No. 09-350

DEC 4 - 2009

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

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

REPLY TO BRIEF IN OPPOSITION

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SUMMARY

• Respondents concede that the Ninth Circuit's decision that respondents are prevailing parties on a declaratory relief claim without having to satisfy the basic requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is final, immediately enforceable, and not subject to further review by the Ninth Circuit. This Court has recognized that interim fee orders, premised upon erroneous determinations of prevailing party status are properly reviewed by certiorari. *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (*per curiam*). Judicial efficiency is ill served by allowing the issue to remain open for years on end especially when the Ninth Circuit has repeatedly stated that it will not apply *Monell* to claims for prospective relief unless and until this Court specifically addresses the issue.

• *Monell* expressly states that its requirements apply to claims for "monetary, *declaratory*, or *injunctive* relief...." 436 U.S. at 690 (emphasis added). The Ninth Circuit's departure from *Monell*'s plain holding must be halted. Even assuming, arguendo, the extraordinary proposition that *Monell* does not mean what it says, and such claims are not subject to its strictures, the only outcome consistent with judicial efficiency and logic, would be to grant review in order to clarify the Court's view.

• There is an explicit, acknowledged conflict among the appellate courts. Two circuits have expressly declined to follow the Ninth Circuit's

erroneous reasoning. Two other circuits, based upon *Monell*'s plain language, have applied its requirements to claims for declaratory and prospective injunctive relief. Two circuits have expressly acknowledged the conflict, without needing to resolve it.

- The Ninth Circuit here has done precisely what this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988) said it could not do – ex post facto transformed resolution of a legal issue into the equivalent of declaratory relief solely for purposes of conferring prevailing party status on plaintiffs, even though petitioner's underlying responsibility for any violation remains to be determined.

I. THE NINTH CIRCUIT'S DEPARTURE FROM *MONELL* AND RESULTING CIRCUIT SPLIT WARRANT IMMEDIATE REVIEW.

Respondents do not suggest that the Ninth Circuit's order declaring plaintiffs to be prevailing parties is subject to further review by that court. They instead contend that petitioner could await remand and trial in the underlying action, and then following any subsequent appeal and decision by the Ninth Circuit on other issues, seek certiorari on this interim fee order. (Brief for Respondents in Opposition ("BRO") 15-16.) Yet, basic principles of judicial efficiency, economics and fairness make it clear that this case is ripe for review at this time and that

petitioner need not and should not pursue some theoretical and tortuous path to review.

The issues will not be clarified by further proceedings. This is an interim award of fees – plaintiffs' entitlement to these fees will not be revisited by the Ninth Circuit and they are subject to immediate payment. (Reply Appendix) This Court has recognized that review is appropriate in these circumstances. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), the Seventh Circuit reversed a directed verdict for the defendants in the plaintiffs' civil rights suit, remanded for a new trial and awarded plaintiffs attorney's fees. *Id.* at 755. Even though matters remained for trial, this Court nonetheless granted certiorari and held that the plaintiffs were not prevailing parties for purposes of a fee award. *Id.* at 756. Procedurally, this case is virtually identical to *Hanrahan*.

This Court reviews interlocutory rulings that are clearly erroneous and have immediate consequences for the petitioning party. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (declining to "ignore the error in the Court of Appeals' judgment" vacating and remanding the district court's decision to deny a preliminary injunction where the Ninth Circuit's ruling "is clearly erroneous under our precedents" and "has produced immediate consequences for Montana ... ").

The Ninth Circuit's improper rule has caused, and will continue to cause, error and confusion on a widespread basis in the district courts. *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989) is routinely applied by lower courts within the Ninth Circuit and has spawned uncertainty in other district courts. (Petition for Writ of Certiorari ("Pet. Cert.") 30-31 n.4.) There is no indication that the Ninth Circuit is inclined to revisit *Chaloux*. Even in the face of internal discord on the issue it has repeatedly reaffirmed that it will follow *Chaloux* unless and until this Court expressly addresses the issue. (Pet. Cert. 31-32.) Nothing justifies allowing the Ninth Circuit to continue on this erroneous path for years to come.

