No. 08-704

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

REPLY BRIEF FOR PETITIONER

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I. There Is An Important Inter-Circuit Conflict Regarding The First Question Presented

The petition describes the deeply entrenched inter-circuit conflict regarding who constitutes a policymaker under *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978). Respondent does not squarely dispute either the existence of that conflict or the importance of the issue involved. The petition describes in detail twenty-two decisions in eleven circuits, and the highest court of one state, on this recurring issue. Respondent does not question the accuracy of petitioner's account of those decisions.

Respondent notes that this Court denied certiorari when this question was first presented in *Bennett v. Slidell*, 472 U.S. 1016 (1985). (Br. Opp. 10). In 1985, however, the Court may sensibly have concluded that it would be prudent to wait to see if a serious conflict emerged once other circuits had addressed the question in *Bennett*. After almost a quarter century of extensive litigation of this issue in the lower courts, an entrenched split in the circuits has emerged, and the importance of the question at issue is beyond dispute.

II. There Is An Important Inter-Circuit Conflict Regarding The Second Question Presented

As we explain in the petition, the Eighth, Ninth, Tenth and Eleventh Circuits have held – unlike the Fifth Circuit in the instant case – that liability may

be imposed on municipalities under *Monell* despite the existence of some written municipal standard forbidding the constitutional violation in question. (Pet. 34-38). Respondent asserts that the decisions in these circuits are "easily distinguished," because the Dallas City Charter provision in the instant case "is different in kind from the policies involved in the decisions of other circuits [petitioner] cites." (Br. Opp. 10).

Respondent asserts that the Dallas Charter provision is "different in kind" from the circumstances in *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992) because the alleged prophylactic rules relied on by the defendant in *Angarita* were "non-existent." (Br. Opp. 10).

> No clear policy governed the terms of ... an interrogation. The chief [of police] accordingly, "had final policymaking authority ... "

(Br. Opp. 9). To the contrary, the Eighth Circuit opinion in *Angarita* described a welter of quite detailed county standards.[1] The Eighth Circuit upheld

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[1] The written rules in question concerned the procedures to be followed in investigating a claim that a city police officer had engaged in misconduct. The court summarized those written rules as follows:

> Section III of Order 85-5 states that complaints must be reduced to writing and signed by the person making the complaint and that the person initiating the complaint must have witnessed the incident or had reliable knowledge of the incident.

(Continued on following page)

the imposition of liability in *Angarita* because there was evidence there that the county (like the city in the instant case) had "departed from" its written standards, not because the court of appeals thought those standards did not exist. 981 F.2d at 1547.

Respondent asserts that the Dallas Charter provision is "different in kind" from the circumstances in

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> Under Section V, "an accused employee will be notified in a verbal, confidential manner of the essential information of the complaint." At that time, an agreement will be effected as to the location where the accused employee can meet with a representative of the Bureau of Internal Affairs and receive a copy of the complaint. After notification, the employee's immediate supervisor will also be notified.
>
> Under Section VII, employees are permitted to have one of their supervisors present during an interview pertaining to an investigation.
>
> Further an employee's rights include the following:
>
> (1) all interviews shall be conducted while the employee is on duty;
>
> (2) only one interviewer will ask the employee questions;
>
> (3) prior to answering any questions, employees shall be informed of the allegations made against him [sic] and receive a copy of the original complaint;
>
> (4) employees shall not be subject to offensive language, nor threatened with transfer, dismissal or disciplinary action; and
>
> (5) the complete interview shall be recorded, whenever conducted by the Bureau of Internal Affairs.

