No. 09-350

In the Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

v.

CRAIG ARTHUR HUMPHRIES AND
WENDY DAWN ABORN HUMPHRIES,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

ESTHER G. BOYNTON
1850 Fifth Ave., Suite 7
San Diego, CA 92102
(310) 248-4833

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTIONS PRESENTED

1. Whether a municipality engaged in an ongoing violation of the Constitution is immune from declaratory and prospective relief in an action under 42 U.S.C. § 1983 in the absence of a determination that the constitutional violation stems from a municipal policy or custom?

2. Whether a determination that a municipality is engaged in an ongoing violation of the Constitution is insufficient to permit an interim award of attorneys' fees under 42 U.S.C. § 1988 without a determination that the constitutional violation stemmed from a municipal policy or custom?

3. Whether a court of appeals' holding that a plaintiff has proven a constitutional violation provides grounds for an interim award of attorneys' under 42 U.S.C. § 1988?

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals' order awarding interim attorneys' fees (Pet. App. 1-4) is unreported. The court of appeals' amended opinion addressing respondents' procedural due process claim (Pet. App. 5-72) is reported at 54 F.3d 1170. The court of appeals' original opinion addressing respondents' procedural due process claim and its first amended opinion (Pet. App. 143-209, 73-142) are not reported. The district court's opinion (Pet. App. 210-254) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2009 (Pet. App. 1), and the petition for a writ of certiorari was filed on September 21, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents Craig and Wendy Humphries obtained a ruling by one court that the child abuse allegations asserted against them by petitioner Los Angeles County were "not true," and a ruling by a second court that they were "factually innocent" of the criminal charges based on those allegations. Prior to these two judicial determinations, the Humphries had—on the basis of the false allegations—been listed in the Child Abuse Central Index ("CACI"), California's child abuse registry.

Neither the County, whose sheriff's deputy made the determination to list the Humphries in the CACI, nor the State of California, which maintains the CACI, provides a process for the Humphries to reverse the erroneous listings. Despite the two court

rulings in their favor, the Humphries remain listed in the CACI, which is used by third parties in making licensing, employment and other important decisions respecting the Humphries. The Humphries accordingly brought this action for declaratory and injunctive relief and damages under 42 U.S.C. § 1983.

The court of appeals held that, by failing to provide a procedure for removal of names wrongly included in the CACI, the State and the County violated the Humphries' federal constitutional right to procedural due process, and remanded the case for further proceedings consistent with its opinion. Petitioner does not seek review of that constitutional ruling.

In a subsequent, unpublished order, the court of appeals awarded the Humphries interim attorney's fees under 42 U.S.C. § 1988, based on its determination that the Humphries had prevailed on their claim for declaratory relief. The court directed the State to pay ninety percent of the fee award and the County ten percent.

The questions presented by the County's petition relate solely to this interim award of attorneys' fees. The County argues that the court of appeals' finding of an ongoing violation of the Constitution is insufficient to permit an award of interim fees. It contends that an additional determination—that the County acted pursuant to one of its own policies or customs—is also required.

This case is interlocutory. The district court, in addressing the Humphries' damages claims on remand, will consider whether the procedural due process violation stemmed from a County policy or custom. A positive answer to that question will dis-

pose of the County's claims. If the district court finds no violation of a policy or custom, the County may raise its contentions on review of a final judgment.

Moreover, there is no conflict among the lower courts warranting this Court's attention. And petitioner's argument, if accepted, would preclude any declaratory or injunctive relief for persons injured by a municipality's ongoing violations of the Constitution not also pursuant to a municipal custom or policy—even though such relief *is* available against States in parallel circumstances through official capacity actions under *Ex parte Young*, 209 U.S. 123 (1908). Review by this Court is not warranted.

A. Statutory Background

The California Department of Justice ("DOJ") maintains the CACI, a database of alleged child abuse information submitted to DOJ by agencies throughout California. DOJ has been compiling such information since 1965. See 1965 Cal. Stat. 2970 (formerly codified at Cal. Penal Code Ann. §§ 11110, 11161.5). Since 1988, the CACI's maintenance has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), Cal. Penal Code § 11164 *et seq.*[1]

DOJ derives CACI entries from DOJ-issued forms, filled in and sent to DOJ by local welfare and law enforcement agencies that investigate reports of suspected child abuse or neglect ("submitting agen-

---

[1] In 1980, California enacted the Child Abuse Reporting Law, which overhauled provisions for reporting and compiling child abuse information. 1980 Cal. Stat. 3420, codified as amended at Cal. Penal Code § 11165 *et seq.* The statute was renamed the Child Abuse and Neglect Reporting Act as of January 1, 1988. See 1987 Cal. Stat. 5368.

cies"). See Cal. Penal Code §§ 11165.9, 11169(a), 11170(a)(1).[2] DOJ culls information from the submitted forms—including identifying data on named victims and suspects, the type of abuse alleged, the submitting agency investigator's classification of the report, and the submitting agency's file number—and enters it into the CACI. See Cal. Code Regs. tit. 11, §§ 903, 904.