This issue directly affects municipalities on a recurring basis and demands resolution earlier rather than later. Local public entities face claims for prospective relief under section 1983 on a regular basis. Municipalities are often charged with enforcing state law in the first instance and hence, targets for claims for injunctive relief barring enforcement of unconstitutional statutes. Similarly, prospective relief, notably reinstatement, is routinely at issue in public employment litigation. Respondents do not and cannot dispute the ubiquitous nature of such claims against municipalities. Because this issue is "important and appears likely to recur in § 1983 litigation against municipalities," review is appropriate. *City of Newport v. Fact Concerts, Inc.*, 453 U.S.

247, 257 (1981); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (plurality).

II. THE NINTH CIRCUIT'S DEPARTURE FROM THE CLEAR LANGUAGE OF *MONELL* AND RESULTING CIRCUIT SPLIT REQUIRE REVIEW BY THIS COURT.

A. *Monell* Expressly Applies To Claims For Declaratory And Injunctive Relief And The Court Has Repeatedly Reaffirmed The Custom, Policy Or Practice Requirement.

Monell expressly states that its strictures apply to claims for "monetary, *declaratory*, or *injunctive* relief...." 436 U.S. at 690 (emphasis added).

Following *Monell,* this Court repeatedly stressed that the custom, policy or practice requirement is a rule of causation compelled by the statutory language. (Pet. Cert. 18-19.) As the Court explained in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986), *Monell* was based on

> the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."

In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality) the Court emphasized that "[r]eading the statute's language in the light of its legislative history, the [*Monell*] Court found that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983" and "[t]hat conclusion ... has been repeatedly reaffirmed."

Respondents cite no decision of this Court suggesting that the definition of what it means to "cause" an individual to be "subjected" to a violation of civil rights varies depending upon the nature of the relief sought. Thus, *Chaloux* and its progeny, including the Ninth Circuit's order here, are flatly contrary to the express language of *Monell* and section 1983 itself, as well as the uniform authority of this Court.

B. Prospective Relief Imposes Substantial Financial Burdens On Municipalities, Thus Eliminating *Chaloux*'s Justification For Departing From *Monell*.

Respondents repeat *Chaloux*'s narrow reinterpretation of *Monell* as being concerned solely with avoiding imposition of financial liability on municipalities based upon respondeat superior. (BRO 25-27.) As noted in the petition and above, this interpretation ignores the Court's clear reliance on the language of section 1983 as barring respondeat superior liability.

Respondents do not dispute that prospective relief can and does impose significant financial burdens

on municipalities. Creating a regulatory scheme, correcting internal procedures, or in employment cases, reinstatement of an employee, all carry significant financial costs. These fiscal burdens undermine the very rationale of *Chaloux*. Failure to apply *Monell*'s basic principles to claims for prospective relief requires local public entities to bear substantial costs, including claims for attorney's fees, even in the absence of any evidence that the particular violation was the result of a custom, policy or practice. This result is contrary to the basic principles of *Monell*.

C. Application Of The *Monell* Requirements Allows Prospective Relief Where A Constitutional Violation Is Fairly Attributable To The Actions Of A Municipality And Does Not Afford "Less" Protection Than Is Available Against The States.

Respondents assert that "[t]he 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." (BRO 22.) This implies that there can somehow be unredressed "ongoing constitutional violations" where a plaintiff cannot prove a custom, policy or practice. Not so. Cases involving "ongoing" constitutional violations represent the quintessential *Monell* claim. *Praprotnik*, 485 U.S. at 130 ("a series of decisions by a subordinate official manifested a 'custom or usage'

of which the supervisor must have been aware"); *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (where police officers "so often violate constitutional rights" that need for training is obvious, municipality may be liable for inaction of policymakers).

