No. 08-08-704

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In an action under 42 U.S.C. § 1983, may a city or other local government body be held liable for a constitutional violation because the official who committed that violation exercised the final authority to make the decision in question?

(2) In an action under 42 U.S.C. § 1983, does the existence of a written government standard forbidding a constitutional violation preclude the imposition of liability on a city or other local government body for such a violation by its officials?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Terrell Bolton respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 7, 2008.

OPINIONS BELOW

The August 7, 2008 opinion of the court of appeals, which is reported at 541 F.3d 545 (5th Cir. 2008), is set out at pp. 1a-14a of the Appendix. The September 9, 2008, order of the court of appeals denying rehearing en banc, which is not reported, is set out at pp. 46a-47a of the Appendix. The August 17, 2007 decision of the district court, which is unofficially reported at 2007 WL 2381253 (N.D.Tex. 2007), is set out at pp. 15a-29a of the Appendix. The December 7, 2006 opinion of the court of appeals, which is reported at 472 F.3d 261 (5th Cir. 2006), is set out at pp. 30a-38a of the Appendix. The September 20, 2005 decision of the district court, which is unofficially reported at 2005 U.S. Dist. LEXIS 20543 (N.D.Tex. 2005), is set out at pp. 39a-45a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 7, 2008. A timely petition for rehearing en banc was denied on September 9, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CHARTER PROVISIONS INVOLVED

The statute and charter provisions involved are set forth in the Appendix.

STATEMENT OF THE CASE

In *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978), this Court held that a city[1] can be held liable for a constitutional violation by an official "whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. Under *Monell* and its progeny the scope of municipal liability turns on the definition of what constitutes "policy" and who is a "policymaker." This Court's decisions on that issue have been "deeply divided." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-86 (1989). This case presents two major questions that have divided the lower courts regarding the scope of municipal liability under *Monell*.

From 1999 until 2003 petitioner Bolton, who had risen from within the ranks of the Dallas Police Department, was the Police Chief of Dallas, Texas. In August 2003 the Dallas City Manager fired Bolton.[2]

[1] The same standard applies to claims against counties, school boards, and other local government bodies. For simplicity the petition refers to claims against cities.

[2] The city agreed that Bolton had not been fired for cause. (App. 17a, 31a, 40a).

Bolton did not challenge his removal from the position of Chief of Police, but asserted that he was entitled to continued employment as a police officer, and that he therefore should have been demoted to a lower rank within the Department rather than being dismissed. (App. 2a, 16a). Bolton commenced this suit against the city of Dallas and the City Manager, alleging that his dismissal was unconstitutional. Bolton contended that under the Dallas city charter he had a property interest in continued employment as a police officer, and that by dismissing him (rather than demoting him) the city had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Dallas moved for summary judgement, arguing inter alia that Bolton did not have a constitutionally-protected property interest in continued employment in the Police Department. In September 2005 the district court granted summary judgment on that ground. (App. 41a-44a). In the first appeal in this litigation, the Fifth Circuit overturned that district court decision, holding that the Dallas charter indeed created a constitutionally-protected property interest in further employment. (App. 33a-36a). The Fifth Circuit dismissed the claim against the City Manager, however, holding that he was entitled to qualified immunity. (App. 37a-38a).

On remand Dallas again moved for summary judgment, arguing that under this Court's decisions in *Monell* and its progeny the city itself could not be held liable even though the City Manager himself had

commited the asserted constitutional violation when he dismissed Bolton. The court below acknowledged that the City Manager's action in dismissing Bolton was final because the city charter expressly forbade the Dallas City Council from interfering in any way with the City Manager's absolute authority to fire a department head. The relevant charter provision 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. (Dallas City Charter, ch. III, § 15).

The city nonetheless argued that the city was not legally responsible for the action of the City Manager in dismissing Bolton. "Defendants ... contend that if [the City Manager's] decision to terminate Bolton was wrong, it was not the decision of the City, and the City cannot be held liable under section 1983." (App. 23a). The district court sustained that contention and again granted summary judgment in favor of the city. (App. 20a-28a).

The Fifth Circuit affirmed. The court of appeals acknowledged that under the Dallas city charter the City Manager had been given the final authority to decide to fire the Chief of Police as well as certain other high ranking city officials. (App. 2a, 4a, 11a, 12a). The dispositive issue in the litigation below was whether that type of absolute authority falls within what *Monell* and its progeny deemed to be "policy-making" authority.

First, the court of appeals reasoned that whether a city is responsible for the actions of a municipal official turns on whether the official's powers are "legislative" or merely "executive" in nature. Only "legislative" actions, it held, constitute policy under *Monell* and its progeny. (App. 9a, 11a-12a).

> The repeated references [in Texas statutes] to the city manager's responsibility for "administration" make clear that the position is executive rather than legislative; that is, state law ... does not give to city managers "the responsibility for making law or setting policy in any given area of a local government's business." [*City of St. Louis v.*] *Praprotnik*, 485 U.S. [112,] 125 [(1988) (plurality opinion)].

(App. 11a-12a). Although the Dallas city charter gave the city manager "final decisionmaking authority" regarding whether, when, or for what to fire a Chief of Police or any other executive rank official, that delegated authority was not "policymaking authority" because "state and local law show that the city manager is an executive and administrative official." (App. 11a). In the Fifth Circuit's view, dismissal decisions are executive or administrative in nature; thus the delegation of the City Manager of final authority to make that type of decision did not constitute a delegation of "policymaking" authority. (App. 12a).