981 F.2d at 1540 n.5.

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992), because the provision in that case was "precatory." (Br. Opp. 10). That is not correct. The Opa-Locka City Charter provision referred to by the court in *Martinez* stated that "appointments and promotions in the administrative service of the City ... *shall* be made according to merit and fitness." 971 F.2d at 714 (emphasis added). The verb "shall" in the Opa-Locka City Charter is the same verb used in the Chapter XII, section 5 of the Dallas City Charter. (Pet. App. 49a). Respondent offers no explanation, and none is readily imaginable, as to how the verb "shall" could be "mandatory" when used in the Dallas City Charter and yet "precatory" when used in the Opa-Locka City Charter. (Br. Opp. 10). The Eleventh Circuit in *Martinez* itself never characterized the city standard in that case as "precatory." To the contrary, the word "precatory" appears in the Eleventh Circuit opinion only in a quotation from this Court's opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *Martinez*, 971 F.2d at 714 (quoting *Praprotnik*, 485 U.S. at 130).

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit held that to provide a defense to a *Monell* action a written municipal standard must impose "a meaningful constraint on the City Officials' employment decisions." 69 F.3d at 449-50. Respondent insists that the relevant section of the Dallas City Charter is a "'meaningful' provision" (Br. Opp. 10), and thus is "different in kind" from a provision that does not – as the Tenth Circuit requires – impose a "meaningful restraint." (*Id.*) But respondent

asserts only that the Dallas Charter contains a "'meaningful' provision," not that the Charter imposes a "meaningful restraint." The difference is significant, and goes to the heart of the second question presented.

A document or action can be "meaningful" without imposing a "meaningful constraint." If, during Watergate, the House and Senate had adopted a joint resolution urging President Nixon not to resign, that would have been a meaningful resolution (indicating, for example, that he was unlikely to be impeached), but not a meaningful constraint, because Nixon would have remained completely at liberty to quit. When, as in the instant case, a city charter calls on a city official to act in a particular way, but provides absolutely no method of review or redress if the official in question violates that standard, there is no meaningful *constraint*.

Respondent asserts that the Dallas provision at issue in the instant case is "different in kind" from the provision the Ninth Circuit found insufficient to insulate the school board from liability in *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004). Respondent does not, however, explain what that difference might be. Respondent does describe the provision in *Lytle* as "general," while insisting that Chapter XII, section 5 of the Dallas Charter is not "generalized." (Br. Opp. 8). Perhaps respondent intends to suggest that the Dallas provision is "different in kind" from the provision in *Lytle* because the Dallas provision is more specific. Such a theory might distinguish a city

charter requiring officials to "obey the Constitution of the United States" (which might be too general to bar a *Monell* claim) from a city charter directing officials to "obey the Due Process Clause of Section One of the Fourteenth Amendment" (which could be sufficiently specific to bar such a claim). But why under *Monell* such a dissimilarity in scope would constitute a "differ[ence] in kind" – with such dramatically different legal consequences – is difficult to understand.

III. The Decision Below Is Not "Clearly Correct"

The Fifth Circuit held that

> Chapter XII, § 5 of the Charter ... prohibits the specific action taken by [the City Manager]. It is the Charter that announces the City's policy in this regard.

(Pet. App. 13a). Respondent contends that the court of appeals was "clearly correct" to reject petitioner's claim, but conspicuously does not endorse the reasoning of that court. Respondent's insistence on defending the decision below on other grounds is rooted in the history of this litigation.

Petitioner's Due Process claim necessarily rests on a showing that he had a constitutionally protected property interest in employment in the position in the police department from which he had been promoted to Chief. See *Perry v. Sindermann*, 408 U.S. 593 (1972). Petitioner's complaint alleged that Chapter XII, section 5 of the City Charter, by requiring the

city to return him to that earlier position once he was removed as Chief, created just such a property interest.

From the outset of the litigation, however, the city has disputed petitioner's interpretation of Chapter XII, section 5, insisting that it created no property interest in employment because the provision permitted the City Manager to fire petitioner. The city argued that "[b]ecause Section 5 imposes no limitation on the City's right to terminate, it does not grant a property interest in continued employment."[2] The language of section 5, the city maintained, was "too nebulous" to confer such a property interest;[3] thus "Section 5 ... necessarily left untouched [the City Manager's] discretion in ... removing executive level employees."[4]

In 2005 the district court granted summary judgment on this ground. (Pet. App. 42a-44a). On appeal, however, the Fifth Circuit in 2006 rejected the city's interpretation of section 5, and held that the City Charter does (except in certain circumstances) forbid the dismissal of a Chief who previously served as a police officer. (Pet. App. 33a-36a).

