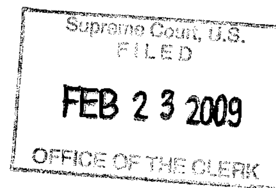

No. 08-704

IN THE

Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

CITY OF DALLAS, TEXAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipality is liable under 42 U.S.C. § 1983 for its agent's violation of a mandatory municipal policy.

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STATEMENT OF THE CASE

Petitioner alleges that the city manager of respondent City of Dallas was required to appoint petitioner to a particular job under the express and mandatory terms of the city's charter. As is relevant here, petitioner specifically alleges that respondent is liable for the city manager's conduct. The court of appeals held that such a claim is self-defeating: petitioner's assertion that the city manager *violated* the "official policy" (*Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978)) of respondent set forth in the city charter negated any claim of municipal liability.

1. Petitioner is the former police chief of respondent City of Dallas, Texas, a position to which he was promoted from assistant chief. In 2003, the city manager fired petitioner as chief of police on the ground that petitioner was unfit to serve in the position.[1] Petitioner contends that the city's charter required the city manager to appoint him to the lower-level rank of sergeant in the police department rather than terminating his employment. At the time, the city charter provided:

> If the chief of the police department, or any assistant above the rank and grade of captain, was selected to that position from

[1] The factual recitation is drawn from the lower court opinions, which accepted respondent's factual allegations and construed them in his favor on summary judgment. In any trial, respondent would of course have the right to contest those factual claims, which are assumed here only *arguendo*.

> the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief or the assistant shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

Dallas Tex. City Charter ch. XII, § 5 (2001), *repealed* Nov. 8, 2005.

The petition for certiorari involves petitioner's claims against respondent City of Dallas, not against the city manager (who was previously dismissed from the case on the ground of qualified immunity). Petitioner sued the city under 42 U.S.C. § 1983 alleging (i) that the city manager had violated petitioner's constitutional rights by terminating his employment, and (ii) that respondent was liable for the city manager's decision. Petitioner's constitutional claim rests on the assertion that the clear and mandatory terms of the city charter give him a constitutionally protected property interest in an appointment to a lower-level position in the police department.

The district court initially dismissed the lawsuit (Pet. App. 39a-45a) but the Fifth Circuit ordered it reinstated (*id.* 30a-38a). The court of appeals agreed with petitioner that the specific and mandatory terms of the charter granted him a protected property interest in continued employment in the department after his dismissal as chief of police. *Id.* 34a. "[I]f a

chief promoted from within the ranks is not removed for cause, by the plain language of the charter he must be restored to his previous position." *Id.* 36a.

2. On remand, the district court again granted respondent summary judgment. Pet. App. 15a-29a. The district court held that the premise of petitioner's claimed constitutional right – that the charter gave him a property interest in continued employment in a lower-ranked position in the police department – defeated his claim against the city. A municipality thus may be held liable under Section 1983 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." *Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978) (emphasis added). The district court recognized that petitioner's suit depended on establishing that the city manager had *violated* city policy by not following the requirements of the charter. Because "[t]he decision to discharge rather than reassign petitioner was a departure from the City's expressed policy, not an exercise by [the city manager] of final policymaking authority," respondent could not be held liable for the city manager's decision. Pet. App. 28a.

3. The Fifth Circuit affirmed. Pet. App. 1a-14a. The court of appeals agreed with the district court that respondent is not liable for conduct that violates the clear terms of the city charter. Because "the Charter . . . prohibits the specific action taken by [the manager]," that "action clearly does not represent final policy with respect to the removal of city

officials like [petitioner]. It is the Charter that announces the City's policy in this regard." *Id.* 13a.

The court of appeals also held that respondent was not liable because the city manager did not hold "final policymaking authority," as distinct from his more limited "final decisionmaking authority." Pet. App. 12a-13a. In the Fifth Circuit's view, although the city manager had authority to make individual employment decisions, there was no "source of law showing that the City vested [the manager] with policymaking power." *Id.* 13a.

REASONS FOR DENYING THE WRIT

The court of appeals' holding that respondent was not liable for its city manager's violation of the mandatory terms of a since-repealed provision of its Charter is clearly correct under this Court's decision in *Monell* and does not conflict with the precedents of this Court or any other court of appeals. Further review is not warranted.

1. The lower courts correctly recognized that petitioner's suit under 42 U.S.C. § 1983 is entirely self-defeating. Petitioner claims a constitutionally protected property interest in appointment to a lower-level position in the city police department based on what petitioner argued, and the court of appeals accepted, was a requirement of the city's charter. *See Bishop v. Wood*, 426 U.S. 341, 344-45 (1976) (property interest in continued public employment must be rooted in state or local law); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (same). Because petitioner's suit admittedly rests on the premise that the city manager *violated* municipal policy by not appointing him to a new position, he

cannot prevail on his claim that the manager's decision *represents* municipal policy. Respondent is accordingly not liable under *Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978). *See* Pet. App. 13a-14a (court of appeals); *id.* 24a-28a (district court).

