No. 09-350 SEP 21 2009

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

CRAIG ARTHUR HUMPHRIES and
WENDY DAWN ABORN HUMPHRIES,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from *Monell's* requirement as determined by the Ninth Circuit?

2. May a plaintiff be a prevailing party under 42 U.S.C. §1988 for purposes of a fee award against a local public entity based upon a claim for declaratory relief where the plaintiff has not demonstrated that any constitutional violation was the result of a policy, custom or practice attributable to the public entity under *Monell*?

3. May a plaintiff be a prevailing party on a claim for declaratory relief for purposes of a fee award under 42 U.S.C. §1988 where there is neither a formal order nor judgment granting declaratory relief, nor any other order altering the legal relationship between the parties in a way that directly benefits the plaintiff?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Craig Arthur Humphries and Wendy Dawn Aborn Humphries, plaintiffs, appellants below, and respondents here.
- The County of Los Angeles, defendant, appellee below, and petitioner here.
- Bill Lockyer, Attorney General, in his official capacity as Attorney General of the State of California, defendant, appellee below, and respondent here.

In addition Leroy Baca, Michael Wilson, and Charles T. Ansberry were defendants in the underlying action, appellees in the proceedings below, but not parties to the fee order that is subject to this petition.

There are no corporations involved in this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 3

STATEMENT OF THE CASE 5

A. Background And District Court Proceedings 5

B. The Appeal 7

C. The Ninth Circuit Determines Plaintiffs Are Prevailing Parties For Purposes Of A Fee Award 10

REASONS TO GRANT THE PETITION 12

I. REVIEW IS NECESSARY TO RESOLVE THE EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE OF WHETHER *MONELL* APPLIES TO CLAIMS FOR PROSPECTIVE RELIEF 16

A. *Monell* Establishes That A Plaintiff May Only Obtain Redress – Whether In The Form Of Damages Or Prospective Relief – Where The Constitutional Injury Is The Result Of A Custom, Policy Or Practice Attributable To The Local Public Entity 16

TABLE OF CONTENTS – Continued

Page

B. The Ninth Circuit Departs From *Monell* In Concluding That A Claim For Declaratory Or Other Prospective Relief Is Not Subject To The Requirement That The Underlying Injury Result From A Policy, Custom Or Practice Of A Local Public Entity..... 20

1. There is no support for *Chaloux's* assumption that the availability of relief against local public entities under §1983 turns on whether the relief will have a financial impact on the defendant..... 23

2. *Chaloux* erroneously assumes that claims for prospective relief can have no financial impact on a public entity..... 24

3. The First, Second, Fourth and Eleventh Circuits recognize that claims for prospective relief are subject to *Monell*..... 28

4. The circuit conflict concerns a recurring issue impacting local public entities throughout the country and necessitates review 30

TABLE OF CONTENTS – Continued

Page

II. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DETERMINATION THAT PLAINTIFFS HAVE PREVAILED ON A CLAIM FOR DECLARATORY RELIEF AGAINST THE COUNTY, ABSENT ANY PROOF OF A CUSTOM, POLICY OR PRACTICE ATTRIBUTABLE TO THE COUNTY UNDER *MONELL*, RUNS AFOUL OF THIS COURT'S DECISIONS IN *HEWITT* AND *RHODES* BARRING PREVAILING PARTY STATUS ABSENT RELIEF THAT AFFECTS THE BEHAVIOR OF THE DEFENDANT TOWARD THE PLAINTIFFS 33

A. The Ninth Circuit's Order Violates *Hewitt*'s Holding That Mere Resolution Of A Legal Issue Is Not The Equivalent Of A Declaratory Judgment Entered After Consideration Of Equitable Issues, Including Whether In Fact Such A Decree Would Materially Affect The Defendant's Behavior Towards The Plaintiff 35

TABLE OF CONTENTS – Continued

Page

B. Under *Rhodes*, The Mere Fact That Plaintiffs Asserted A Claim For Declaratory Relief Does Not Transform Determination Of A Legal Issue Into The Equivalent Of A Declaratory Judgment Where Plaintiffs Cannot Establish That The Relief Obtained Materially Affects Their Relationship With Defendant 41

CONCLUSION 43

APPENDIX

Order filed June 22, 2009 in the United States Court of Appeals for the Ninth Circuit .....App. 1

Second Order Amending Opinion and Amended Opinion, filed January 30, 2009 .....App. 5

Order Amending Opinion an Order, Denying Appellee County of Los Angeles' Petition for Rehearing and Rehearing En Banc, Denying Appellee Bill Lockyer's Petition for Rehearing and Rehearing En Banc, Granting Appellants' Motion for Clarification, Granting in Part, Appellants' Petition for Rehearing or Reconsideration and Amended Opinion, United States Court of Appeals for the Ninth Circuit, filed January 15, 2009.....App. 73

Opinion, United States Court of Appeals for the Ninth Circuit, filed November 5, 2008.....App. 143

TABLE OF CONTENTS – Continued

Page

Order Granting in Part and Denying in Part Defendants' Motions for Summary Judgment, United States District Court, Central District of California, filed August 22, 2005.....App. 210

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of the County Comm'rs v. Brown, 520 U.S. 397 (1997) 18, 31, 32

Bockes v. Fields, 999 F.2d 788 (4th Cir. 1993) 26

Carbella v. Clark County Sch. Dist., 141 F.3d 1174, 1998 WL 141182 (9th Cir. March 27, 1998) 31

Chaloux v. Killeen, 886 F.2d 247 (9th Cir. 1989) ... *passim*

Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994) 29

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 18

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 30

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 18, 30

Dirrane v. Brookline Police Department, 315 F.3d 65 (1st Cir. 2002) 28

Doby v. De Crescenzo, 171 F.3d 858 (3d Cir. 1999) 26

FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 32

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) 26

Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) 29

TABLE OF AUTHORITIES – Continued

Page

Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro, 64 F.3d 962 (4th Cir. 1995) 29

Hewitt v. Helms, 482 U.S. 755 (1987) .....*passim*

James v. Jones, 148 F.R.D. 196 (W.D. Ky. 1993).....31

Joyce v. City & County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994) 31

Leary v. Daechner, 228 F.3d 729 (6th Cir. 2000) 29

Los Angeles Police Protective League v. Gates, 995 F.2d 1469 (9th Cir. 1993) 21, 22, 26