The city subsequently sought summary judgment under *Monell*. The most recent 2008 decision of the

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[2] Brief of Defendants Appellees The City of Dallas, Texas and Teodoro Benavides, No. 05-11141 (5th Cir.) at 7.

[3] *Id.* at 8.

[4] *Id.* at 14.

court of appeals, in approving dismissal of petitioner's claim, expressly relied on an interpretation of Chapter XII, section 5 – that it "prohibits the specific action taken by [the city manager]" – that is precisely the opposite of the city's own longstanding construction of that provision. (Pet. App. 13a). Thus when the court of appeals stated that "the Charter ... announces the City's policy" (Pet. App. 13a), it was reading into the Charter a policy which the city throughout this litigation has insisted the Charter does not contain. Under these circumstances it is understandable that the respondent does not defend or rely on the reasoning of the court of appeals below.

The Brief in Opposition is worded with considerable care to avoid asserting – contrary to the city's longstanding position – that the language of (or any policy in) Chapter XII, section 5 protected petitioner from dismissal. With studied consistency the Brief in Opposition always refers to any such prohibition, not as the actual meaning of Chapter XII, section 5, but only as the meaning "assert[ed]," "allege[d]," "contend[ed for]" or "claim[ed]" by petitioner, or found by the Fifth Circuit.[5] Whenever the Brief in Opposition uses the adjective "mandatory" with regard to Chapter XII, section 5, it carefully does so only in describing the interpretation of that provision advanced by

[5] E.g., Br. Opp. 1 ("[p]etitioner alleges that the city manager was required to appoint petitioner to a particular job under ... the city's charter"); see *id*. at 1, 6, 7, 10, 11.

petitioner.[6] The Brief in Opposition never itself describes Chapter XII, section 5, as "clear," "express," or "highly specific"; rather, respondent invariably attributes those characterizations to either petitioner or the Fifth Circuit.[7] Above all, the Brief in Opposition – unlike the decision of the court of appeals – never describes Chapter XII, section 5 as embodying any municipal policy which forbids dismissal of a Police Chief in petitioner's position.[8]

Rather than rely on reasoning of the Fifth Circuit, respondent instead argues that – regardless of meaning of the City Charter – petitioner's claim is inherently "self-defeating." (Br. Opp. 1, 4). If petitioner succeeds in showing, as *Perry* requires, that he had a property interest in continued employment, respondent asserts that that would ipso facto demonstrate that the city had a policy that forbade dismissal of the plaintiff. Thus here – and perhaps in every *Perry* claim against a city – the very showing

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[6] Br. Opp. 1, 2, 4, 8, 10, 11.

[7] Br. Opp. 2 ("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"); see *id*. at 1, 2, 8.

[8] E.g., Br. Opp. 1 ("petitioner's assertion that the city violated the 'official policy' ... in the city charter")(emphasis omitted).

required by *Perry* would by its nature bar municipal liability under *Monell*.[9]

This syllogism assumes that the standard for establishing a property interest under *Perry* is the same as the standard for establishing a policy under *Monell*. But those legal standards are clearly different. Under *Perry*, for example, a property interest could be created by a simple contract, an "implied contract," or even an "understanding." 408 U.S. at 601; *Jago v. Van Curen*, 454 U.S. 14, 18 (1981); *Bishop v. Wood*, 426 U.S. 341, 344 (1976). But many if not most informal understandings, implied contracts, and even express contracts involving city officials would not constitute policies within the meaning of *Monell*.