The Fifth Circuit acknowledged that other cases interpreting "policymaking" authority under *Monell*

draw no such distinction between legislative and executive positions or actions, but instead impose liability for the actions of municipal officials that are final and unreviewable. The panel emphasized, however, that the Fifth Circuit had expressly and repeatedly disapproved the decisions adopting that less restrictive standard.

> [I]n this circuit, " ... 'we *rejected* the line of authority ... which would permit policy ... to be attributed to the city itself by attribution to any and all officers endowed with final power or authority.'" *Jett* [*v. Dallas Independent School District*, 7 F.3d 1241,] 1248 [(5th Cir. 1993)] (quoting *Bennett v. City of Slidell* 735 F.2d 861, 862 (5th Cir. 1984) (en banc))..... The finality of an official's action does not therefore automatically lend it the character of a policy.

(App. 9a-10a) (emphasis added).

Second, the court of appeals reasoned that even if the City Manager were a policymaker with regard to employment decisions, the city still would not have been legally responsible for action of the City Manager in firing Bolton because that dismissal, although it might violate the Constitution, also violated the Dallas city charter.

> Chapter XII, § 5 of the Charter ... prohibits the specific action taken by [the City Manager]. Thus, absent some contrary custom not shown here, [the City Manger's] action clearly does not represent final policy with

> respect to the removal of city officials like Bolton. It is the Charter that announces the City's policy in this regard.

(App. 13a).

Bolton filed a timely petition for rehearing en banc. The petition was denied on September 9, 2008.

REASONS FOR GRANTING THE WRIT

I. THE "DEEPLY DIVIDED" DECISIONS OF THIS COURT HAVE CREATED CONFLICT AND UNCERTAINTY AMONG THE LOWER COURTS

This case presents two major inter-circuit conflicts regarding the standard governing when a city may be held liable in an action under section 1983. Both of those conflicts are rooted in the deeply divided decisions of this Court.

This Court's decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), "attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 [Civil Rights A]ct and our prior cases, and ... le[ft] further development of this action to another day." 436 U.S. at 695. *Monell* held that a city is liable for constitutional violations by an official "whose edicts or acts may fairly be said to represent official policy," 436 U.S. at 694, but provided no guidance as to what would

constitute a policy or policymaking. Justice Powell noted that under the Court's opinion – which he joined – "[t]here are substantial line drawing problems," and that "[d]ifficult questions nevertheless remain for another day." 436 U.S. at 713. Thirty years later, the day on which those questions and problems would be resolved has not yet arrived.

This Court quickly recognized the uncertainty generated by *Monell*. Two years after that decision it observed that "the contours of municipal liability under § 1983 ... are currently in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Court was unable to agree on the standard for distinguishing a policy (or policymaking) from other acts of municipal employees. "[T]he majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 143 (1988) (Brennan, J., concurring); see *id.* at 123 ("in *Pembaur* ... we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy.... [T]he Court was unable to settle on a general formulation.") (plurality opinion); *Pembaur*, 475 U.S. at 482-83 (plurality opinion), 485-87 (White, J., concurring), 487-90 (Stevens, J., concurring), 490-91 (O'Connor, J., concurring), 492-502 (Powell, J., dissenting).

Two years later, now a full decade after *Monell*, five members of the Court recognized that the

standard governing municipal liability was still "in a state of evolving definition and uncertainty." *Praprotnik*, 485 U.S. at 120 (plurality opinion), 167 (Stevens, J., dissenting) (quoting *Newport*); see 485 U.S. at 125 n.2 (plurality opinion) (municipal liability jurisprudence "a body of law that is already so difficult.").

> The definition of municipal liability manifestly needs clarification, at least in part to give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review....
>
> The Courts of Appeals have already diverged in their interpretation of [*Pembaur*].... Today, we set out again to clarify the issue that we last addressed in *Pembaur*.

485 U.S. at 121, 124 (plurality opinion). Clarification, however, was not readily to be had. The Court was again unable to agree on a standard. As in *Pembaur*, the divergent opinions proposed three different standards. 485 U.S. at 124-32 (plurality opinion), 132-47 (Brennan, J., concurring), 147-73 (Stevens, J., dissenting).

The plurality opinion criticized the standard in Justice Brennan's concurring opinion as "serv[ing] primarily to foster needless unpredictability in the application of § 1983." 485 U.S. at 131. The plurality objected that the standard proposed by Justice Stevens "is too imprecise to hold much promise of consistent adjudication." 485 U.S. at 125 n.2. Any effort to delineate a clear standard for municipal liability, the

plurality reasoned, was confounded by a "conundrum," conceding that "[i]t may not be possible to draw an elegant line." 485 U.S. at 126-27. The limited "guidance" offered by the plurality was apparently misunderstood by Justice Brennan, who saw in it implications which the plurality responded were not "necessary or correct." 485 U.S. at 130. The plurality suggested that "refinements of [its articulated] principles may be suggested in the future." 485 U.S. at 127.

In the twenty years since *Praprotnik*, no such future refinements have been forthcoming from this Court. Although the Court has dealt with other issues, it has not returned to the fundamental question of what constitutes a policy, and policymaking, under *Monell*. A year after *Praprotnik* a majority of the Court conceded that its previous decisions had been "deeply divided." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-86 (1989). In 1997 three members of the Court observed that *Monell* "ha[d] generated a body of interpretive law that is so complex that the law has become difficult to apply." *Board of County Commissioners of Bryan County v. Brown*, 420 U.S. 397, 431 (1997) (Breyer, J., dissenting). "It is not surprising that results [in the lower courts] have sometimes proved inconsistent." 420 U.S. at 435 (citing conflicting results in the courts of appeals).