McMillian v. Monroe County, Ala., 520 U.S. 781 (1997).....18, 31

Monell v. Department of Social Services, 436 U.S. 658 (1978).....*passim*

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).....18

Platte v. Thomas Twp., 504 F. Supp. 2d 227 (E.D. Mich. 2007) 31

Reynolds v. Giuliani, 506 F.3d 183 (2d Cir. 2007).....28, 29

Rhodes v. Stewart, 488 U.S. 1 (1988).....*passim*

Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788 (7th Cir. 1991) 25

Truth v. Kent School District, 542 F.3d 634 (9th Cir. 2008) 11, 21, 22, 30, 31

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

American Financial Services Ass'n. v. City of Oakland, 34 Cal.4th 1239, 104 P.3d 813, 23 Cal. Rptr. 3d 453 (2005) 25

Birkenfeld v. City of Berkely, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) 25

City of Oakland v. Abend, No. C-07-2142 EMC, 2007 WL 2023506 (N.D. Cal. July 12, 2007) 30

Coconut Beach Dev. LLC v. Baptiste, No. 08-00036 SOM/KSC, 2008 WL 1867933 (D. Haw. Apr. 28, 2008) 30

Joyce v. City & County of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994) 31

Trevino v. Lassen Mun. Util. Dist., No. CIV. S-07-2106 LKK/DAD, 2009 WL 385792 (E.D. Cal. Feb. 13, 2009) 30

STATUTES

20 U.S.C.A. §1681, et seq. 3

28 U.S.C. §1254(1) 2

42 U.S.C. §1981 3

42 U.S.C. §1981a 3

42 U.S.C. §1982 3

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1985 3

42 U.S.C. §1986 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §1988 42

42 U.S.C. §1988(b) 3

42 U.S.C. §13981 4

42 U.S.C.A. §2000bb et seq. 4

42 U.S.C.A. §2000cc et seq. 4

42 U.S.C.A. §2000d et seq. 4

California Penal Code, §851.8 6

California Penal Code, §§11164-11174.3 .....*passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 4

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OPINIONS BELOW

The June 22, 2009 order of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition was not reported and is found in the Appendix ("App.") at 1-4. The Ninth Circuit's initial opinion in the underlying appeal was published at 547 F.3d 1117 (9th Cir. 2008), but was subsequently withdrawn from the official bound volume and can be found in the Appendix at pages 143-209. The Ninth Circuit's order of January 15, 2009 amending opinion and order denying appellee County of Los Angeles' petition for rehearing and rehearing en banc, denying appellee Bill Lockyer's petition for rehearing and rehearing en banc, granting appellants' motion for clarification in part, appellants' petition for rehearing or reconsideration and amended opinion is not published in the official reports and is found in the Appendix at pages 73-142. The Ninth Circuit's second order amending opinion and amended opinion of January 30, 2009 is published in the official reports at 554 F.3d 1170 (9th Cir. 2009) and is found in the Appendix at pages 5-72.

The decision of the district court, granting in part and denying in part, defendants' motions for summary judgment was not reported, and is found in the Appendix at pages 210-54.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on November 5, 2008. (App.143.) Petitioner and each of the respondents filed petitions for rehearing. On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of petitioner County of Los Angeles and respondent Bill Lockyer, and granting in part plaintiffs' petition for rehearing as well as plaintiffs' motion for clarification and issued its amended opinion. (App.73.) After petitioner filed a motion to correct a misstatement in the amended opinion, on January 30, 2009, the Ninth Circuit issued its second order amending the opinion as well as an amended opinion. (App.5-72.) Following respondent Humphries' motion for attorney's fees on appeal and the filing of opposition by petitioner County of Los Angeles and respondent Bill Lockyer, on June 22, 2009, the Ninth Circuit issued its order finding plaintiffs to be prevailing parties for purposes of an attorney fee award, directing that any fees be split 90/10 between the State and the County, and remanding to the Appellate Commissioner for a report and recommendation concerning only the amount of fees. (App.1-4.)

28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of certiorari the June 22, 2009 order of the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents pursuant to 42 U.S.C. §1983, which reads 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.

The June 22, 2009 order of the Ninth Circuit was made pursuant to 42 U.S.C. §1988(b) which provides as follows:

> In any action or proceeding to enforce a provision of §§1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §1681, et seq.], the

> Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. §2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.] or §1983 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, such officer shall not be held liable for any costs including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The Humphries respondents allege that petitioner County of Los Angeles, as well as respondent State of California, through its then Attorney General Bill Lockyer, violated their rights under the Fourteenth Amendment to the United States Constitution, the relevant part of which reads as follows:

> ***Fourteenth Amendment (Section I):*** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background And District Court Proceedings.

This action arose from investigation of allegations of child abuse concerning plaintiffs and respondents Craig Arthur Humphries and Wendy Dawn Aborn Humphries. Based upon reports received from another police agency that had spoken with the plaintiffs' 15-year-old daughter, who reported she had been physically abused by the plaintiffs, as well as hospital reports confirming that she had been a victim of "non-accidental trauma," Los Angeles County Sheriff's officers procured an arrest warrant for the plaintiffs for felony torture. (App.18-19.) A Sheriff's Deputy then picked up the Humphries' two other minor children from school and placed them in protective custody. (App.19.)

Based on the provisions of Child Abuse and Neglect Report Act ("CANRA"), California Penal Code, §§11164-11174.3, Sheriff's Detective Michael Wilson completed a child abuse investigation report identifying the Humphries' case as a "substantiated report" of child abuse and forwarded the information to the California Department of Justice, which in turn placed the Humphries in the Child Abuse Central Index or CACI. (App.20.) The CACI listing

identified the Humphries as child abuse suspects with a "substantiated" report. (*Id.*)

Criminal proceedings were then instituted against the Humphries, but subsequently dismissed. (App.20-21.) The Humphries successfully petitioned the criminal court under California Penal Code, §851.8 for orders finding them "factually innocent" of the felony torture charge and requiring the arrest records pertaining to that charge be sealed and destroyed. (App.21-23.) Dependency proceedings concerning the Humphries' children were also subsequently dismissed, the court finding the counts of child abuse to be "not true." (App.23.)