California law mandates that certain agencies consult the CACI and conduct an additional investigation of CACI-listed individuals in deciding whether to grant those individuals certain rights or benefits, including various licenses, jobs and volunteer opportunities, or custody of a child. Pet. App. 14-15; see Cal. Penal Code § 11170(b); Cal. Health & Safety Code §§ 1522.1(a), 1526.8(b)(2), 1596.877(b); see also Cal. Code Regs. tit. 11, § 907(b). Further, CANRA makes CACI data available to a range of other entities, in and out of California, for specified purposes. See App. 13, n. 1; Cal. Penal Code § 11170(e).[3]

CANRA prohibits the submission of information for entry in the CACI unless the submitting agency "has conducted an active investigation and deter-

---

[2] Suspected child abuse reports may originate from "mandated reporters," *i.e.*, persons who hold any of the positions specified in Cal. Penal Code § 11165.7 (teachers, social workers, etc.); commercial film processors, *id.* § 11166(e); or "[a]ny other person," *id.* § 11166(g).

[3] CANRA states that such third party recipients of CACI data "are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions" regarding the contents of those files for purposes of "making decisions" regarding employment, licensing, adoption or child placement. Cal. Penal Code §§ 11170(b)(10)(A), 11170.5(b).

mined that the report is not unfounded, as defined in [Cal. Penal Code] Section 11165.12." Cal. Penal Code § 11169(a). Under section 11165.12(a), an "[u]nfounded report" is one "determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as defined in Section 11165.6." Accordingly, a report is *not* unfounded if it has been determined to meet none of these four criteria.

"Not unfounded" is the only classification decision that CANRA expressly requires an investigator to make prior to submitting a report for CACI listing. Cal. Penal Code § 11169(a). However, the statute defines two sub-categories of "not unfounded" reports—"substantiated reports" and "inconclusive reports"—both of which are included in the CACI. Cal. Penal Code § 11169(b), (c).[4] DOJ's reporting forms direct that, before submitting any report for entry in the CACI, an agency investigator must classify the report "substantiated" or "inconclusive" by marking one of those pre-printed options on the reporting form, which determines the record's retention period. Cal. Code Regs. tit. 11, § 903(a).

CANRA provides for purging of "inconclusive or unsubstantiated" reports ten years after entry in the CACI unless DOJ receives another report on the same "suspected child abuser" within that period, in which case DOJ retains the listing for at least ten

---

[4] An "inconclusive report" (formerly called an "unsubstantiated report") is one determined "not to be unfounded, but in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred." Cal. Penal Code § 11165.12(c).

more years, measured from the receipt of the more recent report. Cal. Penal Code. § 11170(a)(3). The law does not specify a retention period for reports classified as anything other than "unsubstantiated" or "inconclusive." Under DOJ policy, CACI listings based on reports marked "substantiated," as in this case, are set for permanent retention unless the submitting agency notifies DOJ that the report is "unfounded" or should be reclassified as "inconclusive," or that there is no available investigative file that supports the listing. Apps' 9th Cir. Ex. Rec. ("ER") 307-309, 493.

CANRA provides no procedure for challenging CACI listings. The statute provides that, "[i]f a report has previously been filed which subsequently proves to be unfounded, [DOJ] shall be notified in writing of that fact and shall not retain the report," but it does not specify *who* may notify DOJ or how that determination is to be made. Cal. Penal Code § 11169(a); Pet. App. 16-17. CANRA states that "submitting agencies are responsible for the accuracy, completeness, and retention of the reports[.]" Cal. Penal Code § 11170(a)(2). The court of appeals noted that this and other provisions of CANRA "suggest * * * that the investigator and agency that conducted the investigation are responsible for making, and thus correcting, the determination that a report is unfounded." Pet. App. 17.

The court of appeals also determined that "nothing in the statute prevents a submitting agency from enacting some procedure to allow an individual to challenge their listing or seek to have a determination that a report is 'unfounded.'" *Id.* at 17-18. However, neither the County nor the State has enacted such a procedure. *Id.* at 8, 48-49, 71-72.

B. Factual Background

The court of appeals aptly described the events that led to the filing of this action as respondents' "nightmarish encounter with the CANRA system." Pet. App. 18.

Wendy Humphries, a special education teacher at a public elementary school, and her husband Craig Humphries, an executive with a California company and a volunteer soccer coach and basketball coach, were falsely accused of child abuse by "S.H," Mr. Humphries' then-teenage daughter from a previous marriage.[5] As a result of this accusation, the Humphries were arrested by Detective Michael Wilson of the Los Angeles County Sheriff's Department ("LASD") on April 16, 2001. Pet. App. 19.[6]

That same day, a sheriff's deputy, without a warrant, picked up the Humphries' children "J.A." and "C.E." at their schools and took them into "protective custody," and the County placed the children in foster care, even though both of them "denied any fear

---

[5] Petitioner incorrectly asserts that "hospital reports confirm[ed S.H.] * * * had been a victim of 'non-accidental trauma. " Petitioner cites Petitioner's Appendix page 19, at which the court of appeals states, "An emergency room physician diagnosed 'non-accidental trauma, with extremity contusions.'" This diagnosis does not "confirm" S.H. had been someone's "victim."

