circuit, encompassing the jurisdiction at issue in this petition. This court of appeals has managed to broadly construe *McMillian* as immunizing virtually any county official exercising any slice of state authority, while also aggressively deploying this Court's "arm of the State" jurisprudence to confirm outcomes of section 1983 liability. This expansive trend was marked by the Eleventh Circuit's decisions regarding the status of sheriffs in Alabama, Florida and Georgia. The position of Alabama sheriffs was, of course, settled by this Court's 1997 decision in *McMillian*. As for Florida sheriffs, the appeals court – with substantial understatement – observed that "[w]e recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County)." *Brown v. Neumann*, 188 F.3d 1289, 1290 n.2 (11th Cir. 1999).

But it was a series of 6-6 en banc decisions regarding the status of Georgia sheriffs, relied upon by the Georgia court

below, see App. 9a-11a (discussing *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc); and *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), cert. denied, 540 U.S. 1107 (2004)), that established the contours of section 1983 officer status in the Eleventh Circuit. The *Manders* decision expressly employed "arm of the State" idioms to characterize Georgia sheriffs as state officials in cases involving the use of force at county jails. See 338 F.3d at 1309 n.9, 1324-25 (discussing *Hess*, *Regents*, and *Auer v. Robbins*, 519 U.S. 452 (1997)). But in doing so, the plurality in *Manders* privileged the manner in which state law defines an entity or office, emphasized the general characterization of an officer's activities as a state function, and virtually ignored the question of whether the state's fisc would be used to pay a judgment against a county sheriff. Indeed, the Eleventh Circuit held that a state need not be responsible for a judgment in order for an entity to be an arm of the State. Id. at 1328; but see id. at 1331-32 (Anderson, Tjoflat, Birch & Wilson, JJ., dissenting) (disputing this "arm of the State" calculus). The *Manders* decision elaborated on the approach used in *Grech*, which characterized a Georgia sheriff's law enforcement and management activities as a sovereign, state function. See 335 F.3d at 1331-32 & 1347 n.46.

The Eleventh Circuit's refashioning of Eleventh Amendment jurisprudence, especially in regards to counties enjoying some sort of residual "arm of the State" status, has been repudiated by this Court just last Term. See *Northern Ins. Co. of N.Y. v. Chatham County, Georgia*, 126 S. Ct. 1689, 1692-94 (2006), rev'g, *Zurich Ins. Co. v. Chatham County*, No. 04-13308 (Jan. 28, 2005), judgt. order reported at 129 Fed.Appx. 602 (11th Cir. 2005). The Eleventh Circuit's "expansive arm-of-the-State test," 126 S. Ct. at 1693-94, one which tended to discount such factors as whether the state

treasury would be liable for a judgment against a county sheriff, was expressly disavowed by this Court. See id. Likewise, the approach taken by the Eleventh Circuit in *Grech* and *Manders*, and expressly adopted by the Georgia courts, should be rejected here.

B. Lower Courts Have Improperly Construed *McMillian* as Precluding Local Officials From Exercising Autonomous Power Independent from Counties and States.

1. The second broad set of pathologies illustrated by the post-*McMillian* cases has been, contrary to the express admonition of the decision to the contrary, see 520 U.S. at 785, to regard the section 1983 officer status test as an all-or-nothing proposition. While the federal courts of appeals and state appellate courts have been mindful of this Court's concern that a county official may act as a final policymaker under state authority for some purposes, but not for others, there remains another nuance. That is the possibility that some local officials (such as sheriffs), in conducting certain functions, exercise such a high degree of autonomy as not to be directly accountable to county governments, but are not truly state officers, either. In these situations, some federal courts of appeals have ruled that autonomous local officials are not immunized from section 1983 liability.

This Court's opinion in *McMillian* notes that one "guid[ing] . . . principle" of the section 1983 status analysis assesses "whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." Id. at 785 (citing *Jett*, 491 U.S. at 737-38; *Praprotnik*, 485 U.S. at 123). Chief Justice Rehnquist, writing for the Court summarized this analysis in the context of Alabama sheriffs:

"We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity." Id. at 785-86.

2. Some lower courts have construed this language from *McMillian* as raising a presumption that if a local official is not effectively employed or controlled by a county or municipal authority, that officer is definitionally a state officer and immune under section 1983. This was precisely the approach adopted by the Georgia appeals court below. See App. 11a-14a (holding that because county did not exercise authority over sheriff's use of deadly-force policies or law enforcement personnel and resources, the state exercised control over those functions). This analysis was borrowed from Eleventh Circuit precedents, reading *McMillian* to assume that if a local official was not answerable to a county government for a particular function or activity, she was a state officer. See *Grech*, 335 F.3d at 1347; *Manders*, 338 F.3d at 1328.