Plaintiffs filed a federal action naming as defendants petitioner County of Los Angeles ("the County"), the Sheriff of the County, various Sheriff's employees, as well as the State of California through Attorney General Bill Lockyer. In their operative first amended complaint, plaintiffs asserted three federal claims for relief. Two claims arose from the plaintiffs' initial arrest and the subsequent dependency proceedings. (App.27.) The remaining federal claim, and the one that forms the basis for the fee order that is the subject of this petition, concerned plaintiffs' placement on the CACI and inability to have themselves removed from the Index. (App.27-28.) Plaintiffs asserted that the absence of any effective means to remove their names from the database constituted a violation of due process. (App.28.) To that end, plaintiffs sought declaratory and injunctive relief as well as damages from the State and from the County

based upon the alleged deprivation of their rights. (*Id.*)

With respect to plaintiffs' due process claim challenging CANRA and CACI, the County moved for summary judgment under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), arguing plaintiffs could not establish the threshold requirement of a constitutional violation because the procedures did not violate due process. (App.225-26.) The State of California also moved for summary judgment based upon the constitutionality of CANRA and CACI. (*Id.*) The district court granted defendants summary judgment on plaintiffs' due process claim as to CANRA and CACI. (App.244-45.)

B. The Appeal.

Plaintiffs appealed the district court's dismissal of their due process claims for injunctive, declaratory and damages relief stemming from inclusion in the CACI. On November 5, 2008, the Ninth Circuit issued an opinion reversing the judgment as to the County and the State. (App.143.) The court found that CANRA and CACI did not afford due process with respect to allowing those listed in the database to be removed once charges had been determined to be unfounded. (App.205-06.) As to the County, the court observed that unlike the individual defendants, it was not entitled to qualified immunity. (App.208.) The court acknowledged the County could only be subject to liability under *Monell* if a policy or custom deprived the Humphries of their constitutional rights.

(*Id.*) The court noted that the district court "did not address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights." (*Id.*) It then stated that in order to avoid summary judgment, a plaintiff need only show there was a question of fact regarding whether a city, custom or policy caused a constitutional violation. (App.209.) The court then noted that while CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing in the Index, nothing in CANRA "prevented the LASD (Los Angeles County Sheriff's Department) from creating an independent procedure that would allow the Humphries to challenge their listing on the Index" and therefore "LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County's summary judgment on this issue." (*Id.*)

The County of Los Angeles petitioned for re-hearing, noting that the question of whether the actions of its Sheriff's Department personnel with respect to the CACI was the result of a custom, policy or practice fairly attributable to the County under *Monell* had not been litigated in the motion for summary judgment or on appeal. Summary judgment had been granted solely on the basis that there was no constitutional violation in the first instance. (App.245.) The County observed that under California authorities, it was not free to alter the State's statutory scheme governing inclusion or removal from the CACI, and hence, at the very least, the question whether the County could be held responsible for any

constitutional violation under *Monell* was an open question yet to be litigated. The other parties filed petitions for rehearing as well.

On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of the County and the State and granting in part and granting plaintiffs' petition for rehearing and motion for clarification. (App.73.) The court repeated its conclusion that CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the CACI, and that nothing in CANRA prevented the County Sheriff's Department from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. (App.142.) It stated that "[b]y failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to *qualified immunity*. (*Id.*; emphasis added.)

Since the opinion previously noted that the County as a public entity was not entitled to invoke "qualified immunity," the County filed a request for the court to correct what appeared to be an error in the opinion. The County suggested that the court had inadvertently substituted the phrase "qualified immunity" for "*Monell*" liability and submitted proposed language to correct the mistake.

On January 30, 2009, the court issued a second order amending the opinion as well as an amended opinion. (App.5, 7.) As to the County's *Monell* liability, the court repeated its earlier conclusion that it was possible that the County Sheriff's Department had adopted a custom and policy that violated the Humphries' constitutional rights and remanded "to the district court to determine the County's liability under *Monell*." (App.72.) In the disposition of the case, the court stated: "For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. §1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion." (*Id.*)[1]

C. The Ninth Circuit Determines Plaintiffs Are Prevailing Parties For Purposes Of A Fee Award.

Plaintiffs filed a motion for attorney's fees on appeal, arguing that they were prevailing parties given the court's determination that the State statutory scheme under CANRA and CACI violated their rights to due process and that the County did not create additional procedural protections in order

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[1] The court, as it did in its prior opinions, affirmed the grant of summary judgment to the individual defendants based on qualified immunity. (App.72.)

to prevent their constitutional injury. Plaintiffs sought $652,000 as Lodestar attorney's fees and a 2.0 multiplier.

The County opposed the motion for attorney's fees, arguing, among other grounds, that plaintiffs had not prevailed as against the County in that as the opinion recognized, plaintiffs still had to prove that the constitutional violation at issue was the result of a custom, policy or practice attributable to the County under *Monell*. The County also noted that plaintiffs had not sought or obtained summary judgment with respect to their claims for declaratory relief and that in fact no judgment for declaratory relief existed. Rather, the court had simply remanded to the district court for further proceedings consistent with the opinion.

On June 22, 2009, the Ninth Circuit issued its order determining that plaintiffs were prevailing parties for purposes of a fee award as against both the State and the County. (App.1-4.) Citing earlier Ninth Circuit authority, the court held that neither a formal order nor judgment for declaratory relief was necessary for purposes of a fee award. (App.2.) It concluded that its opinion finding that the County might have provided additional procedural protections "materially affected" the relationship between the parties so as to justify a fee award. (*Id.*) The court also found that based upon its earlier decisions in *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989) and *Truth v. Kent School District*, 542 F.3d 634, 644

(9th Cir. 2008), the "limitations to liability established in *Monell* do not apply to claims for prospective relief." (App.4.) Hence, plaintiffs' failure to establish the County's *Monell* liability did not impact whether plaintiffs were prevailing parties for purposes of a fee award. (*Id.*) The court concluded, however, that because of the County's relatively minor role in the procedural scheme, it would only be liable for 10% of any attorney's fees. (*Id.*) The court directed the Appellate Commissioner to issue a report and recommendation solely concerning the amount of reasonable fees. (*Id.*)

REASONS TO GRANT THE PETITION

Review is necessary to resolve an express circuit conflict concerning whether this court's decision in *Monell v. Department of Social Services* applies to claims for declaratory and other prospective relief. Four circuits – the First, Second, Fourth and Eleventh Circuits – have held that *Monell* necessarily applies to claims for declaratory and prospective relief, relying on the plain language of *Monell* itself where the Court stated:

> [L]ocal governing bodies . . . 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 that body's officers.

