No. 08-704

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

THE CITY OF DALLAS, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The **National Employment Lawyers Association (NELA)** is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. Many NELA lawyers represent city and county employees seeking relief from constitutional violations in the workplace. NELA is thus well positioned as an organization to explain the significance of the issues at bar to litigating such claims.

The questions presented by Petitioner are important to the development of law in the area. In spite of *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978), some circuits continue to allow local governments to avoid civil liability for

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[1] The parties have consented to the filing of this brief, and their written consent is on file with the Clerk. No counsel for any party to this action authored this brief in whole or in part. Furthermore, the *amici* and their undersigned counsel bore the full cost of preparation and submission of this brief, and no other person or entity made any monetary contribution to the preparation or submission of this brief. Supreme Court Rule 37.6.

constitutional violations against their employees. Plaintiffs are denied a fair chance to try their claims because – in those circuits – municipalities disclaim accountability for decisions made even in the highest reaches of leadership. This brief *amici curiae* explains why this case presents a good opportunity for redirection.

NELA has filed numerous *amicus curiae* briefs before this Court and the federal courts of appeals to ensure that the civil rights of employees are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has recently filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of Nashville & Davidson Co.* (No. 06-1595); *Gross v. FBL Financial Serv's, Inc.* (No. 08-441); *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146 (2008); *Sprint/ United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Kentucky River Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

The **National Education Association (NEA)** is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to protecting the constitutional rights of public school employees and, to this end, frequently files *amicus curiae* briefs before this Court.

SUMMARY OF THE ARGUMENT OF *AMICI CURIAE*

Within the geographical borders of the Fifth and Seventh Circuits lie seven of the twenty most populous cities in the United States: Chicago, Houston, San Antonio, Dallas, Indianapolis, Austin, Fort Worth. U.S. Census Bureau, Annual Estimates of the Population for Incorporated Places over 100,000, July 1, 2007, http://www.census.gov/popest/cities/SUB-EST2007.html. These cities (and many other units of local government), under the prevailing law of these two circuits, may insulate themselves from unwanted constitutional litigation, by the expedient of (1) vesting final decisionmaking authority in "executive" figures, such as mayors or city managers; or (2) passing an ordinance that ostensibly "bans" officers from violating the constitution. *See, e.g., Auriemma v. Rice*, 957 F.2d 397, 399-400 (7th Cir. 1992); *Jett v. Dallas Independent School Dist.*, 7 F.3d 1241, 1248-50 (5th Cir. 1993).

This case exemplifies the harsh results of this errant case law. The district court "assume[d] *arguendo* that Bolton's Fourteenth Amendment [Due Process] rights were violated when [City Manager] Benavides decided to terminate, rather than reassign, him. . . ." (App. 24a). Even in the teeth of this possibility, the Fifth Circuit held that no liability attached to the city because "the city manager's . . . position is executive rather than legislative" (App. 11a). Alternatively, the panel held that an ordinance which supposedly "prohibit[ed] the specific action taken by Benavides" (App. 13a) insulated the city from civil liability.

Both holdings exalt formalities over the core principle that local governments under § 1983 should be accountable for constitutional injuries inflicted by top officers. *Monell v. Dep't of Social Services of City of N.Y.*, 436 U.S. 658, 692 (1978). It has been lost on these circuits that "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). The Court should grant *certiorari* and close off the wrong path that these courts have taken.

ARGUMENT

I. The Case Law of the Fifth and Seventh Circuits Imposes Arbitrary, Extra-Statutory Limits to Proving Causation Under *Monell*

This Court has often concerned itself with the constitutional rights possessed by public employees. As recently as last term, this Court reaffirmed that public employees enjoy rights against illegal classification under the Equal Protection Clause. *See, e.g., Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 2155 (2008) ("our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently"). Public employees hold First Amendment rights against retaliation for their public speech. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (*citing Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968)). And, as implicated in this case, public employees can have Due Process rights against wrongful termination. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) ("public employees

who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process") (*citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), *and Perry v. Sindermann*, 408 U.S. 593, 602-603 (1972)).

And yet those municipal employees who reside in the Fifth and Seventh Circuits may come to grief when they seek to enforce those rights in federal court. They find themselves pincered between the defense of qualified immunity – which excuses individual officials from liability when their conduct does not violate clearly-established constitutional standards, *see Pearson v. Callahan*, No. 07-751 at 5-6 (U.S. S. Ct. Jan. 21, 2009) – and case law that insulates local governments from liability for the final decisions of top executive officials. So here, in the first interlocutory appeal of this case, Petitioner Bolton lost the qualified immunity defense against the City Manager who fired him, because it was not settled law at the time of his termination that the city charter invested the officeholder with a property interest (App. 38a) ("[a]lthough we now conclude that § 5 of the Dallas City Charter creates a vested property right in employment at a former rank for executive-level officials, this decision is not apparent from *Muncy* [*v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003)]"). In the second round, the Fifth Circuit held that the city was not liable because the City Manager was not a final policymaker (App. 12a).