It was readily apparent that the divergent opinions in *Pembaur* and *Praprotnik* would lead to confusion among the lower courts.

> The divided opinion in *Praprotnik* marks the continuing inability of the Court to complete its self-appointed task of defining a set of municipal employees whose isolated acts may lead to municipal liability.... Justice O'Connor's opinion fails to provide clear guidance. First, it failed to define a "policy-maker." ... [L]ike Justice O'Connor's opinion, Justice Brennan's provides less certainty than one might hope.

The Supreme Court, 1987 Term, 102 Harv.L.Rev. 320, 321, 326-27 (1988).

> [*Praprotnik*] only made matters worse.... [T]his pattern of divisive, inconclusive decisions ... lacks the transparency, accessibility, and congruence with its underlying purposes that any legal standard ought possess. Its indeterminacy in turn makes case outcomes seem manipulable, unprincipled, and arbitrary....

Peter Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Geo.L.J. 1753, 1754-55 (1989).

In the years since *Praprotnik* commentators have tracked the growing confusion and conflicts among the lower courts. "[T]he contrasting views expressed by circuit courts about when policymakers have delegated their policymaking authority and whether certain officials are per se policymakers demonstrate that *Praprotnik* has proven to be an unsuccessful guide." S. Cushman, *Municipal Liability Under*

§ 1983: Toward A New Definition of Municipal Policymaker, 34 B.C.L.Rev. 693, 694 (1993). Lower court judges have repeatedly expressed their frustration with this lack of clarity.

> Decisions of the other courts of appeals on this subject are so varying that there is little point in canvassing them. A series of fractured opinions from the Supreme Court gave comfort to almost every position.

Auriemma v. Rice, 957 F.2d 397, 400 (7th Cir. 1992).

This petition presents the two most important unresolved questions concerning municipal liability under *Monell*. This case is a particularly appropriate vehicle for addressing those questions because, like a majority of the lower court decisions in which those questions have arisen, the underlying dispute in this instance concerns a violation of the constitutional rights of a city employee.

II. THERE IS A DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICT REGARDING THE STANDARD FOR DETERMINING WHO IS A "POLICYMAKER" IN A SECTION 1983 CASE

The most widespread post-*Praprotnik* conflict among the lower courts concerns the standard for identifying the city officials for whose actions the city itself is legally responsible. A majority of the circuits hold that, at least in the employment context, a city is liable for the actions of whichever city official or

agency has the *final* authority – not subject to further review by other city officials – to make the decision in question, e.g. to fire a particular worker. (See pp. 15-24, *infra*). The minority view imposes liability on cities for actions of officials with such final decisionmaking authority only if they also possess certain additional power, such as (in the Fifth Circuit) officials who exercise "legislative power." (See pp. 24-28, *infra*).

This conflict has given rise to a concomitant semantic dispute. That disagreement derives from the portion of the decision in *Monell* which used the (there undefined) term "policy" to characterize the actions for which cities would be liable under section 1983. In the majority circuits an official who exercises final decisionmaking authority is characterized as making "policy" and is referred to as a "policymaker." In the minority circuits, on the other hand, only an official who has the requisite additional power is labeled a final "policymaker"; officials who lack that special power are called mere final "decisionmakers." (See App. 7a). Thus an official such as the City Manager in the instant case would be characterized as a policymaker under the standard in most circuits, but not under the Fifth Circuit's definition of a policymaker.

In the years immediately following *Monell*, the circuit courts that reached this issue initially agreed upon the majority final decisionmaking authority standard. In 1984, however, the Fifth Circuit rejected that standard in a sharply divided en banc decision. *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984)

(en banc). The *Bennett* majority recognized that the Fifth Circuit itself had in the past applied the final authority standard, citing in particular that court's earlier decision in *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980). 728 F.2d at 766. The court noted as well that "[o]ther circuits have followed this rationale," citing decisions in the Second, Ninth and Eleventh Circuits. 728 F.2d at 767. But *Bennett* established for the Fifth Circuit a new more restrictive standard, limiting liability to the final actions of officials who held certain types of power (denoted "policymaking" power). The en banc court in *Bennett* expressly

> rejected the line of authority, discussed in [the portion of the opinion referring to precedents in the Second, Ninth and Eleventh Circuits] and represented in particular by our opinion in *Schneider* ... which would permit policy ... to be attributed to the city itself by attribution to ... [a] city officer endowed with final ... power or authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc).

This Court's subsequent decisions in *Pembaur* and *Praprotnik* did not resolve this conflict. To the contrary, as the Seventh Circuit has observed, this Court's decisions, rather than providing clear guidance on this pivotal question, instead "gave comfort to almost every position." *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992). Since *Praprotnik* the Fifth Circuit has reaffirmed its express rejection of the

"line of authority" imposing liability for the decisions of officials with final decisionmaking authority, most recently in the decision in the instant case. (App. 9a-10a). In the last two decades the conflict that originated in *Bennett* has spread and deepened; today this recurring legal issue has been addressed by eleven of the twelve geographical circuits, with widely divergent results.

A. The Majority View: Municipalities Liable for Actions by Officials Exercising Final Decisionmaking Authority

Seven circuits and the highest court of one state hold that a city is liable under *Monell* for the actions of a municipal official whose employment (or other) decisions are final, not subject to review by any other city official or agency.

The First Circuit has repeatedly held that a city is liable if the city official with final decisionmaking authority takes an employment action that violates the Constitution. In *Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992), an opinion joined by then Judge Breyer, a City Manager fired the plaintiff when he refused to agree to an unconstitutional condition for continued employment.