436 U.S. at 658, 690 (1978) (emphasis added).

Despite this clear language in *Monell*, and the absence of any suggestion in this Court's post-*Monell* opinions that the requirement of proving custom, policy or practice does not apply to claims for declaratory or other prospective relief against a public entity, the Ninth Circuit alone exempts such claims from *Monell*'s strictures. The result is an end-run around this Court's repeated holdings that a public entity may only be held responsible for inflicting a constitutional injury where the conduct at issue was the result of a custom, policy or practice fairly attributable to the public entity.

The sole rationale offered by the Ninth Circuit for discarding *Monell* is that claims for declaratory and other prospective relief do not result in the sort of financial burdens imposed by damages awards, which it perceived as the basis for *Monell*'s rejection of *respondeat superior* liability. Yet, *Monell* itself involved claims for injunctive relief as well as damages. Further, it is untenable to suggest, as the Ninth Circuit does, that claims for declaratory and injunctive relief do not impose financial burdens on local public entities. This case underscores the very point – the Ninth Circuit has held the County will be liable for at least 10% of a fee award that could range up to $1.3 million, all without any determination that the particular conduct at issue was actually the result

of a policy, custom or practice attributable to the County. Moreover, other claims for prospective relief, most specifically injunctive relief, can often lead to institutional or other changes, such as reinstatement of an employee, that impose a significant financial burden on a defendant public entity.

Local public entities are routinely confronted with claims for prospective relief under §1983. As this case illustrates, since they are inevitably tasked to enforce state laws which they have no power to change, they are typically on the frontlines of any constitutional challenges to such statutory schemes, challenges that necessarily seek declaratory and injunctive relief. It is essential that this Court grant certiorari in order to resolve the conflict between the Ninth Circuit and the First, Second, Fourth and Eleventh Circuits, concerning this important and recurring issue and direct the Ninth Circuit to follow this Court's decision in *Monell*.

Review is also necessary because the Ninth Circuit's order determining plaintiffs to be prevailing parties on their claim for declaratory relief flies in the face of this Court's decisions making it clear that mere adjudication of a question in a vacuum, without a specific order and judgment changing the relationship between the parties, is not sufficient to convey prevailing party status for purposes of a fee award under 42 U.S.C. §1988. In *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988), the court expressly limited prevailing party status to those litigants who, even in the context of declaratory

relief, obtain a favorable judicial determination on an issue that affects the behavior of the defendant toward the plaintiffs. That is simply not the case here.

The Ninth Circuit's opinion did not reverse the judgment with directions to enter judgment for plaintiff on the declaratory relief claim. It simply remanded for further proceedings "consistent with this opinion." (App.72.) In its June 22, 2009 order finding plaintiffs to be prevailing parties, the court noted that under Ninth Circuit authority it could award attorney's fees for a claim of declaratory relief even in the absence of a specific judgment, and recast its prior opinion as the equivalent of a judgment for the declaratory relief in favor of the plaintiffs. (App.3-4.) But the court did not explain how any such "judgment" affected the relationship between the parties, since the court acknowledged that the County's *Monell* liability for purportedly not creating additional procedural protections remained at issue. In sum, how can the County's behavior towards the plaintiffs be materially affected when it cannot be determined that the County's behavior has any relationship to the violation at issue in the first place?

The Ninth Circuit's clear departure from this Court's decisions in *Hewitt*, and *Rhodes* limiting fee awards to those parties who obtain material relief through a formal judgment, must be corrected by this court. For this reason too, review is necessary.

I. REVIEW IS NECESSARY TO RESOLVE THE EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE OF WHETHER *MONELL* APPLIES TO CLAIMS FOR PROSPECTIVE RELIEF.

A. *Monell* Establishes That A Plaintiff May Only Obtain Redress – Whether In The Form Of Damages Or Prospective Relief – Where The Constitutional Injury Is The Result Of A Custom, Policy Or Practice Attributable To The Local Public Entity.

In *Monell v. Department of Social Services*, 436 U.S. 658, 690, this Court held that Congress intended "municipalities and other local government units to be included among those persons to whom §1983 applies." In so holding, the court noted that both the legislative history of §1983 as well as its plain terms foreclosed allowing redress against a local public entity based upon the doctrine of *respondeat superior*. *Id.* at 693. Rather, it is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* at 694.

Monell itself stemmed from a district court's refusal to grant an injunction directing payment of back pay to the plaintiffs on the ground that the municipality could not be subject to suit under §1983.

Id. at 661-62. Since the claim arose in the context of equitable relief, this Court, not surprisingly, did not limit its holdings to claims for damages but, rather, made it clear that it applied to all claims for redress of any kind under §1983:

> Local governing bodies . . . 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 that body's officers.

436 U.S. at 690 (emphasis added).

The breadth of the court's holding was dictated by the plain language of §1983 as originally enacted, which provided that,

> "[*A*]*ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, *suit in equity*, or other proper proceeding for redress. . . ."

Monell, 436 U.S. at 691 (quoting 17 Stat. 13) (emphasis added).

Thus, as the court concluded in *Monell*, under the terms of §1983, both as originally enacted and in its present form, claims against a local public entity are subject to the requirement that there be a constitutional injury inflicted as a result of conduct fairly attributable to that public entity, and if such an injury is inflicted, then the public entity may be liable "to the party injured in any action at law, *suit in equity*, or other proper proceeding for redress. . . .'" *Id.* at 692 (emphasis added). The full panoply of remedies under §1983, including equitable or other relief, are therefore available against public entities, subject to the requirement that the injury they purport to redress was inflicted as a result of a policy, custom or practice of the public entity.

Following *Monell*, this Court has repeatedly emphasized that the custom, policy or practice requirement is a rule of causation compelled by §1983 itself. *See*:

- *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ["municipal liability is limited to action for which the municipality is actually responsible"];
- *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) ["For our purposes here, the crucial terms of the statute are those that provide for the liability when a government 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of constitutional rights. Aware that governmental bodies can act only

through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights"];

- *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) ["It is only when the 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under §1983"];
- *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) ["(i)n *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under §1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury"];
- *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 785 (1997) ["we held in *Monell* . . . that a local government is liable under §1983 for its policies that cause constitutional torts. These policies may be set by the government's lawmakers, 'or by those whose edicts or acts may fairly be said to represent official policy' "].