These courts apply a standard of causation that runs against the grain of *Monell*, which was intended to broaden municipal liability. The Court in *Monell*, when

it overruled the absolute immunity previously enjoyed by local governments in *Monroe v. Pape*, 365 U.S. 167 (1961), reaffirmed the principle "that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). Accordingly, it held that a local government could be liable when its "official policy" was the "moving force" behind a breach. *Monell*, 436 U.S. at 694 ("it is 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"). The decision incontestably broadened the opportunities for citizens to hold local government accountable, although it still required some showing of causation by the plaintiff.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986), this Court considered "whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement." It held "that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. The majority reasoned that:

> where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983. [*Id.* at 481.]

Yet the Court failed to reach a majority in support of a more precise definition. A four-justice plurality held that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481. As the Petitioner describes fully in his papers, the circuits have reached widely divergent opinions about the reach of this standard.

There is notorious instability in the causation principle first hatched in *Monell. See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting with Stevens and Ginsburg, JJ.) (calling for reexamination of the *Monell* causation framework); *id.* at 429-30 (Souter, J., dissenting with Stevens and Breyer, JJ.) (same). But we can be certain of one thing: that whatever the right standard *ought* to be, the Fifth Circuit's position – drawing a line between "executive" decision-makers and "legislative" policy-makers – *cannot* be the correct one. It is a classic "tyranny of labels," *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.), holding relief hostage to a federal court's *post hoc* determination about whether a local official's decision ought to be considered "legislative" or "executive" in nature.

Nothing in the language of § 1983, or the nature of the rights themselves, warrants the false subdivision of "legislative" and "executive" authority. Section 1983 furnishes a cause of action to correct constitutional violations, regardless of the source. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("[t]he very purpose of § 1983 was to interpose the federal courts between the States

and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial") (citation and internal quotation marks omitted). Equal Protection covers actions by executive and legislative officials alike. *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 2150 (2008) ("[i]t is well settled that the Equal Protection . . . Clause's protections apply to administrative as well as legislative acts"). Executive officers, no less than legislators, are barred by the First Amendment against retaliating against employees on account of public speech. *Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (defendant in First Amendment retaliation case identified as a "Constable . . . an elected official who functions as a law enforcement officer"). And the Due Process Clause constrains arbitrary actions by each branch of government. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The Court itself has noted the challenge of drawing lines between branches, even under the Federal Constitution. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) (noting the "difficulty of defining such categories of 'executive' or 'quasi-legislative'"); *Bowsher v. Synar*, 478 U.S. 714, 748 (1986) (Stevens, J., joined by Marshall, J., concurring in the judgment) (observing "unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power"). Yet the Fifth and Seventh Circuits compound the folly by attempting to impress legislative/executive

classifications upon units of local government, a form of interference that this Court once disapproved.

> while it might be easier to decide cases arising under §1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish

McMillian v. Monroe County, Ala., 520 U.S. 781, 795 (1997).

Even more lamentably, these circuits sanction a second rule: that so long as a local government adopts a written policy prohibiting its officers from violating constitutional norms, it cannot – as a matter of law – be held liable for their officers' breaches. *See* App. 13a ("[i]t is the Charter that announces the City's policy in this regard"); *Auriemma*, 957 F.2d at 401 ("[t]he Superintendent of Police in Chicago had no power to countermand the statutes regulating the operation of the department"). The Court previously rejected such an argument, tendered in the context of Title VII, holding that the existence of an anti-discrimination policy alone did not insulate the employer from liability for a supervisor's sex harassment of an employee. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability"). *Cf. Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 737-38 (1989) (remanding for finding of whether school

district could be liable for superintendent's actions, where district had a written policy prohibiting the actions alleged).

Other courts of appeals have held that such a rule would be a pathway to subverting *Monell* altogether. As the Tenth Circuit observes, even an executive's defiance of written policy should not fend off governmental liability:

> This must include even actions by final policymakers taken in defiance of a policy or custom that they themselves adopted. Were the rule of law different, we would invite irrational results. Holding municipalities immune from liability whenever their final policymakers disregard their own written policies would serve to encourage city leaders to flout such rules. Policymakers, like the members of the Board before us, would have little reason to abide by their own mandates, like the RIF policy, and indeed an incentive to adopt and then proceed deliberately to ignore them. Such a rule of law would thus serve to undermine rather than enhance Section 1983's purposes.

Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281, 1285 (10th Cir. 2007) (footnote omitted). Other circuits agree. *See, e.g., Amnesty America v. Town of West Hartford,* 361 F.3d 113, 127 n.7 (2d Cir. 2004) (municipality may be liable for deliberate indifference of police chief to use of excessive force at demonstration, in spite of "Town's written policy on the use of force in

arrests, and its written policy on handling anti-abortion protests"); *Lytle v. Carl*, 382 F.3d 978, 985 (9th Cir. 2004) ("[a] general statement by a school board or board of trustees that a superintendent is not authorized to violate the law, without more, cannot be enough to insulate the school district from liability").