In the instant case there are two important distinctions between the *Perry* and *Monell* standards. First, respondent assumes that there can be only a single policy in any given city; thus if Chapter XII, section 5 constitutes a city policy, respondent reasons, nothing done by any Dallas official that is inconsistent with that provision could itself constitute a municipal policy. On respondent's theory, even if the Mayor and City Council of Dallas had enacted an ordinance that dismissed petitioner, that ordinance

[9] Br. Opp. 7 ("Petitioner's ... 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.")

itself would have been, not a city policy, but a violation of municipal policy.

The *Praprotnik* plurality opinion, however, expressly recognized that there will be situations in which a city indeed has *two* policymakers, and in which as a result there are two (possibly inconsistent) actions or standards, both of which would constitute a "policy" for which a city would be held liable under *Monell*.

> Assuming that applicable law does not make the decisions of the [Civil Service] Commission reviewable by the Mayor and Aldermen, or vice versa, one would have to conclude that policy decisions made by *either* the Mayor and Aldermen *or* by the Commission would be attributable to the city itself.

485 U.S. at 126 (emphasis added). Thus under the governmental structure in St. Louis, if the city's Civil Service Commission adopted a rule forbidding dismissal of the Chief of Police except for cause, but the Mayor and Aldermen nonetheless fired the chief for some impermissible reason, both the Commission's rule and the action of the Mayor and Aldermen would constitute policies under *Monell*. The St. Louis Police Chief would have a constitutionally protected property interest (because of the Civil Service Commission's rule), but the city would be liable for the dismissal (because of the action of the Mayor and Aldermen).

The circumstances of the instant case fall squarely within the Court's analysis in *Praprotnik*. The actions of the voters, in adopting the Dallas City Charter, were not "reviewable by" the City Manager. The actions of the City Manager, in firing Chief Bolton, were not "reviewable by" the electorate. Thus both actions constituted municipal policy under *Monell*.

Second, under *Perry* a court could construe some municipal provision or action to establish a property interest, even though (as here) city officials adamantly disagreed. It is entirely unimportant under *Perry* whether city officials dispute the court's interpretation of such a provision. But under *Monell* it makes little sense to describe as the "official policy" of a city a *federal* court's interpretation of an ordinance or charter provision with which city officials emphatically disagree. Surely the three federal judges who in 2006 construed the Dallas City Charter to protect petitioner from dismissal cannot themselves be characterized as "officials whose acts may fairly be said to be those of the municipality." *Board of Commissioners of Bryan County v. Brown*, 520 U.S. 397, 403-04 (1997).

IV. This Case Is An Appropriate Vehicle For Deciding The Questions Presented

The case presents in particularly stark terms both of the questions presented. With regard to the first question, the court of appeals held that the

highest ranking administrative official in Dallas, who oversees thousands of city employees and a multi-billion dollar budget, did not act on behalf of the city when he fired the city's Chief of Police. With regard to the second question, the court of appeals declared to be the "official policy" of the city – precluding liability for any other action – an interpretation of the City Charter which city officials have long adamantly rejected and which the City Manager was empowered to disregard with impunity.

Respondent asserts that it will "clearly" prevail on the second question presented, and that the case thus does not provide an appropriate vehicle for deciding the first question. As we explain above, the merits of respondent's arguments on the second question are, if anything, weaker than its position on the first question.

When a petition presents two or more questions, moreover, the Court is not required at the certiorari stage to attempt to predict the strength of the arguments on each question. Such a practice is not necessary to assure that at the merits stage the Court will be able to reach and resolve the questions which certiorari was granted to resolve. Even if the Court ultimately decides one question in favor of the respondent, the Court neither must nor invariably does limit its opinion to that particular question. To the contrary, the Court often affirms a decision despite having addressed and resolved one or more issues in favor of the petitioner. In such cases the Court first

discusses the matters on which the petitioner prevails, and then considers the issues on which the respondent prevails and that result in an affirmance. E.g., *Smith v. Jackson*, 544 U.S. 228 (2005); *Strickler v. Greene*, 527 U.S. 263 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *Farrar v. Hobby*, 506 U.S. 103 (1992).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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