> [A] single decision can be a policy for *Monell* purposes ... if it is made by the official charged with the final responsibility for making it under local law.... [The City Manager] could be found by a finder of fact to be the decisionmaker possessing final authority

> with respect to employment determinations such as the type of [conditions of employment].

977 F.2d at 45. The First Circuit applied that rule as well in *Cordero v. Jesus-Mendez*, 867 F.2d 1 (1st Cir. 1989), despite the fact that the city lawmakers clearly did not agree with the action in question. In *Cordero* a newly elected mayor fired several dozen city employees because they were members of the other political party, the very party that continued to control the city's Municipal Assembly. 867 F.2d at 4-5. The court of appeals nonetheless held that under *Monell* the city was liable for the mayor's actions because of their finality.

> The Mayor ... is one "whose edicts or acts may fairly be said to represent official policy." Under Puerto Rico law, one of the express powers given to mayors of municipalities is: "To appoint all the officials and employees of the municipal executive branch and remove them from office...."

867 F.2d at 7 (quoting *Monell*). In *Rivera-Torres v. Velez*, 341 F.3d 86 (1st Cir. 2003), the First Circuit explained that because a mayor's action in dismissing city workers was final, the mayor's employment decisions "ipso facto 'constitute the official policy of the municipality.'" 341 F.3d at 103 (quoting *Cordero*).

The Second Circuit also applies this final decisionmaking authority standard. In *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005), the mayor of Yonkers laid off the plaintiff because she had supported

a political opponent. The city was held liable for that action because the mayor had final authority to hire and fire.

> Where a city official "has final authority over significant matters involving the exercise of discretion," his choices represent official policy.... [The mayor's] actions undoubtedly represent government policy. Because he has final authority over hiring and firing decisions, which are discretionary matters, his decisions in this area constitute the municipality's final actions.

424 F.3d at 296-97 (quoting *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983)). Similarly, when a sheriff led a campaign of retaliation against a corrections officer who had cooperated with the FBI, the Second Circuit held that the county was legally responsible for that action because

> no provision of State or local law ... requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence.

Jeffes v. Barnes, 208 F.3d 49, 61 (2d Cir. 2000).

In the Third Circuit an official is a policymaker if he or she "has final, unreviewable discretion to make a decision or take an action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). The Third Circuit reiterated this standard in *Solomon v. Philadelphia Housing Authority*, 143 Fed.Appx. 447,

456 (3d Cir. 2005), a decision joined by then Judge Alito.[3] In *McGreevy v. Stroup*, 413 F.3d 359 (3d Cir. 2005), the Third Circuit applied that standard to hold a school district liable because a school superintendent had retaliated against the plaintiff by giving her an adverse performance rating.

> [T]he Pennsylvania Code ... makes clear that the superintendent is the final policymaker over ratings determinations. [The Code] provides: ["]rating shall be done by or under the supervision of the superintendent of schools....["] ... This section unambiguously gives the superintendent final policymaking authority with regard to employment ratings.

413 F.3d at 368. Relying on this same standard, the Third Circuit held a city liable for a series of retaliatory actions by the director of a city department.

> A "final policymaker" is not always the chief executive officer.... The test is "which official has final, unreviewable discretion to make a decision or take an action." *Andrews*.... In the present case, the [department head] had the final say regarding the hiring and firing of employees. If [the department head] could have fired [the plaintiff], it simply does not

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[3] 143 F.Appx. at 456-57 ("if either of th[e] employees [who violated the plaintiff's constitutional rights] had final decision-making authority (i.e., acted as a "policymaker") with regard to [the plaintiff's] suspension, [the Public Housing Authority] can be held liable").

> make sense to argue that he did not have the final policymaking authority to harass him (a lesser retaliatory action).

Shehee v. City of Wilmington, 67 Fed.Appx. 692, 696 (3d Cir. 2003).

In the Sixth Circuit "the hallmark of municipal liability is the *finality* of the decision being reviewed." *Arendale v. City of Memphis*, 519 F.3d 587, 601 (6th Cir. 2008) (emphasis in original). In *Arendale* the plaintiff alleged that his suspension from the city police department was unconstitutional; the Sixth Circuit concluded that the city was liable for that asserted violation because the action of the Police Chief in approving the suspension was unreviewable.

> [The Police Chief] has final decision making power within the Memphis Police Department.... [N]either the Memphis Charter nor the Memphis City Code provide for further review of Plaintiff's suspension. [The Police Chief] had "final policy making authority" with respect to Plaintiff's disciplinary charge. *Praprotnik*, 485 U.S. at 123.... Accordingly ... the City may be held liable under § 1983 for the final disciplinary decision of [the Chief.]

519 F.3d at 602. In *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), the Sixth Circuit applied the same standard in holding a city liable for the action of a Police Chief in demoting the plaintiff. "[B]ecause it is clear that [the Chief] did in fact possess final

authority to demote [the plaintiff], the City can be held liable for his actions." 401 F.3d at 744.

In the Ninth Circuit as well local governments are liable for constitutional violations by officials who possess unreviewable decisionmaking authority. In *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), the board of trustees of a county school district had accorded final authority over disciplinary actions to the school superintendent and his subordinates. The court of appeals concluded that the school district was liable for retaliatory actions taken by an assistant superintendent. "That [the assistant superintendent's] disciplinary decisions were not subject to review by anyone within the District indicates that he was a final policymaker." 382 F.3d at 985. In *Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), the plaintiff had been dismissed by the Chief Juvenile Probation Officer, an action which was not subject to review by any other city agency or official. 117 F.3d at 414-15. The finality of that employment decision meant that the Juvenile Probation Officer "acted as a final policymaker with regard to [the plaintiff's] position." 117 F.3d at 416.