Respondents do not explain how application of the *Monell* requirements would bar redress in an appropriate case. They posit the hypothetical of a local official refusing to grant a marriage license to an interracial couple. (BRO 23-24.) Under such circumstances, the couple could obtain injunctive relief against the individual official in his personal capacity, requiring him to issue the license. Respondents do not explain why this would not provide appropriate redress. And, if a low-level official declined to issue a license and it is brought to the attention of a policymaking official or an individual to whom such authority has been delegated, failure to issue a license upon a renewed request would amply meet the requirements of *Monell*. *Pembaur*, 475 U.S. at 480, 483; *Praprotnik*, 485 U.S. at 127, 130.

Respondents contend that applying *Monell* to claims for prospective relief somehow provides litigants with less protection than is available against the states under the Eleventh Amendment. But respondents are arguing apples and oranges. The case does not present, and the Court need not resolve, issues surrounding the availability of prospective relief against state officials sued in their official capacity.

Nonetheless, the premise of respondents' argument – that prospective relief is available against state officials without establishing action fairly attributable to the state equivalent to those factors imposing *Monell* liability on municipalities – is dubious. This Court's Eleventh Amendment jurisprudence has made it clear that injunctive relief against state officials is limited to those situations where it is necessary to stop enforcement of an unconstitutional statute and avoid ongoing violations of federal law. *Ex parte Young*, 209 U.S. 123, 155-56, 159 (1908) (state attorney general may be sued for prospective relief to bar enforcement of unconstitutional statute and avoid continuing violation of federal law); *Green v. Mansour*, 474 U.S. 64, 67-69, 73 (1985) (discussing *Ex parte Young* and its progeny, and finding declaratory judgment against state officials improper because "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction").

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court invoked *Monell* in explaining the differences between suing a state official in a personal, as opposed to official, capacity:

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. [Citation.] More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the

> entity itself is a "'moving force'" behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell*, *supra*, at 694); thus, in an official-capacity suit, the entity's 'policy or custom' must have played a part in the violation of federal law. *Id.* at 166 (parallel citations omitted) (original emphasis).

Hafer v. Melo, 502 U.S. 21, 25 (1991) reaffirmed *Graham*: "Suits against state officials in their official capacity ... should be treated as suits against the State" and "[b]ecause the real party in interest in an official capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law.'"

Indeed, a case that respondents cite and discuss – *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007) – rejected claims for prospective injunctive relief against *state officials* because plaintiffs failed to satisfy *Monell*'s requirements of a policy, custom or practice attributable to the state as causing plaintiffs' injuries.

Monell allows full redress for constitutional injuries in appropriate circumstances and there is no justification for the Ninth Circuit's departure from its plain holding.

D. There Is An Acknowledged Conflict Among The Circuits On Whether *Monell* Applies To Claims For Prospective Relief.

Two circuit courts have expressly rejected *Chaloux*'s holding that *Monell* does not apply to claims for declaratory or prospective injunction relief. Despite respondents' rhetorical hair-splitting, the conflict is manifest. In *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002), the court expressly rejected *Chaloux*'s reasoning, noting that it was "on its face at odds with *Monell* itself." Respondents seek to minimize *Dirrane*'s clear conflict with *Chaloux*, by asserting that the First Circuit suggested that prospective relief could be sought against a local public official as opposed to a local public entity without satisfying *Monell*'s requirements. (BRO 20, citing *Dirrane*, 315 F.3d at 71-72.) But the *Dirrane* court noted, "*Monell* says that a suit against an officer in his official capacity is 'only another way of pleading an action against an entity of which an officer is an agent.'" 315 F.3d at 71, citing *Monell*, 436 U.S. at 690 n.55. *Dirrane* does not suggest that a plaintiff can circumvent *Monell* simply by bringing claims for prospective relief against County officials in their official capacity. *Dirrane* clearly involves a claim for prospective relief against a local public entity, and the First Circuit expressly rejected *Chaloux*'s reasoning that such claims are not subject to *Monell*.