II. The Case Law of the Fifth and Seventh Circuits Deflects Public Accountability for Constitutional Violations, Contrary to *Monell*

Monell, as noted, "is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). The responsibility problem is poignant in this case, because the City Manager exercised plenary authority over both "removal from . . . office" and "removal from . . . employment" of any executive rank official such as the Chief of Police. (Dallas City Charter, ch. III, § 15) (App. 25a, 48a). No one, save for the City Manager himself, could have put out the lights in Bolton's office – his decision was both final and unreviewable. While the charter section appears crafted to shield the City Manager from political influence in making key appointments, by the Fifth Circuit's lights it also paradoxically allows everyone in the process to avoid accountability for removing Bolton from public service, without cause. *E.g.*, Charles Dickens, *Little Dorrit*, ch. 10, "Containing the whole Science of Government" (1857) ("[b]ecause the Circumlocution Office was down upon any ill-advised public servant who was going to do it, or who appeared to be by any surprising accident in remote danger of doing it, with a minute, and a memorandum, and a letter of instructions that extinguished him"). This heralds a return to the era of

Monroe v. Pape: immunity for local units of government, as decreed in a self-serving ordinance.

Compare the outcome here to a Sixth Circuit decision in favor of the plaintiff on comparable facts, *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994). The court there held that the single act by the City's Director of Safety and City Manager of discharging a fire chief in retaliation for exercising his First Amendment rights was an exercise of civic authority that warranted corporate liability. The panel majority specifically disaffirmed the suggestion that the termination must be rooted in official express policy:

> The City argues that it is not liable under *Monell* because Meyers was not discharged pursuant to a formal city "policy." The City states, as though it is dispositive, that "[t]here is no evidence of any policy or custom of disciplining municipal employees for exercising their right of free speech. There is no evidence that any final policy-making official ever promulgated a policy of disciplining City employees for exercising their rights of free speech." Petitioner's Brief at 17. *No municipal official in his right mind would advocate such a general policy.* The City is not accused of routinely disciplining employees for exercising First Amendment rights or of having an officially promulgated policy to that effect. Its highest officials-the Safety Director, the City Manager and the Civil Service Commission-acted together to

> discipline John Meyers for exercising his constitutional rights in this one case. [*Id.* at 1117, emphasis added.]

Indeed, Cinncinati (like Dallas) assigned to its City Manager solitary authority to "dismiss, suspend and discipline all officers and employees in the administrative service under the control of the City Manager." (*id.* at 1118, *quoting* Administrative Code of the City of Cincinnati, Art. II, § 1). Such solitary executive authority by city managers to hire and fire recurs in § 1983 case law. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 625 n.2 (1980) ("[u]nder §3.3(1) of the city's charter, the City Manager has sole authority to '[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city. . . .'"); *Randle v. City of Aurora*, 69 F.3d 441, 448-49 (10th Cir. 1995) (finding genuine issue of material fact about whether City Manager was final policymaker under ordinance that conferred power to "[a]ppoint, suspend, transfer and removal of all employees of the city, except as otherwise provided herein, subject to the personnel regulations of the city adopted by the council"); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 715 (11th Cir. 1992) (per curiam) (finding monetary damages award against municipality was appropriate where the City Manager, who had final policymaking authority with respect to personnel decisions, terminated a city employee for exercising her First Amendment rights to criticize the City Manager).

Because the outlier decisions of the Fifth and Seventh Circuits allow local government to avoid accountability for constitutional violations, purely by moving authority around on paper, the *amici curiae* ask that this Court take up the present case and reverse the decision below.

* * * *

Two final points make this case highly suitable for review. First, not only was the decision below erroneous, but the panel below expressly cited – and rejected – the case law of other circuits authorizing municipality liability for the decisions of officers endowed with final or supervisory power or authority (App. 9a-10a). Application of the rule also truly made a difference in the outcome. The panel made no assessment on the merits about whether the City Manager's decision violated Bolton's Due Process rights, and it even assumed *arguendo* that Bolton's rights were violated by his termination (App. 24a).

Second, the Court may review this case without fear of unbalancing the relationship between local governments and their employees. This Court recently held that "in striking the appropriate [constitutional] balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist*, 128 S. Ct. at 2152. Yet the core constitutional rights at stake – Equal Protection, Due Process, and the First Amendment – are beyond doubt. The only issue presented by this case

is whether employees will enjoy a fair opportunity to enforce them in federal courts. Because the Fifth and Seventh Circuits have placed slippery barriers around *Monell*, out of keeping with this Court's precedents, the language of § 1983, or common sense, we urge that the Court grant review of the decision below and reverse it.

CONCLUSION

For the above reasons, *amici curiae* NELA and NEA respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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