[6] The Humphries were arrested and booked on the single charge of felony torture under California Penal Code § 206 on April 18, 2001. Pet. App. 19. Two days later, Detective Wilson filed a complaint in the Los Angeles County Superior Court, which instead charged the Humphries with two misdemeanors: corporal injury to a child, Cal. Penal Code § 273d(a), and cruelty to a child by endangering health, Cal. Penal Code § 273a(b). See Pet. App. 20.

of abuse or mistreatment and indicated their desire to return home." Pet. App. 19.

The following day, April 17, Detective Wilson completed a report for submission to the CACI, based on S.H.'s allegations. He named Craig and Wendy Humphries as the "suspects"; identified S.H. as the "victim"; stated the "incident" took place from December 1, 2000, to March 18, 2001; identified LASD's file number; and marked the report "substantiated." Pet. App. 20; ER 241. LASD then forwarded Detective Wilson's report to DOJ, which in turn entered the data into the CACI, thereby listing the Humphries for "substantiated" child abuse. Pet. App. 20.

Detective Wilson filed a misdemeanor complaint against the Humphries in the Los Angeles County Superior Court, again based on S.H.'s allegations. Pet. App. 20; ER 433-34. The County filed a separate petition in the Los Angeles County Superior Court, Juvenile Division, commencing non-criminal proceedings to have C.E. and J.A. declared dependent children of the juvenile court on grounds that their "sibling has been abused or neglected." Pet. App. 23.

After spending ten days in foster care, J.A. and C.E. were returned to the Humphries' custody. Pet. App. 19, 213. Subsequently, on June 12, 2001, the juvenile court adjudicated and dismissed all counts of the dependency petition as "Not True." Pet. App. 23.

The criminal charges against the Humphries were dismissed in August 2001. Pet. App. 21. The prosecutor had learned that, during the timeframe of the alleged abuse claimed by S.H., an oncologist examined S.H.'s entire body on repeated occasions and saw no sign of abuse, contradicting "the basic part of

[S.H.'s] testimony that she was injured during the entire time." *Ibid.*

Prior to the dismissals of the dependency and criminal actions, the Humphries received notice that they were listed in the CACI. The notice "inform[ed] them that if they believed the report was unfounded, and they desired a review, * * * they should address their request to Detective Wilson." Pet. App. 20, 24.

After the dependency and criminal actions were dismissed, the Humphries, through their attorney, contacted LASD's Family Crimes Bureau. They learned Detective Wilson no longer worked there, and that there was no available procedure for them to challenge their CACI listing. Pet. App. 24. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney that, after reviewing the matter, LASD would not reverse its report to the CACI on the Humphries. *Ibid.*

Thereafter, the Humphries sought and obtained orders from the criminal court, finding the Humphries "'factually innocent' of the felony torture charge, and requiring the arrest records pertaining to that charge be sealed and destroyed." Pet. App. 21-22; see Cal. Penal Code § 851.8. In finding factual innocence, the criminal court necessarily determined "that no reasonable cause exists to believe that the [Humphries] committed the offense for which the arrest was made." Pet. App. 22-23.

Even after these orders were issued, however, the State and the County refused to reverse the Humphries' CACI listings, and the Humphries remain listed as "substantiated" child abusers. Pet. App. 24.

C. Proceedings Below

Following the refusal of the County and State to expunge petitioners' names from the CACI, petitioners commenced this action in the District Court for the Central District of California seeking declaratory and injunctive relief and damages for violations of 42 U.S.C. § 1983.[7] The Humphries sought a judicial declaration against the State Attorney General, the County, and the County Sheriff "that CANRA and the County's and State's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records." Pet. App. 28.

The Humphries also requested injunctive relief against all defendants ordering "the County of Los Angeles to notify the [California] DOJ that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD." *Ibid.* They also sought damages against the County, the Sheriff, and two Sheriff's Department detectives for the violations of their constitutional rights. *Id.* at 27-28.

---

[7] The First Amended Complaint also included Section 1983 claims related to the Humphries' arrests and the warrantless removal of their children, which were not involved in the appeal below, and five state-law counts that were dismissed by the district court and not appealed. Pet. App. 27-29. The complaint named five defendants: Los Angeles County; California Attorney General Bill Lockyer in his official capacity; and County Sheriff Leroy D. Baca and LASD Detectives Charles T. Ansberry and Detective Michael L. Wilson, each in their individual and official capacities. ER 4-5.

1. *The District Court's Ruling.* The district court granted summary judgment in favor of all defendants on the Section 1983 claims relating to the CACI, on the basis that the Humphries' inclusion in the Index did not violate their federal constitutional rights. Pet. App. 234, 254.[8]

2. *The Court of Appeals' Decision.* The court of appeals unanimously reversed the grant of summary judgment to the County and the State, remanded for further proceedings, and affirmed the grant of summary judgment to the Sheriff and detectives on grounds of qualified immunity.[9] Pet. App. 72.