The Tenth Circuit has repeatedly imposed liability on local governments because an employment action had been taken by an official with final decisionmaking authority. *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), held a county liable for the action of the County Assessor who had fired a subordinate in retaliation for her complaints about sexual harassment, reasoning that "aggrieved staff members

such as plaintiff had no meaningful avenues of review of [the Assessor's] employment decisions." 876 F.2d at 819. In *Ware v. Unified School District No. 492*, 881 F.2d 906 (10th Cir. 1989), the court of appeals held that a school district was liable for the unreviewable act of a school superintendent in dismissing the plaintiff.

> A direct causal link [between the school district and the constitutional violation] ... may be established when the governing body has delegated its decision-making authority to the official whose illegal conduct caused the harm.... Th[e] evidence is clearly sufficient to permit the jury to conclude that the [school] board had effectively delegated its power to terminate [the plaintiff] to [the superintendent]. *Accord Starrett v. Wadley* ... (county liable when it admitted vesting employee with authority to fire his staff).

881 F.2d at 912-13. In *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), the Tenth Circuit applied the final decisionmaking authority doctrine to reprimands issued by a Chief of Police.

> [T]he City admitted that "[a]t all times pertinent hereto, the City ... has delegated to [the Chief of Police] final authority to issue reprimands to Colorado Springs police officers.... This admission effectively disposes of the municipal liability issue because it all but flatly states that [the Chief of Police] was the final policymaker with respect to issuing written reprimands in the department....

> [City ordinances] do not create mandatory or even formal review of department actions.... [F]or all intents and purposes the Chief's discipline decisions are final.... Thus, even if we based our analysis on Colorado Springs' municipal code, we would hold that [the Chief of Police] has final authority to establish policy with respect to departmental reprimands.

890 F.3d at 1568-69.

The Eleventh Circuit has long imposed liability on cities for employment actions of officials with final decisionmaking authority. In *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992), the court of appeals held the city liable for the action of its city manager in firing the plaintiff. In that case the city charter, in language similar to the city charter in the instant case,[4] gave the city manager final control of the hiring and firing of high level city officials. Such final decisionmaking authority made the city responsible for the actions of the city manager.

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[4] 971 F.2d at 714:

> Neither the [city] commission nor any of its members shall direct or request the appointment of any person to, or his removal from, office by the city manager ... or in any manner take part in the appointment or removal of officers and employe[e]s in the administrative service....

> [T]he City's charter eliminates the authority of *any* official or body to review the City Manager's decision to fire an unclassified employee for retaliatory reasons.... [T]he City's charter ... vest[s] the City Manager with absolute, discretionary authority to hire and fire unclassified personnel in the administrative department. On this basis we conclude that [the charter] is a direct grant of power to the City Manager to make final policy with respect to personnel matters for unclassified employees....

971 F.2d at 714-15 (emphasis in original). The decision expressly rejected the argument of a dissenting judge that it should distinguish – as does the Fifth Circuit – between final decisionmaking authority and final policymaking authority. See 971 F.2d at 715-16 (Johnson, J., concurring in part and dissenting in part). The Eleventh Circuit has repeatedly imposed liability on cities for the employment actions of final decisionmakers.[5]

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[5] E.g., *Templeton v. Bessemer Water Service*, 154 Fed.Appx. 759, 765 (11th Cir. 2005) ("We view the code sections as establishing the mayor as the final decisionmaker regarding a broad range of hiring decisions within the city.... This is precisely the kind of control ... that would subject the city to § 1983 liability."); *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1480 (11th Cir. 1991) (city liable "if state law assigns to [discriminatory official] the final authority to make personnel decisions for the police department"; liability turns on who is "the ultimate decisionmaker"); *Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) (county liable for actions of official because "he had absolute

(Continued on following page)

The New York Court of Appeals holds that a law which gives an executive official unreviewable authority over a particular type of decision constitutes a delegation of final policymaking authority. In *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061 (1996), the Court of Appeals held Orangetown liable for the decision of the town building inspector to revoke a building permit. Under *Praprotnik* and *Pembaur*, it reasoned, the controlling question was "[w]hether an official has final authority to take municipal action in a given case." 88 N.Y.2d at 51, 665 N.E.2d 1067.

> [T]he Building Inspector ... [was] vested by law with the exclusive and unfettered authority to decide the question of revocation....
>
> The town Zoning Code, which necessarily reflects Town policy, vests the Building Inspector, alone, with the authority to revoke building permits.... The Building Inspector therefore implements Town policy....

88 N.Y.2d at 52-53, 665 N.E.2d at 1068.

B. The Minority View: More Than Final Decisionmaking Authority Required

Four circuits, including in this instance the Fifth Circuit, hold that an exercise of final decisionmaking

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authority over the appointment and control of his [subordinates].")

power, while necessary for municipal liability, is not by itself sufficient. These circuits apply divergent standards regarding what additional circumstance must be present.

In the Seventh Circuit a city is liable only for the acts of officials who hold "legislative" power. The decisions in that circuit

> equate[ ] "policy" with the legislative power of a jurisdiction. The holder of the ultimate power to establish rules of general applicability is the "policymaker." Usually this means the city council; at all events, holders of purely executive power are never "policymakers."