The irreconcilable tension within petitioner's suit is apparent from his own filings in the lower courts. Petitioner, in his first appeal, successfully urged the Fifth Circuit to recognize his property interest in continued employment on the ground that the manager "must conduct himself as prescribed in the charter" (Pet. Br. 7, No. 05-11141 (5th Cir. Filed Jan. 17, 2006)), which in turn "provides in mandatory terms that he 'shall' be restored to the rank he held prior to appointment to the position" (Pet. Reply Br. 2, No. 05-11141 (5th Cir. Filed May 6, 2006)). Subsequently, on remand in the district court, petitioner argued, *inter alia*, that (1) the city manager lacked discretion under the city charter to terminate rather than demote a chief of police who had come from the ranks and had not been discharged for cause; (2) his discharge was arbitrary and capricious because it was contrary to the Dallas city charter; (3) the city manager had ignored the plain language of the charter; and (4) the manager "did not have the discretion to simply flaunt the law." Pet. App. 27a (citations omitted).

Petitioner notes that the charter "expressly gives the City Manager sole control over both 'removal from . . . office' and 'removal from . . . employment' of any executive rank official such as the Chief of Police." Pet. 4 (quoting Dallas City Charter, ch. III, § 15). *Accord Amicus* Br. 11 (citing the same

provisions). But petitioner answers that point himself: petitioner does "*not* challenge his *removal* from the position of Chief of Police, but assert[s] that he was entitled to continued employment as a police officer, and that he therefore should have been demoted to a lower rank with the Department rather than being dismissed." Pet. 3 (emphasis added). His right to a lower-level position is determined by the city charter, which is not a question over which the city manager has any discretion, much less "sole control."

Petitioner also notes that "the court of appeals did not suggest that there was any official or agency in the city of Dallas which had the power to prevent or correct such a violation of the city charter by the City Manager." Pet. 38. But it is a commonplace feature of government that officials execute policy created by others. It therefore does not help to define the narrower class of cases in which the decision in question constitutes "official *policy*" that gives rise to municipal liability. The dispositive point is not that Dallas did not task another official with responsibility to "prevent or correct" the city manager's decision, but rather is that petitioner contends that the decision was itself contrary to an official city policy that petitioner emphatically argues was by its terms mandatory. Because petitioner's own suit rests on the assertion that respondent's policy required that petitioner be reassigned to another position in the police department, the city manager's failure to do so thus represented a departure from, not implementation of, the alleged city policy.

Petitioner also errs in his reliance on this Court's holding in *Monroe v. Pape*, 365 U.S. 167, 171 (1961), that governmental conduct is "'under color of law' under section 1983 [even] if *state* law forbids the constitutional violation in question." Pet. 39 (emphasis in original). The "color of law" inquiry determines the liability of individual government employees. The question here, by contrast, is the liability of a governmental entity – a municipality. *Monell* thus overruled *Monroe* in part by holding that Section 1983 applies to municipalities, but also held that Congress did not impose *respondeat superior* liability on municipalities, thus limiting the circumstances in which "the § 1983 remedy [is] extended to reach the deep pocket of municipalities." *Hudson v. Michigan*, 547 U.S. 586, 597 (2006). *Contra Amicus* Br. 4 (maintaining that there is a "core principle that local governments under § 1983 should be accountable for constitutional injuries inflicted by top officers," without regard to existence of official municipal policy).

In sum, petitioner cannot escape the horns of the dilemma of his own lawsuit. Petitioner's claim under Section 1983 is that respondent violated petitioner's constitutional rights because the city charter granted him a protected property interest in assignment to a lower-level position in the police department. That alleged property interest allegedly arises from the mandatory terms of the city charter. But acceptance of that assertion necessarily establishes that the city manager's failure to follow the charter amounted to a violation of city policy, for which respondent cannot be held liable. *Monell, supra.*

2. Petitioner errs in contending that this case implicates a circuit conflict over "whether a city is insulated from liability by the existence of a written standard forbidding violations of federal constitutional rights." Pet. 33. He maintains that "the lower courts have reached conflicting conclusions regarding cases in which the authoritative action of a city's official is inconsistent with some written standard." *Id.* 34.

The straightforward answer is that the judgment in this case does not rest on a generalized "written standard" that broadly "forbid[s] violations of federal constitutional rights." The Fifth Circuit accepted petitioner's own submission that the governing provision of the city charter required with great specificity and in mandatory terms that the city appoint petitioner to a lower-level position in the police department. The supposedly conflicting cases cited by petitioner are accordingly inapposite.