The court of appeals first concluded that the Humphries have a protected liberty interest under *Paul* v. *Davis*, 424 U.S. 693 (1976). Pet. App. 30-31, 41. Accordingly, it held that both the County and the State violated the Humphries' due process rights "by listing and continuing to list" them in the CACI without a constitutionally sufficient process for challenging the listing, and found CANRA, as applied by the County and the State, constitutionally infirm for the same reason. *Id.* at 29, 67-68.

The court determined that nothing in CANRA "prevented the LASD from creating an independent

---

[8] The district court granted defendants summary judgment on the Section 1983 claims related to the Humphries' arrest and incarceration, while denying the County's and one detective's motions for summary judgment on the Section 1983 claim arising from the warrantless seizure of the children. Pet. App. 28.

[9] It is not clear why the court below disposed of the *official*-capacity claims against the individuals on qualified immunity grounds. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 556 n.10 (1985) ("Of course, an official sued in his official capacity may not take advantage of a qualified immunity defense.").

procedure that would allow the Humphries to challenge their listing" in the CACI. *Id.* at 72. The court faulted the County for allowing Detective Wilson to place the Humphries on the CACI "with all of its legal consequences" while "his judgment is apparently unreviewable except by himself." *Id.* at 58. It held "that the State and County procedures used in maintaining the [CACI] were constitutionally insufficient, and thus [CANRA] violates the Humphries' procedural due process rights." *Id.* at 2 (internal quotation marks omitted).

The court of appeals recognized that the district court had no occasion to address whether the County had acted pursuant to a municipal "policy or custom" within the meaning of *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978), and that the issue had not been briefed. It noted that, as the facts had been alleged, "it is possible that the LASD adopted a custom or policy" that violated the Humphries' constitutional rights and remanded to the district court to determine the "County's liability under *Monell*." Pet. App. 72.[10]

3. *The Court of Appeals' Interim Award of Attorneys' Fees.* The court of appeals, in a unanimous unpublished order, subsequently granted respondents' motion for an interim award of attorneys' fees pursuant to 42 U.S.C. § 1988. Pet. App. 1-4.

The court found "that the Humphries have prevailed on their claim for declaratory relief and are

---

[10] The panel opinion was twice amended, the second time to clarify the scope of the *Monell* remand. Pet. App. 7, 75-76. The court of appeals denied the petitions of the County and the State for rehearing and rehearing en banc on January 15, 2009, with no judges requesting an en banc vote. *Id.* at 73, 76-77.

thus entitled to an award of attorney's fees" against the County and the State. *Id.* at 2. The court's holding that the State and County procedures violated respondents' due process rights "'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff.'" *Ibid.* (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 111-112 (1992)).

The court rejected the County's argument that it could not be held liable for fees in the absence of a finding that it had acted pursuant to a municipal policy or custom, stating that "it is well established in our circuit that the limitations to liability established in *Monell* do not apply to claims for prospective relief." Pet. App. 4 (citing *Chaloux* v. *Killeen*, 886 F.2d 247, 250 (9th Cir. 1989)).

The State, the court determined, is "responsible for 90% of the fees awarded" because it "craft[ed] the statutory and regulatory provisions that created the CACI and its attendant review procedures." Pet. App. 3. The County is responsible for 10% of the fees awarded because it "fail[ed] to craft its own additional procedural protections" to allow innocent parties to have their names removed from the CACI. *Ibid.*

On October 2, 2009, the special master appointed by the court of appeals to recommend the amount of the fee award recommended a total award of $592,580.92. Report at 19. The County's 10% share is $59,258.09. *Id.* at 20. The County did not object to the master's report and recommendation. 9th Cir. Order (Oct. 2, 2009) at 2.

ARGUMENT

The principal focus of the County's petition is the remarkable proposition that a federal court may not be able to provide any prospective relief against a municipality engaged in an ongoing violation of the federal Constitution—even though such relief is routinely available to stop a State's constitutional violations through the device of an official-capacity action. According to the County, prospective relief is available only when the ongoing violation is the product of a municipal custom or policy.

The court of appeals correctly rejected this contention in its prior decision in *Chaloux* v. *Killeen*, 886 F.2d 247 (9th Cir. 1989). It held that *Monell*'s "policy or custom" liability standard "did not intend to limit the reach of plaintiffs seeking prospective relief under § 1983 against the further exercise of governmental authority under an allegedly unconstitutional state statute." *Id.* at 251. Plaintiffs seeking purely prospective or declaratory relief need not prove a "policy or custom" for relief from unconstitutional conduct.

No court of appeals has squarely rejected the sensible conclusion that the availability of prospective relief does not turn on the *Monell* standard. Indeed, the only court of appeals to disagree with *Chaloux* has left open the possibility that its ruling rested on form rather than substance, pointing out that prospective relief against municipalities could be available in official capacity actions against municipal officers similar to those that may be asserted against state officials.

In this case, moreover, the remand proceedings will address whether the County acted pursuant to a

policy or custom. There is no reason for this Court to address the legal issue at this interlocutory stage.