Nothing in *Monell*, or any of its progeny, even remotely suggests that §1983's requirement that a plaintiff prove that he or she suffered a deprivation of rights caused by the defendants' conduct would vary

depending upon the type of redress sought. Nonetheless, the Ninth Circuit, standing alone, has carved out an exception for claims for declaratory and other prospective relief that is inconsistent with the plain language of §1983, this Court's decision in *Monell* and in subsequent cases, as well as the decisions of its sister circuits.

B. The Ninth Circuit Departs From *Monell* In Concluding That A Claim For Declaratory Or Other Prospective Relief Is Not Subject To The Requirement That The Underlying Injury Result From A Policy, Custom Or Practice Of A Local Public Entity.

As the Ninth Circuit noted in its order declaring the plaintiffs to be prevailing parties with respect to their declaratory relief claim for purposes of a fee award, it is settled law in that circuit that such claims are not subject to *Monell*. (App.3-4.) In *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989), the court held that plaintiffs challenging state procedures concerning post-judgment garnishment could properly hold the County Sheriff liable in his official capacity for purposes of declaratory relief, without showing that the underlying constitutional violation was "inflicted pursuant to an official county policy."

In so holding, the court focused on this Court's discussion in *Monell* regarding the financial burden that *respondeat superior* liability would impose on

public entities. *Id.* The Ninth Circuit stated: "We find no persuasive reasons for applying the Court's 'official policy or custom' requirement to suits against counties only for prospective relief. The justification for limiting an action for damages is notably absent when the relief sought is an injunction halting the enforcement of an unconstitutional state statutory scheme." *Id.* at 251.

The Ninth Circuit explained:

> *Monell* does not apply here. Unlike *Monell*, this case presents *solely* a claim for prospective relief. Appellants sought only a declaration that the Idaho post judgment garnishment procedures are unconstitutional and an injunction against the counties' enforcement of the challenged state statutes. We conclude that the Court did not intend to apply any 'official policy or custom' requirement to foreclose a suit for prospective relief against a county or its officials for enforcing allegedly unconstitutional state laws.

Id. at 250.

As the order at issue here underscores, the Ninth Circuit has consistently reaffirmed *Chaloux's* misguided interpretation of *Monell*. *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644 (9th Cir. 2008) ["*Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here]; *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993) ["the City can be subject to prospective injunctive relief even if the constitutional

violation was not the result of an 'official custom or policy' "].

Tellingly, even within the Ninth Circuit there is a recognition that *Chaloux* is manifestly inconsistent with the plain language of *Monell* and this Court's subsequent decisions. *See Truth*, 542 F.3d at 644 [observing that the district court urged that *Chaloux* be overruled because it "'rests on shaky grounds,'" but noting that since the Court's post-*Monell* cases do not specifically address "whether *Monell* applies to actions only seeking prospective relief," the panel had "no authority to overrule *Chaloux*"]; *Los Angeles Police Protective League*, 995 F.2d at 1472 n.1 [noting that in the "concurrence there is a suggestion that *Chaloux* was wrongly decided" but finding that "(h)owever meritorious this argument may be, we are bound by *Chaloux*. . . ."].

Indeed, as the concurring opinion in *Los Angeles Police Protective League* observed:

> *Chaloux* held that the official policy or custom requirement of *Monell* does not apply to suits against municipalities that seek only prospective relief. [Citation.] This holding is in conflict with *Monell*. *Monell* does not distinguish among cases based on the type of relief sought; it simply holds that a municipality may not be sued *at all* unless the challenged conduct represents the official policy or custom of the municipality. . . .

Id. at 1477 (emphasis in original).

Thus, even within the Ninth Circuit, it appears manifest that the underlying reasoning of *Chaloux* does not withstand scrutiny. In neither *Chaloux* nor any other case has the Ninth Circuit offered any compelling rationale to justify its departure from the plain language of *Monell* and the controlling language of §1983.

1. There is no support for *Chaloux's* assumption that the availability of relief against local public entities under §1983 turns on whether the relief will have a financial impact on the defendant.

As noted, *Chaloux* is premised on the notion that in *Monell* this Court rejected *respondeat superior* liability on the grounds that in enacting §1983, Congress did not want to impose substantial damages liability on local public entities for the misconduct of employees. *Chaloux*, 886 F.2d at 250. Yet, review of *Monell* belies such an interpretation.

There, the Court did not focus on the nature of the relief sought; rather, the Court focused upon whether legislative history indicated that local municipalities could be deemed "persons" under §1983 and if so, how such a public entity could "subject" a person, or "cause [a person] to be subjected" to a deprivation of constitutional or other federal rights. *Monell*, 436 U.S. at 691 (quoting 17 Stat. 13) (emphasis omitted). The Court emphasized that the terms "shall subject, or cause to be

subjected" in §1983 as enacted "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692.

Critically, as the text of §1983 makes plain, once it has been shown that a defendant has caused a violation of federal rights, the plaintiff can obtain appropriate "redress" through "any action at law, *suit in equity*, or other proceeding. . . ." *Id.* (quoting 17 Stat. 13) (emphasis added). That is why this Court in *Monell* clearly stated that local governing bodies "can be sued directly under §1983 for monetary, *declaratory*, or *injunctive* relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690 (emphasis added). The question of whether a public entity has subjected a plaintiff to a constitutional injury, i.e., whether a policy, custom or practice inflicted the injury, does not turn upon the nature of the relief eventually sought by the plaintiff.

2. *Chaloux* erroneously assumes that claims for prospective relief can have no financial impact on a public entity.

The premise of *Chaloux* is that in *Monell* this Court rejected *respondeat superior* liability as a basis for a damage claim against a public entity under

§1983 because such suits for damages would result in an onerous financial burden on public entities and hence *Monell* does not impact claims for prospective relief. *Chaloux*, 888 F.2d at 250. As discussed above, that basic proposition is itself untenable. Yet, even the underlying assumption of *Chaloux* – that claims for prospective relief somehow impose no financial burdens on public entity defendants – is manifestly illogical.