In *Lytle v. Carl*, 382 F.3d 978, 985 (9th Cir. 2004), the Ninth Circuit held that a "general statement" that a municipal official "is not authorized to violate the law, without more, cannot be enough to insulate" the municipal entity from suit. Liability was thus not precluded by a city rule broadly stating that the relevant municipal official was delegated power to take actions "not inconsistent with law." *Id.* at 984-85.

In *Martinez v. City of Opa-Locka*, 971 F.2d 708, 714 (11th Cir. 1992), the Eleventh Circuit held that a city was not protected from suit by a "precatory admonition against discrimination." The city could not avoid liability on the basis of a rule requiring that personnel decisions "be made according to merit and

fitness" (*id.*) because, beyond that vague suggestion, "the City Manager's discretion over unclassified personnel matters [was] not constrained by any policy other than set by her." *Id.* at 715.

In *Randle v. City of Aurora*, 69 F.3d 441, 450 (10th Cir. 1995), the Tenth Circuit held that constraints on employment decisions that are "*meaningful*—as opposed to merely hypothetical—" will "strip an official of 'final decisionmaking' authority." On that basis, the court of appeals remanded for further proceedings to determine "whether the Council has, in fact, enacted . . . regulations [governing employment decisions] or whether they provide a meaningful constraint on the City Officials' employment decisions." *Id.* at 449-50.

In *Angarita v. St. Louis County*, 981 F.2d 1537, 1546 (8th Cir. 1992), the Eighth Circuit held that "[a]n unconstitutional governmental policy can be inferred from a single decision taken by the highest official responsible for setting policy." The plaintiffs' suit in that case alleged that the chief of police had specifically directed that they be subject to an interrogation that involved "blatant misconduct and coercion." *Id.* No clear policy governed the terms of such an interrogation. The chief, accordingly, "had final policymaking authority," and his actions "in his official capacity in this situation [were] sufficient to impose liability on" the municipality. *Id.*

The four decisions cited by petitioner are easily distinguished, and petitioner's own Section 1983 claim would be rejected by each of the courts of appeals he cites. Like those courts, the Fifth Circuit recognized that "[i]t is well-established that a single unconstitutional action by a municipal actor may give

rise to municipal liability if that actor is a final policymaker." Pet. App. 6a. The critical distinguishing feature of this case is that petitioner's own suit is premised on the assertion that respondent had adopted a mandatory policy requiring petitioner to be assigned to a lower-level position within the police department. That policy is the *sine qua non* of the "property right" that underlies petitioner's claimed constitutional right in his suit under Section 1983. The "meaningful" provision (*Randle*) of the Dallas City Charter on which petitioner relies is different in kind from the policies involved in the decisions of other circuits he cites, which range from the "precatory" (*Martinez*) to the non-existent (*Angarita*).

3. Petitioner also errs in separately contending that review is warranted in this case to resolve a "conflict among the lower courts concern[ing] the standard for identifying the city officials for whose actions the city itself is legally responsible." Pet. 12. Petitioner focuses on a claimed disagreement among the circuits regarding whether municipal liability attaches merely to the conduct of an official with final decisionmaking authority or instead is limited to circumstances in which the official also "possesses certain additional power," such as "legislative" authority. *Id.*

Petitioner specifically claims that a conflict has existed throughout the quarter-century since the Fifth Circuit's en banc decision in *Bennett v. Slidell*, 728 F.2d 762 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). But in that period, the Court has declined numerous opportunities to review the question he presents (beginning with *Bennett* itself),

a fact that is not immediately apparent only because petitioner omits the subsequent history of the cases he cites.

But even if a conflict otherwise worthy of this Court's attention existed, certiorari should be denied here because the competing legal rules would not affect the outcome in this case. Petitioner asserts that some courts of appeals determine municipal liability without considering whether the relevant municipal actor had the power to set policy, as opposed to the authority to implement policy set by some other municipal official (such as the mayor) or body (such as the city council). The relevant point, however, is that every circuit adheres to the requirement articulated by *Monell*, *supra*, that only "official policy" may give rise to municipal liability under Section 1983. Here, petitioner's claim rests on the assertion that the city manager acted in violation of respondent's official policy, which was set forth in the city's charter.

Put another way, even if some circuits would deem respondent's city manager to be a "final decisionmaker" for *some* purposes (for example, in exercising his discretion to fire employees other than the chief of police without reinstatement), no circuit would find municipal liability in *these* circumstances. Here, petitioner alleges that the city manager violated a mandatory rule requiring that petitioner be appointed to a lower-level position within the police department. Because the circuit conflict alleged by petitioner would not affect the disposition of this case, review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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