I. THIS CASE'S INTERLOCUTORY POSTURE MAKES IT AN INAPPROPRIATE VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED.

The interlocutory posture of this case weighs heavily against review by this Court, because the district court on remand will address the *Monell* issue that is the subject of petitioner's argument before this Court.

The court of appeals reversed the district court's dismissal of respondents' complaint and remanded for further proceedings consistent with its opinion. One of the issues to be addressed on remand is whether the County acted pursuant to a "policy or custom" and therefore is liable for damages under this Court's decision in *Monell*. See Pet. App. 72.

If the district court decides that issue in respondents' favor, the County recognizes that it would be liable for attorneys' fees. See Pet. 16. And there is very substantial support for the conclusion that the County here acted pursuant to a custom or policy. As the court of appeals explained, "[n]othing in CANRA * * * prevented the [County] from creating an independent procedure that would allow the Humphries to challenge their listing in the Index. By failing to do so," and instead vesting the review function in the official who conducted the initial investigation, "it is possible that the [County] adopted a custom and policy" violative of the Humphries' constitutional rights. Pet. App. 72. It would be an inefficient use of this Court's limited resources to address a legal question

that may not exist after completion of the proceedings on remand.

On the other hand, if the district court were to find no County policy or custom, and that holding were upheld by the court of appeals, the County could renew its request for review by this Court of the interim award of attorneys' fees by filing a petition for a writ of certiorari with respect to that final judgment.[11] There accordingly is no reason for the Court to address that issue now. See *Va. Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Moreover, the County's liability under the interim fee award is $59,258.09. See page 13, *supra*. The amount of money at stake also weighs against a grant of review at this interlocutory stage of the litigation.[12]

---

[11] Petitioner erroneously asserts (Pet. 32 n.5) that a subsequent petition would be untimely, citing *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952). That case involves a court of appeals' entry of a second judgment with respect to the same appeal. The Court has long held that legal issues addressed in an earlier appeal may be the subject of a certiorari petition seeking review of the judgment entered in a subsequent appeal from the district court's final judgment in the case. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916).

[12] Furthermore, the fee order has no precedential effect. The Ninth Circuit's local rules establish that unpublished orders—such as the attorney's fees order in this case—carry no precedential weight, except when relevant under the law of the case doctrine or for determining issue or claim preclusion. See 9th Cir. R. 36-3(a).

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS WARRANTING THIS COURT'S ATTENTION.

Petitioner's claimed conflict among the courts of appeals is illusory. There is no court of appeals decision squarely holding that declaratory or injunctive relief is not available against a municipality under Section 1983 without a finding that the municipality's actions are the product of a policy or custom.

To begin with, the Sixth and Seventh Circuit decisions that petitioner cites explicitly *do not decide* this issue. In *Leary* v. *Daechner*, 228 F.3d 729 (6th Cir. 2000), the court "assume[d], *without deciding*, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages." *Id.* at 740 n.4 (emphasis added). In *Gernetzke* v. *Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), the court plainly stated that the issue was not presented for consideration, as "plaintiffs do not argue that *Monell* is applicable only to their damages claim." *Id.* at 468.[13]

The Second Circuit case on which petitioner relies is similarly inapposite. *Reynolds* v. *Giuliani*, 506 F.3d 183 (2d Cir. 2007), was a challenge by the State of New York to an injunction entered against state officials for failure to supervise New York City offi-

---

[13] Petitioner does not cite a Fifth Circuit case similarly reserving decision on the question. *Nobby Lobby, Inc.* v. *City of Dallas*, 970 F.2d 82, 93 n.12 (5th Cir. 1992) ("Because substantial evidence supports the district court's finding that the officers' conduct in this case was pursuant to a city policy we express no opinion on whether a plaintiff must establish a municipal policy or custom to obtain declaratory relief against a municipality.").

cials in their exercise of delegated responsibilities under state law. The only question in the case was "whether *state* defendants are liable to plaintiffs for the *city* defendants' violations * * *." *Id.* at 189 (emphasis added). Unlike here, the State, not the municipal entity, was the appealing party—and the State did not dispute the city's liability.

Indeed, as the court itself said in *Reynolds*, "*Chaloux* is distinguishable from our case insofar as it dealt with a municipality's liability for state policy * * * rather than a supervisor's responsibility for the actions of subordinates." *Id.* at 191. Any discussion of *Chaloux* and *Monell* in that case, therefore, cannot represent a holding with respect to *municipal* liability.

Next, the cases petitioner cites from the Fourth and Eleventh Circuits are ones in which the issue was not raised by the parties or considered by the courts. In *Church* v. *City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), the Eleventh Circuit considered an interlocutory appeal from a preliminary injunction against the City of Huntsville in favor of homeless plaintiffs. Determining that plaintiffs could not show a substantial likelihood of prevailing on the merits of their claim that a city policy was the force depriving them of their rights, the court vacated the injunction. The plaintiffs' brief assumed without analysis that the *Monell* standard applied.[14] The Eleventh Circuit accordingly had no occasion to address the issue.