These Georgia and Eleventh Circuit authorities[1] appear to be in direct conflict with rulings from the Seventh Circuit. In *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), that court of appeals read *McMillian* as rejecting section 1983 liability when a local official was acting, for a particular purpose, as an "'executive officer[] of the state,' such that counties could not be held liable under respondeat superior for the actions of their sheriffs." Id. at 685 (quoting *McMillian*, 520 U.S. at 788 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala.1987)). But that

[1] As to the section 1983 liability of Georgia sheriffs, in the performance of their law enforcement activities, all relevant federal and state courts have spoken to the matter. In contrast to the time that this Court reviewed a petition for certiorari in *Mathers*, see 540 U.S. 1107 (2004), there is no need for further percolation of the issue.

did not raise a presumption that an autonomous local official was an "arm of the State" for section 1983 liability. The Seventh Circuit noted in this regard:

> According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under respondeat superior, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases – namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects.
>
> . . . .
>
> Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties. Because the Sheriff was not acting as an agent of the state in this case [the Eleventh Amendment was inapplicable and section 1983 liability attached].

Id. at 1685 (citations omitted).

This recognition of a "third way" in section 1983 liability analysis has been reaffirmed by the Seventh Circuit, see *DeGenova*, 209 F.3d at 975 ("The Sheriff also argues that because we have held that Illinois sheriffs are not county employees, by default they must be agents of the State. We rejected this argument in *Franklin*, and do so again today."),

and other federal appeals courts. See *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226-27 (4th Cir. 2001) (North Carolina county school boards as autonomous bodies). Indeed, dissenting judges in the Eleventh Circuit opinions, discussed above, raised precisely the same point. See *Manders*, 338 F.3d at 1331-32 ("the proper question is whether the sheriff has carried his burden of proving that he is an arm of the state. . . . [t]he issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non*. The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no respondeat superior liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state. The Seventh Circuit recognized this in *Franklin v. Zaruba*. . . ."") (Anderson, Tjoflat, Birch, Wilson, JJ., dissenting).

3. Petitioner submits that this Court's section 1983 officer status jurisprudence (including *McMillian*), as well as its "arm of the State" precedents, are fully consistent with the notion that certain local officials, exercising certain categories of functions, are autonomous of county government control but are not state officers for purposes of immunizing their conduct under section 1983 and the Eleventh Amendment. To disavow the existence of local officials independent of both county and state authority would be to refuse to recognize the diversity of local government organization in many states in this country, a result expressly disavowed by the *McMillian* decision itself. See 520 U.S. at 795. Any other outcome would also turn both this Court's section 1983 and "arm of the State" precedents on their head and lead to the result that, where the status of an official is ambiguous under the relevant state law, she will be presumed immune from suit for federal constitutional

violations.

Georgia sheriffs, as final policymakers on the use of deadly force and the allocation of law enforcement assets in their counties (as the court below correctly held, see App. 14a-18a), are not arms of the State. This result can be reached either through a proper analysis of the calculus of factors and considerations in *McMillian* or, at a minimum, by a recognition that certain local officials (such as sheriffs) while not properly assimilable to county government are, nonetheless, not officers of the state. Whether the proper defendant in this case is DeKalb County, Georgia, or the Sheriff's Office of DeKalb County, is of no moment. See *Brown*, 188 F.3d at 1290 n.2; *Franklin*, 150 F.3d at 685 (allowing substitution of county government with sheriff's department, or vice versa, depending on the section 1983 liability analysis of the responsible party).

The important question is whether autonomous local officials should be suffered to exploit the ambiguities of their status in order to thwart the application of federal law and section 1983 liability. In *McMillian*, this Court warned of just such a gambit by local officials. 520 U.S. at 796 ("The final concern of petitioner and his *amici* is that state and local governments will manipulate the titles of local officials in a blatant effort to shield the local governments from liability. But such efforts are already foreclosed by our decision in *Praprotnik*.") (citing and quoting 485 U.S. at 127). While petitioner by no means suggests that Georgia has crudely or cynically "manipulate[d] the titles of local officials," id., a larger matter is at stake in this petition: the general coherence of this Court's section 1983 liability and "arm of the State" jurisprudence as applied to local officials.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 5, 2006

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[2] Counsel acknowledges the assistance of the following Emory Law School student in the preparation of this Petition: John E. Wierwille.

Appendix