Auriemma v. Rice, 957 F.2d 397, 399 (7th Cir. 1992). *Auriemma* held that the city of Chicago was not responsible for the politically motivated demotions of the plaintiffs, even though the demotions had been expressly approved by the mayor himself, because "the mayor is an executive, not legislative, official in Chicago's system of government." 957 F.2d at 400.

The Seventh Circuit has repeatedly insisted that "[g]enerally, a person holding only executive power does not have policymaking authority for purposes of § 1983." *Rasche v. Village of Beecher*, 336 F.3d 588, 601 (7th Cir. 2003) (village not liable for constitutional violation by village president); see *Gianessi v. City of Pekin*, 52 Fed.Appx. 265, 269 (7th Cir. 2002) (city not liable for constitutional violation by mayor

because he was only responsible for "the administration – that is, the *enforcement* – of the laws, an executive function") (emphasis in original); *Grenetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) (where "[a]n executive official ... implements legislative policy ... his act is ... not the act of the municipality itself for purposes of liability under section 1983"; school district not liable for constitutional violation by school superintendent).

The Fifth Circuit decision in the instant case expressly adopts the Seventh Circuit's distinction between legislative and executive authority, holding that only officials with legislative power are the "policymakers" for whom a city is legally responsible. (App. 9a-12a). Applying that narrow definition of municipal liability, the court below concluded that only the Dallas City Council, and not the city's City Manager, makes "policy" under *Monell* and its progeny. (App. 11a-12a).

The Fourth Circuit also distinguishes "the authority to make final *policy* [from] the authority to make final implementing *decisions*." *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 965-66 (4th Cir. 1995) (emphasis in original). But, unlike the Fifth and Seventh Circuits, the Fourth Circuit holds that executive actions do at times constitute the type of conduct for which a city can be held liable. In the Fourth Circuit an executive official is a policymaker if he or she can establish "rules, plans, [or] procedures." *Greensboro*, 64 F.3d at 965; see *Crowley v. Prince George's County,*

Maryland, 890 F.2d 683, 686 (4th Cir. 1989) (city agency a policymaker because it was authorized to "proscribe rules.") In *Greensboro* that circuit held that a city manager was a policymaker with regard to employer-employee relations because he was authorized to establish such rules or plans to "administer" the city's personnel programs and to "implement the provisions of [city ordinances]" and to "carry out the intent of the [city] council." 64 F.3d at 965 (emphasis omitted). In *Crowley* the Fourth Circuit held that a County Executive was a policymaker regarding employee relations because the county charter authorized him to "administer[ ]" the county's personnel system. See 890 F.2d at 686 (policymaking includes "final authority to interpret and enforce the city's policy"). The authority of executive officials to "administer" municipal laws and programs is precisely the type of power which the Fifth Circuit in the instant case held is *not* sufficient to warrant municipal liability. (App. 11a).

The Eighth Circuit distinguishes "final policymaking authority from final decisionmaking authority." *Davison v. City of Minneapolis, Minnesota*, 490 F.3d 648, 660 (8th Cir. 2007). In the Eighth Circuit there are two circumstances in which a final decisionmaker is deemed a municipal policymaker. First, as in the Fourth Circuit, an executive official is a policymaker if he or she has the authority to promulgate rules. Thus in *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992), the Eighth Circuit held that a Superintendent of Police was a policymaker

because he "was responsible for drafting and approving many of the department's general orders." Second, an official is a policymaker if higher officials have wholly relinquished control over his or her actions. Thus in *Williams v. Butler*, 863 F.3d 1398 (8th Cir. 1988) (en banc), the city had "exempt[ed] municipal court employees from the City's general policy statements." 863 F.2d at 1402-03. Because the municipal judge thus had "*carte blanche* authority" over court employees, the judge "was the official policymaker for the hiring and firing of his staff." 863 F.3d at 1403.

C. The Conflict Is Deeply Entrenched and Well Recognized

The conflict regarding this question is deeply entrenched and widely recognized.

The 1984 Fifth Circuit decision in *Bennett* expressly "rejected" the less stringent standard in several other circuits, citing among the disapproved line of cases the Second Circuit decision in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983). 728 F.2d at 767. Current Second Circuit decisions continue to rely on *Rookard* in imposing liability on a city for the actions of a final decisionmaker.[6]

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[6] E.g., *Gronowski v. Spencer*, 424 F.3d 285, 296 (2d Cir. 2005) (quoting *Rookard*); *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003) (quoting *Rookard*); *Clue v. Johnson*, 179 F.3d 57, 62 (2d Cir. 1999) (quoting *Rookard*).

Two years after *Bennett*, in *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986) the First Circuit noted that the Fifth Circuit's en banc decision in *Bennett* had rejected the majority rule that a city is liable for the final, unreviewable employment action of a city official. 796 F.2d at 552-53. The First Circuit, however, expressly refused to follow the decision in *Bennett*, holding that the majority rule was "more persuasive." 796 F.2d at 553.

In 1981, after the Fifth Circuit decision in *Schneider* (which had adopted the majority rule) but before the en banc decision in *Bennett* (which overturned *Schneider*), the current Eleventh Circuit was established, encompassing several states that had until then been part of the Fifth Circuit. The new Eleventh Circuit expressly adopted as binding precedent all decisions issued by the old Fifth Circuit prior to October 1, 1981,[7] a rule which encompassed the decision in *Schneider*. In 1984 the new Fifth Circuit in *Bennett* repudiated *Schneider* and adopted the minority rule. In 1986, however, the Eleventh Circuit expressly rejected the Fifth Circuit decision in *Bennett*, deciding instead to continue to adhere to *Schneider*.

