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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

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

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The court of appeals' order awarding interim attorneys' fees (Pet. App. 1-4) is unreported. The court of appeals' second amended opinion addressing respondents' procedural due process claim (Pet. App. 5-72) is reported at 554 F.3d 1170 (9th Cir. 2009). The court of appeals' first amended opinion (Pet. App. 73-142) is unreported. The court of appeals' initial opinion (Pet. App. 143-209) is published at 547 F.3d 1117 (9th Cir. 2008). The district court's opinion (Pet. App. 210-54) 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, and was granted on February 22, 2010 (limited to the first question presented). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents Craig and Wendy Humphries are trapped in what the court of appeals described as a "nightmar[e]." Pet. App. 18. On the basis of false allegations, the Humphries were listed in the Child Abuse Central Index ("Index"), California's child abuse registry. They obtained a ruling by one court that the child abuse allegations asserted against them were "not true," and a ruling by a second court that they were "factually innocent" of the arrest charges that arose from those allegations. But the Humphries nonetheless remain listed in the Index, which is used by third parties in making licensing,

employment, child custody, and other important decisions

The court of appeals held that, by failing to provide an adequate procedure for removal of names wrongly included in the Index, 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 did not seek review of that constitutional ruling.

The court of appeals subsequently awarded the Humphries interim appellate attorneys' 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 County's petition relates solely to its obligation to pay its portion of this interim award—approximately $60,000. 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, separate determination—that the County acted pursuant to one of its own policies or customs—is also required.

That standard, never before applied by this Court in a case involving prospective relief to remedy an ongoing constitutional violation, would deprive the federal courts of the power to halt continuing violations of constitutional rights in a variety of contexts. The Court should reject petitioner's invitation to alter dramatically the standards governing the availability of the judicial redress that is critical to vindicating the rights guaranteed by the Constitution.

A. Statutory Background

The California Department of Justice ("DOJ") maintains the Child Abuse Central Index (the "Index"), 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. 1171 (formerly codified at Cal. Penal Code Ann. §§ 11110, 11161.5). Since 1988, maintenance of the Index has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), Cal. Penal Code §§ 11164 *et seq*.[1]

DOJ derives Index entries from "Child Abuse Investigation Report" forms,[2] filled in and sent to DOJ by local welfare and law enforcement agencies that investigate reports of suspected child abuse or neglect ("submitting agencies"). See Cal. Penal Code §§ 11165.9, 11169(a), 11170(a)(1).[3] DOJ culls information from the submitted forms—including identifying

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[1] In 1980, California enacted the Child Abuse Reporting Law, which overhauled provisions for reporting and compiling child abuse information. 1980 Cal. Stat. 1071, § 4, 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. c. 1444.

[2] From the mid-1980's through 2009, DOJ issued several versions of these forms, all designated "SS 8583" forms. Cal. Code Regs. tit. 11, § 903(b) (May 12, 2006); see also Ct. App. E.R. 303, 333, 336-39, 244-248, 356, 396-404. A new designation, "BCIA [DOJ Bureau of Criminal Information and Analysis] 8583" appears on the form revised as of January 5, 2010. Cal. Code Regs. tit. 11, § 901.

[3] 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, physicians, etc.); commercial film or photographic print processors, or "[a]ny other person." *Id.* § 11166(a), (e), (g).

data on named victims and suspects, the type of abuse alleged, the submitting agency's classification of the report, and the submitting agency's file number—and enters it into the Index. ER 302-04; see Cal. Code Regs. tit. 11, §§ 900, 901 (Jan. 5, 2010).

California law mandates that certain entities consult the Index and conduct an additional investigation of Index-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) & 11170.5; Cal. Health & Safety Code §§ 1522.1(a), 1526.8(b)(2), & 1596.877(b). Further, CANRA makes Index information available to a range of other entities, both within and outside of California, for specified purposes. See Pet. App. 13, n.1; Cal. Penal Code § 11170(e); see also Cal. Code Regs. tit. 11, § 905(b) (Jan. 5, 2010).[4]

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

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[4] CANRA states that such third party recipients of Index 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).

defined in Section 11165.6." Accordingly, a report that has been determined not to meet any of these four criteria is *not* unfounded.

In addition to requiring that a report be determined to be not "unfounded" prior to submission for entry in the Index (Cal. Penal Code § 11169(a)), the statute defines two sub-classifications of "not unfounded" reports—"substantiated reports" and "inconclusive reports." Cal. Penal Code § 11169(b), (c).[5] Under DOJ regulations, before submitting a report for listing in the Index, an agency must classify it either "substantiated" or "inconclusive" by marking one of those pre-printed options on the reporting form, which determines the listing's retention period. Cal. Code Regs. tit. 11, § 901 (Jan. 5, 2010); see former § 903(a), (b) (May 24, 2002) at ER 397-400.

CANRA states that "submitting agencies are responsible for the accuracy, completeness, and retention of the reports" they submit for listing in the Index. Cal. Penal Code § 11170(a)(2).