For example, here, the Ninth Circuit opines that it has granted declaratory relief to the plaintiff to the effect that CANRA and CACI, as presently constituted, are unconstitutional, and that the County failed to supply its own procedures that might have remedied some of the constitutional deficiencies. (App.1-4.) The court acknowledges both in its underlying opinion and fee order, however, that it is an open question whether the purported failure to provide such policies was attributable to a County policy, custom or practice. (App.4, 72.)[2] Of course, a

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[2] As the County established in its petition for rehearing as to the court's first opinion, under California law local public entities cannot impose their own procedures above those set by State law and federal courts have repeatedly recognized that local public entities cannot be held liable under *Monell* simply for enforcing state law. *See, Birkenfeld v. City of Berkely,* 17 Cal.3d 129, 150-52, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) [city could not create additional procedures for unlawful detainer actions]; *American Financial Services Ass'n. v. City of Oakland*, 34 Cal.4th 1239, 1251, 104 P.3d 813, 23 Cal. Rptr. 3d 453 (2005) [city ordinance could not regulate predatory lending practices more stringently than state regulations]; *Surplus Store*

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declaration that a particular statutory scheme is unconstitutional and requires further procedures could lead a defendant to implement such procedures, perhaps at substantial cost, simply to avoid future liability.

Similarly, a prospective injunction, for example, directing a public entity to reinstate a terminated employee, will require the public entity to expend funds in the form of salary or other benefits. Under such circumstances, it is nonsensical to draw a distinction between a prospective injunction requiring reinstatement, and a retrospective injunction directing, for example, payment of back pay. Yet, that is the illogical result that obtains in the Ninth Circuit. *See Los Angeles Police Protective League*, 995 F.2d at 1472 [injunction requiring reinstatement of job and pension rights not subject to *Monell*], and 1472 n.1 [award of back pay may be "equitable relief" but

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& Exch., Inc. v. City of Delphi, 928 F.2d 788, 790-93 & n.4 (7th Cir. 1991) [merely enforcing state law is insufficient to establish a municipal policy under *Monell*]; *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) [county not liable under *Monell* for County Social Services Board's termination of director, where Board "enjoyed its discretion to fire [director] at the prerogative of and within the constraints imposed by the [state]"]; *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) [county not liable under *Monell* for county judge's ministerial role in enforcing unconstitutional state statute]; *Doby v. De Crescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ["when a county is merely enforcing state law, without adopting any particular policy of its own, it cannot be held liable under . . . *Monell*"].

because it is "retrospective relief" it is subject to *Monell* requirements].

Finally, as this case illustrates, a declaratory relief claim can serve as a springboard for a substantial fee award. Plaintiffs are seeking, after application of a multiplier, over $1.3 million in appellate attorney's fees alone.[3] Petitioner County will be subject to at least 10% of whatever amount the Appellate Commissioner determines plaintiffs should recover. It cannot be said that such an award does not have a financial impact on a public entity.

Claims for prospective relief necessarily create economic burdens on defendants. Thus, even utilizing its own reasoning, *Chaloux* does not support an attempt to bypass *Monell* and inflict a substantial cost award on a public entity without any effort to show that the particular constitutional violation in question was the result of a policy, custom or practice attributable to the public entity.

Given the Ninth Circuit's striking departure from the plain language of *Monell* and its progeny as well as the text of §1983 itself, it is not surprising that it stands alone among the circuits with respect to this issue. The result is a circuit conflict that requires resolution.

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[3] Trial court fees have not yet been sought by plaintiffs.

3. The First, Second, Fourth and Eleventh Circuits recognize that claims for prospective relief are subject to *Monell*.

Not a single circuit has followed the Ninth Circuit in concluding that claims for prospective relief are exempt from *Monell*. Indeed, two circuits have expressly rejected *Chaloux*'s reasoning, and two others, without reference to *Chaloux*, have found that *Monell* compels application of the "custom, policy and practice" standard to claims for prospective relief.

In *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002), the court held that *Monell* governed a claim for prospective relief and rejected the reasoning of *Chaloux*, stating it was "on its face at odds with *Monell* itself." Similarly, in *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007), the Second Circuit acknowledged that *Monell* governed claims for prospective relief, noting that the district court had erroneously relied upon *Chaloux*, given the Ninth Circuit's departure from the clear command of *Monell*:

> 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.

506 F.3d at 191.

Two other circuits, without reference to *Chaloux*, have found that *Monell* governs claims for protective relief. In *Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995), the court expressly held that the plaintiffs were not entitled to injunctive relief under §1983 because they could not establish the existence of a municipal policy. Similarly, in *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994), the court vacated a preliminary injunction, finding that plaintiffs could not establish that the underlying conduct was the result of a custom, practice or policy under *Monell*.

Moreover, other circuits have recognized *Chaloux*'s departure from *Monell*, but found it unnecessary to reach the issue in the cases before them. *See Leary v. Daechner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000) [acknowledging circuit conflict but assuming "without deciding, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages"]; *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) [observing that "the predominate though not unanimous view is that *Monell*'s holding applies regardless of the nature of the relief sought"].

4. The circuit conflict concerns a recurring issue impacting local public entities throughout the country and necessitates review.

The explicit conflict among the federal appellate courts concerning application of *Monell* to claims for prospective relief requires resolution. Claims for prospective relief, particularly declaratory relief, are ubiquitous in suits against local public entities. And, because local public entities are often tasked with enforcing state laws and state mandated procedures, they are inviting, indeed, inevitable targets for suits challenging such laws and procedures – even those which they have no power to alter or ignore. This court has recognized that its jurisdiction is properly invoked where the issue is "important and appears likely to recur in §1983 litigation against municipalities." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988). That is precisely the case here.[4]

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[4] A sampling of district court decisions underscores the prevalence of this issue. *See, e.g., Trevino v. Lassen Mun. Util. Dist.*, No. CIV. S-07-2106 LKK/DAD, 2009 WL 385792, at *11 (E.D. Cal. Feb. 13, 2009) [plaintiff entitled to summary judgment on claims for injunctive relief against public entity because such claims are not subject to *Monell*]; *Coconut Beach Dev. LLC v. Baptiste*, No. 08-00036 SOM/KSC, 2008 WL 1867933, at *4 & *5 (D. Haw. Apr. 28, 2008) [*Chaloux* and *Truth* establish that *Monell* does not apply for claims for prospective relief, and declining to follow out of circuit cases to the contrary]; *City of Oakland v. Abend*, No. C-07-2142 EMC, 2007