> The new Fifth Circuit, sitting *en banc*, has rejected this line of authority primarily represented by *Schneider* to the extent that

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[7] *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

> such cases "would permit policy ... to be attributed to the city itself by attribution to any and all city officials endowed with final ... power or authority." *Bennett*.... The ... Eleventh Circuit ... case law ..., however, emphasizes finality in and of itself is indicative of policymaking ability, and *Schneider* and its progeny are unquestionably still viable authority in this circuit.... "[W]here a government entity delegates the final authority to make decisions then those decisions necessarily represent official policy."

Mullins v. City of Huntsville, Ala., 785 F.2d 1529, 1533 n.2 (11th Cir. 1986) (quoting *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 n.9 (11th Cir. 1985)).

The Seventh Circuit commented in *Auriemma* that "decisions of the other courts of appeals on this subject are so varying that there is little point in canvassing them." 957 F.2d at 400. The Supreme Court of Wisconsin observed that

> [t]he federal cases have taken several approaches to this issue. Some cases equate policymaking with legislative power, others with executive power.

Burkes v. Klauser, 185 Wis.2d 308, 353, 517 N.W.2d 503, 522 (1994).

Commentators have repeatedly described this inter-circuit conflict.

> The ... more frequently litigated ... question in determining if an official is a municipal policymaker is whether the official possesses policymaking authority. Two contrasting approaches can be taken in answering this question, and each has found support in the lower courts.
>
> One approach equates a municipality's policymakers with those who exercise its ultimate legislative power.... The opposing approach includes within the definition of municipal policymakers those who are the final authority or ultimate repository of city power, that is, those who exercise or are exercising only executive power. "A person authorized to commit the city to a course of action necessarily sets its policy; on this view, the action *is* the policy."

1 J. Cook and J. Sobieski, Jr., Civil Rights Actions, par. 2.05[B][4] at 2-186 (2008) (footnotes omitted; emphasis in original; quoting *Auriemma*, 957 F.2d at 399).

> Lower courts have taken opposing positions on whether municipal officials not designated by state or local law as policymakers may nonetheless be transformed into policymakers by virtue of the fact that the municipality has vested unreviewable authority to act in those officials.

S. Cushman, *Municipal Liability Under § 1983: Toward A New Definition of Municipal Policymaker*,

34 B.C.L.Rev. 693, 696, 713-14 (1993) (footnotes omitted).

> [There are] two polar approaches to determining who is a municipal policy maker. One approach equates policy-making authority with the legislative power. Under this view, ... a holder of purely executive power, even if his decisions are final, cannot be a policy maker. The other approach equates policy-making authority with the ability "to take final action in the name of the jurisdiction – that is, executive power."

J. Ryland, *Constitutional Law – Auriemma v. Rice: The Seventh Circuit's Narrow Construction of § 1983 Municipal Liability*, 24 Mem.St.U.L.Rev. 111, 118-20 (1993) (footnotes omitted).

This question has now been addressed by eleven circuits, and the issues which it raises have been fully aired in the lower courts. The conflict is deeply entrenched, with several circuits having expressly recognized and disapproved the differing standards in other circuits. The disagreement regarding the relevant standard is manifestly outcome determinative; action by a municipality's city manager is a paradigm of the type of final decisionmaking authority which would provide a basis for municipal liability in most circuits other than the Fifth Circuit. This question is of obvious and recurring importance, and is ripe for review by this Court.

III. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING THE SIGNIFICANCE OF A WRITTEN STANDARD FORBIDDING A CONSTITUTIONAL VIOLATION

A. There Is A Three-Way Division Among The Lower Courts Regarding The Significance of Such A Standard

The divergent opinions in *Praprotnik* triggered another conflict among the lower courts. In the wake of *Praprotnik*, the courts of appeals are divided regarding whether a city is insulated from liability by the existence of a written standard forbidding violations of federal constitutional rights.

Praprotnik addressed this issue in a particularly inconclusive manner. The plurality initially asserted that

> [w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.

485 U.S. at 926 (plurality opinion). Justice Brennan objected to the implications of this portion of the plurality opinion.

> While I have no quarrel with such a proposition in the abstract, I cannot accept the plurality's apparent view that a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively

> insulates the municipality from any liability based on acts inconsistent with that policy.... [T]he relevant inquiry is whether the policy in question is actually and effectively enforced through the city's review mechanisms.

485 U.S. at 145 n.7. The plurality, in response, denied that it would attach conclusive significance to "a municipal charter's precatory admonition." 485 U.S. at 130.

> Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced. If such a showing were made, we would be confronted with a different case than the one we decide today.

485 U.S. at 131.

In the wake of these opinions, the lower courts have reached conflicting conclusions regarding cases in which the authoritative action of a city's officials is inconsistent with some written standard. In the Ninth and Eleventh Circuits the existence of such a written standard is of limited or no relevance to whether a city is liable for a constitutional violation. On the other hand, in the Fifth and Seventh Circuits such a written standard generally precludes the imposition of liability on a city. The Eighth and Tenth Circuits have taken an intermediate position.

In *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), the Ninth Circuit concluded that *Praprotnik* does not permit a government body to insulate itself from

liability simply by adopting a standard prohibiting constitutional violations. In that case a school district had authorized the school superintendent to discipline employees "in accordance with the applicable ... laws." 382 F.3d at 984. The school district argued that

> if a superintendent is instructed in general terms to follow the law, and if that superintendent then violates the law, he or she would be exceeding his delegated authority and would therefore not be a "final policymaker."