---

[14] See Brief of Appellees Joe Church, Gregory Jacobs, Michael Dooly and Frank Chisom at 13, *Church* v. *City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) (No. 93-6827) ("This suit[] was brought against the City for actions taken by the city via 'exe-

Greensboro Professional Fire Fighters Association, Local 3157 v. *City of Greensboro*, 64 F.3d 962 (4th Cir. 1995), was an appeal of a grant of summary judgment in favor of the City in an action brought by a firefighter and his union alleging that he had been the victim of retaliation for union activities. The plaintiffs sought both injunctive relief and damages. See *id.* at 964. They did not argue that declaratory and injunctive relief were available under Section 1983 without proof that the defendants acted pursuant to a policy or custom. Rather, they "argued that regardless of whether the City is liable under 42 U.S.C. § 1983," they were entitled to an injunction against prospective acts of harassment under a court's general equitable powers. *Id.* at 967 n.6. *Greensboro* contains no reference to *Chaloux*, and neither do the briefs submitted to the court.[15]

The final court of appeals invoked by petitioner—the First Circuit—has addressed the relevance of a finding of a municipal policy or custom in the context of a claim for prospective relief. But it has indicated that any policy or custom requirement may apply only in actions brought against a municipality itself: such a requirement could be a matter of form rather than substance, because prospective relief may be

---

cution of [a] government's policy or custom . . ." [citing *Monell*]. Therefore, under the law, municipal liability will attach.")

[15] See Brief of Appellants Greensboro Professional Fire Fighters Association and Steven B. Zimmerman at 21, *Greensboro Professional Fire Fighters Association, Local 3157* v. *City of Greensboro*, 64 F.3d 962 (4th Cir. 1995) (No. 94-1878) (arguing that "even where monetary relief may be expressly prohibited by constitutional provisions, or the Defendant is not subject to suit for damages under 42 U.S.C. § 1983 because it is not considered a 'person[,'] federal courts still have remedial equity power to issue prospective injunctive relief.").

available through the device of an official-capacity suit against municipal officials.

In *Dirrane* v. *Brookline Police Department*, 315 F.3d 65 (1st Cir. 2002), a police officer sued the Town of Brookline, the town's police department, and individual police officials for alleged whistleblower retaliation. On appeal, the police officer argued that *Monell* does not bar a federal claim for prospective injunctive relief—as opposed to damages—against a municipality, relying on *Chaloux*. The court rejected this argument and indicated its disagreement with *Chaloux*. *Id.* at 71.[16]

The *Dirrane* court, however, went on to discuss the possibility that a plaintiff could obtain prospective relief against a municipality without meeting the *Monell* standard by framing the suit as an action for injunctive relief against local officials in their official capacities, rather than against the municipality itself, under the rationale of *Ex parte Young*. *Id.* at 71-72; see *Ex parte Young*, 209 U.S. 123 (1908); pp. 22-24, *infra*. That discussion suggests that in a future case arising in the First Circuit in which a civil rights plaintiff seeks injunctive relief against a municipality, such relief can be obtained without satisfying *Monell* by framing the action as an officer suit under *Ex parte Young*.[17]

---

[16] The court nevertheless went on to find that the police officer had failed to establish the preconditions for any award of equitable relief. *Id.* at 72.

[17] The First Circuit extended *Dirrane*'s disagreement with *Chaloux* without discussion in a later case, *Rivera* v. *Puerto Rico Aqueduct and Sewers Authority*, 331 F.3d 183 (1st Cir. 2003). The court did not consider whether official-capacity Section 1983 suits should be held to a different standard. Hence, the

If the First Circuit sustains such an action, any disagreement between the Ninth Circuit and the First Circuit would become completely academic. See *Monell*, 436 U.S. at 690 n.55. A plaintiff could obtain declaratory relief from a municipality without a *Monell* showing simply by naming a municipal official, not the municipality itself, as the defendant. Any disagreement between the First and Ninth Circuit therefore does not merit this Court's attention.

In sum, petitioner relies upon two circuits that do not even mention *Chaloux*, two that explicitly disavow any position on *Chaloux*, a case in the Second Circuit that does not consider municipal liability, and one circuit that has expressed its disagreement with *Chaloux* while potentially rendering that disagreement academic. Given that no other circuit has squarely considered and rejected *Chaloux* in a case where the issue has been explicitly considered, there is no conflict warranting this Court's attention.[18]

First Circuit remains open to such a possibility in a case that squarely presents it.

[18] Conceding that the "Ninth Circuit has consistently reaffirmed *Chaloux*[]," Pet. 21, petitioner nevertheless suggests that there is controversy in the Ninth Circuit over *Chaloux*. Petitioner incorrectly states that in *Truth* v. *Kent School District*, 542 F.3d 634 (9th Cir. 2008), the "district court urged that *Chaloux* be overruled because it 'rests on shaky grounds.'" Pet. 22. In *Truth*, however, the defendant *school district*, not the district court, argued that *Chaloux* should be overruled. *Truth*, 542 F.3d at 644 ("The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it 'rests on shaky grounds.'"). The Ninth Circuit reaffirmed *Chaloux*, noting that subsequent decisions of this Court had not undermined its validity. *Ibid.*

III. A MUNICIPALITY THAT IS VIOLATING THE CONSTITUTION IS NOT IMMUNE FROM DECLARATORY OR INJUNCTIVE RELIEF WITHOUT A FINDING THAT IT IS ACTING PURSUANT TO A MUNICIPAL POLICY OR CUSTOM.