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Moreover, as the Ninth Circuit itself has indicated, unless and until this Court directly addresses the issue of whether claims for prospective relief are subject to *Monell*, it will persist in following *Chaloux*. *See, Truth*, 542 F.3d at 644 [declining to reconsider *Chaloux* in light of *Board of the County Commissioners v. Brown*, 520 U.S. 397 and *McMillian v. Monroe County*, 520 U.S. 781 because "[n]either of these cases addresses whether *Monell* applies to actions only seeking prospective relief"]; *see also, Carbella v. Clark County Sch. Dist.*, 141 F.3d 1174 (Table) (9th Cir. 1998), 1998 WL 141182, at *3 (9th Cir. March 27, 1998) [reversing summary judgment on claim for injunctive relief directing reinstatement of plaintiff, noting *Monell* does not apply to claims for prospective relief and declining to depart from

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WL 2023506, at *13 (N.D. Cal. July 12, 2007) [rejecting motion to dismiss for failure to meet *Monell* requirements on claims for prospective relief, noting under *Chaloux* no such requirements apply]; *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 861 (N.D. Cal. 1994) [noting that plaintiff need not satisfy *Monell* requirements to prevail on claims for injunctive relief based on enforcement of state law, but rejecting injunction on other grounds]; *James v. Jones*, 148 F.R.D. 196, 204 n.11 (W.D. Ky. 1993) [citing *Chaloux*, and noting that Sixth Circuit has not addressed issue of *Monell*'s applicability to claims for prospective relief, but absent such authority court will follow *Monell*]; *Platte v. Thomas Twp.*, 504 F. Supp. 2d 227, 240-41 (E.D. Mich. 2007) [noting open question in the Eighth Circuit whether *Monell* applies to claims for prospective relief, but finding it unnecessary to resolve question].

Chaloux in light of *Board of the County Commissioners v. Brown*, 520 U.S. 347, because *Brown* did not address "prospective relief"].

In addition, it is appropriate for this Court to grant review in this case at this time. There is no further proceeding contemplated in the Ninth Circuit with respect to whether the plaintiffs are prevailing parties on the declaratory relief claim. The court has remanded to the Appellate Commissioner solely for the determination of the amount of fees. (App.4.)[5] And, because there is an award of interim fees, they will be paid regardless of what subsequently transpires in the district court with respect to plaintiffs' claims for damages. Indeed, as the Ninth Circuit has emphasized, it perceives those claims, which even it acknowledges are subject to *Monell*, as independent from the claim for declaratory relief upon which the fee award is based. (App.4.) In sum, the issue is clearly presented at this time and is ripe for review by this Court.

The Ninth Circuit's blatant departure from this Court's decision in *Monell* must be corrected, and the

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[5] Petitioner County of Los Angeles cannot await issuance of a subsequent order of the Ninth Circuit setting the amount of fees without risking a determination that a petition for certiorari raising the prevailing party issue would be untimely. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-13 (1952) [period for seeking certiorari runs from initial order resolving issue sought to be reviewed, even if subsequent order repeats prior ruling while resolving other issues].

standards governing municipal liability applied consistently throughout the circuits. For these reasons, the court should grant the petition.

II. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DETERMINATION THAT PLAINTIFFS HAVE PREVAILED ON A CLAIM FOR DECLARATORY RELIEF AGAINST THE COUNTY, ABSENT ANY PROOF OF A CUSTOM, POLICY OR PRACTICE ATTRIBUTABLE TO THE COUNTY UNDER *MONELL*, RUNS AFOUL OF THIS COURT'S DECISIONS IN *HEWITT* AND *RHODES* BARRING PREVAILING PARTY STATUS ABSENT RELIEF THAT AFFECTS THE BEHAVIOR OF THE DEFENDANT TOWARD THE PLAINTIFFS.

Plaintiffs did not move for summary judgment on any of their claims in the district court. Defendants obtained for summary judgment on the ground that the provisions of CANRA and CACI satisfied due process. (App.244-45.) In reversing the district court's grant of summary judgment on this issue, and determining that nothing in CANRA foreclosed the County from adding additional procedures, the court acknowledged that whether the County's failure to provide such procedures was the result of a custom, policy or practice attributable to the County under *Monell* remained an open question. (App.72.) The court, however, did not reverse with directions to

enter judgment on any claim. Rather, it simply stated:

> We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion. (*Id.*)

In granting plaintiffs' motion for attorney's fees, the Ninth Circuit, seizing upon its resolution of the constitutional issue, determined that the Humphries "prevailed on their claim for declaratory relief and are thus entitled to an award of attorney's fees." (App.2.) Without analysis, the court declared that its holding that "the State and County procedures used in maintaining the . . . Index . . . were constitutionally insufficient and thus" that CANRA "'violates the Humphries procedural due process rights,'" therefore 'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff.'" (*Id.*)

As noted, the court further held that since, under *Chaloux*, *Monell* does not apply to claims for prospective relief, plaintiffs could be prevailing parties for a fee award against the County, even if it is later determined that the County's failure to implement any particular procedures was not the result of a policy, custom or practice attributable to the County. (App.3-4.)

The Ninth Circuit's decision blatantly disregards this Court's decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988),

which foreclose prevailing party status based solely on resolution of a legal issue, without regard to the safeguards accompanying a formal declaratory judgment and meaningful evaluation of whether the relief obtained affects the behavior of the defendant towards the plaintiff.

A. The Ninth Circuit's Order Violates *Hewitt*'s Holding That Mere Resolution Of A Legal Issue Is Not The Equivalent Of A Declaratory Judgment Entered After Consideration Of Equitable Issues, Including Whether In Fact Such A Decree Would Materially Affect The Defendant's Behavior Towards The Plaintiff.

In *Hewitt*, a prisoner sued prison officials for various violations of due process. 482 U.S. at 757. The defendants asserted qualified immunity and also contested the constitutional claims on the merits. *Id.* Before any decision was rendered, the prisoner was released. *Id.* The district court granted summary judgment against the prisoner on the constitutional claims without addressing defendants' claim of qualified immunity. *Id.* at 757-58. The Third Circuit reversed, finding that the prisoner had been denied due process, but remanded for determination of qualified immunity. *Id.* at 758.

On remand, the individual defendants obtained summary judgment based on qualified immunity. *Id.* Plaintiff appealed, and that judgment was affirmed.

Id. at 758-59. He then sought attorney's fees in the district court, arguing that the prior judicial determination that his rights had been violated had led to a change in procedure in the State prison system. *Id.* at 759-60. The district court denied the fee claim, but the Third Circuit reversed, finding that its prior holding that his misconduct conviction was unconstitutional was a form of judicial relief. *Id.* at 760.