382 F.3d at 985. The court of appeals rejected that proposed defense.

> This argument proves too much, for the very premise of school district liability for the acts of a final policymaker is that the policymaker violated the constitutional rights of the plaintiff. 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.

Id.

In *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992), the Eleventh Circuit took a similar approach. The plaintiff in *Martinez* had been fired by the city manager in retaliation for constitutionally protected activity. The city suggested that the actions of the city manager could not constitute city policy because the city charter required that personnel decisions "be made according to merit and

fitness." 971 F.2d at 714. The Eleventh Circuit rejected that suggestion, emphasizing that the actions of the city manager – whether or not they complied with that provision of the city charter – could not be reviewed by any other city official. 971 F.2d at 714-15. The court of appeals concluded that the plurality opinion in *Praprotnik* barred reliance on a city charter provision which no higher city official could require the city manager to obey.

> The Court ... warned in *Praprotnik* that a municipal charter could not insulate the municipality from liability for constitutional deprivations merely by including a "precatory admonition against discrimination or any other employment practice not based on merit and fitness...." [485 U.S.] at 130.

971 F.2d at 714.[8]

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit emphasized that "any ... constraints must be *meaningful* – as opposed to merely hypothetical – in order to strip an official of 'final policymaking' authority." 69 F.3d at 450 (emphasis in original). A "[city] charter provision that all personnel decisions were to be made solely based upon 'merit and fitness' did not immunize City from

[8] The quotation is from the plurality opinion in *Praprotnik*, which in turn is quoting Justice Brennan's concurring opinion. See 485 U.S. at 935 n.7 (Brennan, J., concurring).

liability based upon City Manager's personnel decision." *Id.*

In *Williams-El v. Johnson*, 872 F.2d 224 (8th Cir. 1989), the Eighth Circuit held that "[t]he written, official policy of a city is to be given great weight in determining what the city's policies are." 872 F.2d at 230. Such a written policy however, is not conclusive in that circuit. In *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992), the Eighth Circuit upheld the imposition of liability against a county because of the actions of the county Superintendent of Police, stressing that "[t]here is ample evidence that the County departed from its complaint review procedure ... through blatant misconduct and coercion." The court of appeals regarded the violation of the county's own standards as an aggravating factor, not some sort of defense.

In the Seventh Circuit, on the other hand, the existence of a written standard precluding a particular type of constitutional violation does insulate a city from liability for such a violation. In *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992), several Chicago city employees had been demoted shortly after the election of a new mayor; they asserted that the demotions had been ordered by the Chief of Police, with the concurrence of the mayor, because of the political views of the plaintiffs. The court of appeals acknowledged that such patronage practices were widespread and longstanding in the city of Chicago. 957 F.2d at 399. It held, nonetheless, that the city was not liable for those actions.

> Ordinances applicable to the police department unequivocally ban ... political discrimination.... If ... [the Chief] discriminated on account of ... politics, he violated rather than implemented the policy of Chicago.

957 F.2d at 399-401. The Seventh Circuit has held that a city is immune from liability for injuries caused by an unconstitutional conduct of city officials – no matter their rank or position – if the action in question was inconsistent with a state law,[9] a personnel manual,[10] or a consent decree.[11]

In the instant case the Fifth Circuit, as it had earlier,[12] applied the rule in *Auriemma*. The mere existence of a provision of the city charter forbidding the dismissal of Bolton was held to insulate the city from liability. (App. 13a). In so holding, 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. To the contrary, as the Fifth Circuit repeatedly acknowledged, the City Manager's

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[9] *Radic v. Chicago Transit Authority*, 73 F.3d 159, 161 (7th Cir. 1996).

[10] *Lawshee v. Simpson*, 16 F.3d 1475, 1484 (7th Cir. 1994).

[11] *Auriemma*, 957 F.2d at 399 (citing the consent decree in *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1356-59 (N.D.Ill. 1979)).

[12] *Barrow v. Greenville Ind. Sch. Dist.*, 480 F.3d 377, 382 (5th Cir. 2007).

actions – whether or not they violated the city charter or the constitution – were final.

B. The Fifth and Seventh Circuit Standard Is Inconsistent With The Purpose and History of Section 1983

The courts below sustained the defendant's contention that the City Manager's decision to fire petitioner Bolton, because it violated the city charter, "was not the decision of the City." (App. 23a). That conclusion starkly illustrates how far the caselaw in the Fifth and Seventh Circuits has departed from the intended purpose of section 1983 and from the decisions of this Court.

Nearly half a century ago this Court rejected an all too similar argument, that constitutional violations by city officials are not actions "under color of law" within the meaning of section 1983 if *state* law forbids the constitutional violation in question. *Monroe v. Pape*, 365 U.S. 167, 171 (1961). In disapproving such a limitation on section 1983, this Court emphasized that

> [it] is abundantly clear that one reason [section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to enjoyment of rights ... guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. at 180. In later decisions holding that section 1983 plaintiffs are not required to exhaust state law remedies, this Court twice insisted that relief under section 1983 cannot be denied because the conduct complained of not only violated the federal constitution but was prohibited by state law as well.

> It is immaterial whether respondents' conduct is legal or illegal as a matter of state law.... Such claims are entitled to be adjudicated in the federal courts.

McNeese v. Board of Education, 373 U.S. 668, 674 (1963).

> A major factor motivating [the adoption of section 1983] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals....

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 506 (1982). Nothing in the reasoning of or the legislative history recounted in *Monell* suggests that the existence of such a state law (or city charter) prohibition, which this Court has repeatedly held irrelevant to the meaning of section 1983, should nonetheless be dispositive of and fatal to a section 1983 claim against a city.

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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