The legal standard urged by the County would make the availability of relief against a municipality's ongoing violations of the Constitution depend upon whether the challenged action rested upon a municipal policy or custom. There is no basis in the applicable legal principles, or in simple logic, for that limitation on federal courts' power to protect the rights conferred by the federal Constitution.

A. Prospective Relief Is Available Against A State Without A *Monell*-Type Showing, And Municipalities Should Not Be Permitted Greater Leeway To Violate The Constitution.

The court of appeals' holding avoids an illogical asymmetry between local and state governments regarding the availability of prospective relief with respect to ongoing constitutional violations.

Under the Court's *Ex parte Young* doctrine, suits for injunctive relief against state officials for deprivation of Federal Constitutional rights are allowed to go forward without violating the immunity granted to the States by the Eleventh Amendment. See *Ex parte Young*, 209 U.S. 123; see also *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for

prospective relief are not treated as actions against the State.'") (citation omitted).

This doctrine exists even though respect for the States' sovereignty is embedded within the Constitution. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 707 (1999) ("[S]overeign immunity derives * * * from the structure of the original Constitution."); *Printz* v. *United States*, 521 U.S. 898, 919 (1997) ("[The states] retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text * * *.") (citation omitted).

Of course municipalities do not enjoy sovereign immunity. *Will*, 491 U.S. at 71 n.10. Yet petitioner suggests a reading of *Monell* that would allow municipalities to enjoy a greater immunity from injunctive relief than States.

Official-capacity actions for prospective relief are functionally equivalent to actions against the entity employing the named official. *Id.* at 71. Yet because "official-capacity actions for prospective relief are not treated as actions against the State," States are susceptible to claims of deprivation of federal constitutional rights under the *Ex parte Young* fiction that such suits against an official do not impinge on state sovereignty. *Id.* at 71 n.10. An action enjoining a state official in his official capacity from engaging in unconstitutional conduct necessarily binds the State. Petitioner, however, proposes that municipalities and municipal officials should enjoy immunity from such suits unless a plaintiff can show a widespread custom or policy was the depriving force.

An example: Suppose a municipal official denied an interracial couple a marriage license because of their race. Clearly, the officer's conduct violates the

Fourteenth Amendment's prohibition against racial discrimination. See *Loving* v. *Virginia*, 388 U.S. 1 (1967). Under the proposed reading of *Monell*, the municipality could not be held liable for damages *or* injunctive relief unless there was a "policy or custom" against granting marriage licenses to interracial couples. Under *Chaloux*, no such showing is necessary for prospective relief, and a court could grant an injunction ordering the municipality to issue a marriage license to the interracial couple. Under petitioner's theory, in contrast, the court would be powerless to direct the city to issue the license. This simply cannot be the law—and clearly would not be if a State, not a county, were the licensing entity.

Chaloux sensibly withdraws from municipalities (and official-capacity municipal employees) this unintended privilege. *Chaloux*, 886 F.2d at 250 ("We conclude that the [*Monell*] Court did not intend to apply any 'official policy or custom' requirement to foreclose a suit for prospective relief against *a county or its officials* for enforcing allegedly unconstitutional *state* laws.") (emphasis added). Indeed, even *Dirrane*, upon which petitioner relies to establish a conflict, notes the "tension" created by petitioner's suggested interpretation of *Monell*. *Dirrane*, 315 F.3d at 71-72.

At the same time, *Chaloux* also heeds the Court's desire in *Monell* to buffer municipalities from excessive damages liability. *Chaloux* undergirds the *Monell* Court's sensible rejection of *respondeat superior* liability on the part of municipalities, which was intended to guard against damages liability for the unauthorized actions of lone employees. *Monell*, 436 U.S. at 691.

B. *Chaloux*'s Reading of *Monell* is Correct

The court of appeals' interpretation of *Monell* is sensible and prudent. In *Monell*, this Court confronted the question "[w]hether local government officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities[.]" *Monell*, 436 U.S. at 662 (internal quotation marks omitted). Answering in the affirmative, this Court overruled in part *Monroe* v. *Pape*, 365 U.S. 167 (1961), which had exempted municipal corporations from § 1983 suits by interpreting the word "person" in § 1983 to encompass only natural persons. *Monell*, therefore, greatly expanded municipal liability.