In *Reynolds*, 506 F.3d 183, 191, the Second Circuit expressly rejected *Chaloux*. Respondents assert there is no real conflict because *Reynolds* involved a claim for prospective relief against state officials based upon their failure to supervise county officials, as opposed to a claim against a local public entity. The distinction is illusory. Nothing suggests that the Second Circuit, having found that failure to satisfy *Monell* forecloses a claim for prospective injunctive relief against state officials would, nonetheless, allow claims for prospective relief against a municipality under the same circumstances when, of course, *Monell* directly addresses the liability of local public entities. As the *Reynold*'s court explained in expressly rejecting *Chaloux*: "*Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a municipal policy or custom in suits seeking monetary, declaratory or injunctive relief." 506 F.3d at 191.

Two other circuits have expressly held that *Monell* applies to claims for declaratory or prospective injunctive relief without addressing *Chaloux*. *See Greensboro Prof'l Firefighters Assoc., Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995) and *Church v. City of Huntsville*, 30 F.3d 1332, 1342, 1347 (11th Cir. 1994). Respondents assert that the plaintiffs in those cases did not cite *Chaloux*. (BRO 18-19.) But in *Greensboro*, the plaintiffs contended they were entitled to prospective relief even if they could not establish municipal liability under *Monell*,

and the court expressly rejected the argument. 64 F.3d at 967 n.6. *Church* relies on the plain language of *Monell* and its progeny in applying the *Monell* requirements to claims for prospective relief. 30 F.3d at 1342-47.

Two other circuits have recognized *Chaloux*'s clear departure from *Monell* but found it unnecessary to reach the issue. (*See* Pet. Cert. 29, citing *Leary v. Daeschner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001), cert. denied, 535 U.S. 1017 (2002).) Their recognition of the conflict underscores the need for this Court to provide guidance on this significant and recurring issue.

III. THE NINTH CIRCUIT'S DEPARTURE FROM *HEWITT* AND *RHODES* REQUIRES REVIEW BY THIS COURT.

The Ninth Circuit's order ex post facto declaring its prior opinion to be the equivalent of declaratory relief in favor of plaintiffs represents a blatant departure from the commands of this Court in *Hewitt v. Helms* and *Rhodes v. Stewart* and warrants review. *Horn v. Banks*, 536 U.S. 266, 267 (2002) (*per curiam* reversal where "Court of Appeals directly contravened" decision of the Court).

The Ninth Circuit has departed from the basic principle of *Hewitt* and *Rhodes* that an appellate court cannot transform resolution of a legal issue into the equivalent of declaratory relief where, at the end

of the day the relationship between the parties is not substantially altered in that the defendant is ultimately not liable for the alleged conduct. Contrary to respondents' assertion (BRO 29), *Hewitt* did not turn on whether the plaintiff would benefit from injunctive relief because he was no longer a prisoner. Rather, the problem in *Hewitt* was that while the Circuit court had held the defendants violated the plaintiff's civil rights, that declaration was essentially a nullity given that on remand defendants established qualified immunity. *See* 482 U.S. at 758-59, 761-63. As the Court recognized in *Hewitt*, divorcing a declaratory judgment from a finding of ultimate liability in the case erodes the basic rules for establishing such liability. *Id.* at 763.

If no County policy, custom or practice caused a deprivation of plaintiffs' civil rights for the very reason that it was the State and not the County that was ultimately responsible for the statutory scheme, a declaration to the effect that the County is somehow responsible is virtually a nullity and nothing more than a predicate for awarding attorney's fees. This Court's decisions in *Hewitt and Rhodes* foreclose such a result.

CONCLUSION

Petitioner urges that the petition for certiorari be granted.

Respectfully submitted,

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