This Court reversed, noting that the appellate court had never granted declaratory relief:

> The Court of Appeals treated its 1981 holding that Helms' misconduct conviction was unconstitutional as 'a form of judicial relief' – presumably (since nothing else is even conceivable) a form of declaratory judgment. It was not that. *Helms I* explicitly left it to the District Court 'to determine the appropriateness and availability of the requested relief,' [citation]; the Court of Appeals granted no relief of its own, declaratory or otherwise. *Id.*

This Court held that transforming resolution of a legal issue into the equivalent of a declaratory judgment was incompatible with the requirement that a judgment, even a declaratory judgment, must affect the behavior of the defendant which necessarily required consideration of a defendant's ultimate liability:

> In all civil litigation, the judicial decree is not the end, but the means. At the end of the

> rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

Id. at 761 (emphasis in original).

This Court noted that absent some showing that the purported declaratory relief materially altered the defendants' legal relationship to the plaintiff, it would not suffice for prevailing party status. As the Court observed, such a result would be absurd since, at the end of the day, if defendants truly were not liable for the violation – in that case based on qualified immunity – the declaration was essentially of no effect:

> As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only "relief" he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law

> in an otherwise unfavorable opinion. There would be no conceivable claim that the plaintiff had "'prevailed,'" for instance, if the District Court in this case had first decided the question of immunity, and the Court of Appeals affirmed in a published opinion which said: "'The defendants are immune from suit for damages, and the claim for expungement is either moot or has been waived, but if not for that we would reverse because Helms' constitutional rights were violated.'"

Id. at 761-62.

That is virtually identical to the situation present here. Because the underlying issue of whether the policies in question can even be attributed to the County remains up in the air for purposes of liability, it is impossible to see how a decision in plaintiffs' favor materially affects the relationship between the parties. If these policies are not in fact County policies but mandated by State law, how can the declaration, as a practical matter, impact the County's responsibility to afford relief?

As *Hewitt* noted, there is also a "practical objection to equating statements of law (even legal holdings en route to a final judgment for the defendant) with declaratory judgments. . . ." *Id.* at 762. Such post-facto characterizations of legal holdings as the equivalent of declaratory relief "deprives the defendant of valid defense to a declaratory judgment to which he is entitled." *Id.* As this Court observed:

> Imagine that following *Helms I*, Helms' counsel, armed with the holding that his client's constitutional rights had been violated, pressed the District Court for entry of a declaratory judgment. The defendants would then have had the opportunity to contest its entry not only on the ground that the case was moot but also on equitable grounds. The fact that a court *can* enter a declaratory judgment does not mean that it *should*. [Citations.]

Id. at 762-63 (emphasis in original).

Indeed, this Court noted that in determining whether to afford declaratory relief, a court would appropriately consider whether the defendants would actually be liable on an underlying claims for damages:

> If the only effect of a declaratory judgment in those circumstances would be to provide a possible predicate for a fee award against defendants who may ultimately be found immune, and thus to undermine the doctrine of official immunity, it is conceivable that the court might take that into account in deciding whether to enter a judgment. The same considerations may not enter into the decision whether to include statements of law in opinions – or if they do, the court's decision is not appealable in the same manner as its entry of a declaratory judgment.

Id. at 763.

Once again, that is essentially the situation present here. The Ninth Circuit has identified no meaningful relief obtained by plaintiffs as against the County on the claim for declaratory relief. The only purpose of the post-facto declaratory judgment granted by the Ninth Circuit is as a "possible predicate for a fee award" against the County, despite the fact the County may eventually be found not to be liable for damages under *Monell.* As this Court emphasized in *Hewitt*, a court, in determining whether to grant a declaratory judgment, might well take into account the question of whether such a declaratory judgment would serve as a predicate for a fee award under circumstances that would undermine an underlying rule of liability itself – in this case *Monell* – by imposing liability on local public entities for conduct that is not fairly attributable to them.

The Ninth Circuit has done exactly what this Court in *Hewitt* said it cannot do – transformed resolution of a legal issue into the equivalent of declaratory relief, solely as predicate for a fee claim, without showing how in fact such a declaratory judgment materially affects the County's conduct vis-à-vis the plaintiffs. Worst yet, it does so where, given that the *Monell* issue is open, it appears that in fact plaintiff might never be able to establish that the County itself is responsible for any of the alleged policies.

B. Under *Rhodes*, The Mere Fact That Plaintiffs Asserted A Claim For Declaratory Relief Does Not Transform Determination Of A Legal Issue Into The Equivalent Of A Declaratory Judgment Where Plaintiffs Cannot Establish That The Relief Obtained Materially Affects Their Relationship With Defendant.

Nor does it make any difference that here, unlike *Hewitt*, the plaintiffs pled a claim for declaratory relief in the complaint. The Ninth Circuit's opinion did not purport to direct entry of judgment on that claim or any other claim; rather, the court reversed summary judgment as to the State and County and remanded for proceedings consistent with the opinion. (App.72.) And in any event, as this Court held in *Rhodes v. Stewart*, 488 U.S. 1, 3, the mere fact that "the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under §1988." As the Court observed: "Indeed, we confirmed the contrary proposition. . . ." Citing *Hewitt*, this Court emphasized that the ultimate determination of whether an award of declaratory relief confers prevailing party status under §1988 depends on whether it "affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4 (emphasis omitted).

In *Rhodes*, the plaintiffs had filed suit to invalidate restrictions on their receipt of magazine subscriptions as prisoners; however, since one was released and the other had died before the district court entered its order invalidating the prison rule, they could not in fact obtain redress from any changes in prison policy caused by their lawsuit. Hence, despite the fact that plaintiffs had obtained a declaratory judgment, they could not be deemed prevailing parties for purposes of a fee award. *Id.* at 3.

Again, that is the situation here. If, at the end of the day, plaintiffs cannot establish that any policy, custom or practice of the County led to the absence of procedural protections, it cannot be said that plaintiffs have obtained any meaningful relief from the County. In fact, the Ninth Circuit has not explained how the specific declaratory relief it purportedly granted in any way materially impacts plaintiffs' position vis-à-vis the County.

The Ninth Circuit's fee order clearly evinces at best its confusion about, and at worst its disregard of, the guiding principles this Court enunciated in *Hewitt* and *Rhodes* concerning the circumstances in which an award of declaratory relief may give rise to a fee claim under §1988. Thus, for this reason too, review is warranted.

CONCLUSION

For the foregoing reasons, petitioner urges that the petition be granted.

Respectfully submitted,

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