Explaining its decision to overturn a recent precedent, the *Monell* Court recognized that *Monroe* was in tension "with the warp and woof of civil rights law." *Monell*, 436 U.S. at 696. Specifically, the Court observed that *Monroe*'s holding had been extended to injunctive suits even though this was inconsistent with a generation of school desegregation cases. *Id.* at 696-697; see also *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) (extending *Monroe* to suits seeking injunctive relief); *Suits against Municipalities for Equitable Relief under Section 1983*, 87 Harv. L. Rev. 252, 257-258 (1973) (explaining that the Court extended *Monroe* to injunctive and declaratory relief suits because of *Monroe*'s flawed reading of § 1983's legislative history). *Monell* expressed concern that immunizing municipalities from suit weakened federal court's powers to grant injunctive and prospective relief to remedy constitutional violations. See *Monell*, 436 U.S. at 696 (noting that several school desegregation decisions "holding school boards liable

in § 1983 actions are inconsistent with *Monroe*, especially as *Monroe*'s immunizing principle was extended to suits for injunctive relief"). Read in this historical context, *Monell* ensured the federal judiciary's role in safeguarding constitutional rights from infringement by municipalities.

The *Monell* Court, however, realized that overturning *Monroe* would make municipalities liable for damages under § 1983, a risk not faced by state defendants due to sovereign immunity. To limit the financial exposure of municipal governments, *Monell* established the now familiar "policy or custom" test for liability. Examining the legislative history, this Court framed the question of liability around the concept of responsibility, concluding that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S. at 691. Clearly, however, the animating concern behind *Monell*'s "policy or custom" test is a desire to shield the public fisc from suits alleging that rogue employees violated a person's constitutional rights.

Monell explicitly limited its holding in another respect. This Court concluded by "express[ing] no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity." *Id.* at 701. Following *Monell*, this Court has applied the "policy or custom" test only in damages cases. See *City of St. Louis* v. *Prapotnik*, 485 U.S. 112 (1988); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986).

Given this backdrop, there is little reason to extend *Monell*'s holding to suits seeking prospective relief. *Monell* sought to protect citizens' constitutional rights by allowing suits against municipalities while

simultaneously limiting the financial liability of counties and cities by requiring a showing of a "policy or custom" for damages awards. *Monell*'s concern with damages awards "is notably absent when the relief sought is an injunction halting the enforcement of an unconscionable state statutory scheme." *Chaloux*, 886 F.2d at 251.

IV. THE QUESTIONS PRESENTED REGARDING THE COURT OF APPEALS' DETERMINATION THAT RESPONDENTS ARE PREVAILING PARTIES DO NOT WARRANT REVIEW.

Petitioner does not even contend that there is a conflict among the lower courts with respect to the second and third questions presented in the petition—regarding whether respondents qualify as prevailing parties entitled to an interim award of attorneys' fees pursuant to 42 U.S.C. § 1988.

The claim that respondents do not qualify as prevailing parties in the absence of a determination that the County acted pursuant to a custom or policy simply recasts the first question presented. Certainly nothing in Section 1988 independently imposes a custom or policy requirement.

The claim that the court of appeals' finding of a constitutional violation is insufficient to qualify respondents as prevailing parties is meritless. That ruling—as to which the County has not sought review—plainly obliges the County to cease its ongoing violation of the federal Constitution by providing respondents with the procedural protections that the Constitution requires. The court of appeals correctly determined that its "holding 'materially alters the legal relationship between the parties by modifying

the defendants' behavior in a way that directly benefits the plaintiff.'" Pet. App. 2 (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992)).

The court of appeals held that "a single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision." Pet. App. 60. By virtue of the court's holding, the County must provide an alternative mechanism for reviewing the CACI listings.

Surely the County is not contending that entry of an injunction is required in order to require it to comply with the court of appeals' ruling. Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 469 (1974) (discussing prior decisions in which the Court had declined to enter injunctions against unconstitutional state laws "anticipating that [the Court's rulings] would be given effect by state authorities"); see also *Hanrahan* v. *Hampton*, 446 U.S. 754, 757 (1980) (approving practice of awarding § 1988 fees once one party "had established the liability of the opposing party, although final remedial orders had not been entered").

In *Texas State Teachers Association* v. *Garland Independent School District*, the Court held that "a judgment vindicating the First Amendment Rights of public employees in the workplace * * * materially altered the school district's policy limiting the rights of teachers to communicate with each other * * *." 489 U.S. 782, 793 (1989). It was the finding of a constitutional violation itself that "materially altered" the relationship between the parties.

The County's reliance on *Hewitt* v. *Helms*, 482 U.S. 775 (1987), and *Rhodes* v. *Stewart*, 488 U.S. 1

(1988), is entirely misplaced. In both of those cases the plaintiffs could not receive any prospective benefit from the favorable legal rulings. In *Hewitt*, the plaintiff had been released from prison and in *Rhodes* one plaintiff had been released from prison and the other had died. Therefore, as the County itself recognizes, the plaintiffs, "could not in fact obtain redress from any changes in prison policy caused by their lawsuit." Pet. 42.

Here, by contrast, respondents' names remain in the CACI. Respondents accordingly *will* benefit from the County's cessation of its continuing failure to provide respondents with the process required by the Constitution.

This case presents no issue regarding the Humphries' status as prevailing parties that warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ESTHER G. BOYNTON
1850 Fifth Ave., Suite 7
San Diego, CA 92102
(310) 248-4833

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

NOVEMBER 2009