The statute does not specify a retention period for Index listings arising from reports classified "substantiated," such as the report involved in this case.[6] DOJ's policy is to retain such listings in the

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[5] An "[i]nconclusive report" (formerly called an "[u]nsubstantiated report") is one determined "not to be unfounded, but 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).

[6] Respondents' Index listing was created in 2001. At that time CANRA defined a "substantiated report" as one "determined by the investigator who conducted the investigation, based upon some credible evidence, to constitute child abuse or neglect, as defined in Section 11165.6." Cal. Penal Code § 11165.12(b). As

Index permanently, unless the submitting agency notifies DOJ that the report has been reclassified as "unfounded" or "inconclusive," or that there is no available investigative file that supports the listing. Ct. App. E.R. 307-09, 493.[7]

CANRA provides for purging of "inconclusive or unsubstantiated" reports ten years after entry in the Index 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 more years, measured from the receipt of the more recent report. Cal. Penal Code § 11170(a)(3).

The statute does not specify a procedure for challenging Index listings. It states that, "[i]f a report has previously been filed which subsequently proves to be unfounded, the [DOJ] shall be notified in writing of that fact and shall not retain the report," but the statute does not state how a report may be proved unfounded, or who may notify DOJ of "that fact." Cal. Penal Code § 11169(a); Pet. App. 16-17.

The court of appeals determined that "nothing in the statute prevents a submitting agency from enacting some procedure to allow an individual to chal-

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amended in 2005, the provision defines a "substantiated report" as one "determined by the investigator who conducted the investigation to constitute child abuse or neglect, as defined in Section 11165.6, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred." See Cal. Stats. 2004, ch. 842, § 6.

[7] The County is wrong in asserting (Pet. Br. 6) that all "not unfounded" reports are "removed from the Index ten years after entry" if DOJ "receives no further child abuse reports regarding the listed person." The statutory provision cited by the County—Cal. Penal Code § 11170(a)(3)—does not provide for removal of "substantiated" reports. See Pet. Br. 6.

lenge their listing or seek to have a determination that a report is 'unfounded.'" Pet. App. 17-18. However, neither the County of Los Angeles nor the Los Angeles County Sheriffs' Department ("LASD")—the submitting agency in this case—has enacted such a procedure for individuals included in the Index as a result of reports submitted by LASD. *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.[8]

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 pre-

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[8] The County's brief presents (Pet. Br. 7-10) a detailed—and in parts inaccurate—discussion of the allegations against the Humphries, which the Los Angeles County Superior Court, Juvenile Division ("juvenile court") subsequently held were "not true" Pet. App. 23. We will not burden the Court with a lengthy rebuttal of the County's presentation of these allegations, which serve no purpose other than to continue the "nightmare" described by the court of appeals.

One misstatement typifies these errors: the County overstates what Wilson had received from Utah when he arrested the Humphries and completed his report for submission to the Index. See Pet. Br. 8-9. Wilson had not received any photographs or videotaped interview, nor did he ever receive any report prepared by the Utah Department of Human Services, Division of Child and Family Services. See Appellants' Supp. ER 17-19, 26-30, 41, 43, 46, 50-52; ER 143-44, 274-93, 630.

vious marriage. As a result of this accusation, they were arrested by Detective Michael Wilson of the LASD on April 16, 2001. Pet. App. 19; Ct. App. E.R. 202.[9]

That same day, a sheriff's deputy, acting without a warrant, picked up the Humphries' children "J.A." and "C.E." at their schools and took them into "protective custody." The County placed the children in foster care, even though they "denied any fear of abuse or mistreatment and indicated their desire to return home." Pet. App. 19.

The following day, April 17, based on S.H.'s allegations, Detective Wilson completed a Child Abuse Investigation Report for submission to the Index. 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; Ct. App. E.R. 241. The Sheriff's Department then forwarded Detective Wilson's report to DOJ, which in turn entered the data into the Index, listing respondents "as child abuse suspects with a 'substantiated' report." 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; Ct. App. E.R. 433-34. Additionally, based on the same allegations, the County filed a

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[9] Respondents were arrested and booked on the single charge of felony torture under California Penal Code § 206, on April 16, 2001. Pet. App. 19. Two days later, Wilson filed a complaint with misdemeanor charges in the Los Angeles County Superior Court. See page 8, *infra*.

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 (internal quotation marks omitted).

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." *Id.* at 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.* (internal quotation marks omitted).

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

After the dependency and criminal actions were dismissed, the Humphries, through their attorney, contacted LASD's Family Crimes Bureau. They learned that "Detective Wilson no longer worked at the Bureau, and that there was no available procedure for them to challenge their listing in the [Index]." 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 Index because "the fact that the case was dismissed 'would not negate the entries' into the [Index]." *Ibid.* Respondents were not permitted to present any evidence to Becker. Ct. App. E.R. 593-94.

Thereafter, in December 2002, 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 "found 'that no reasonable cause exists to believe that the [Humphries] committed the offense for which the arrest was made.'" Pet. App. 22-23.

Subsequently, in response to a questionnaire from DOJ, a clerical worker in LASD's Family Crimes Bureau "confirmed" to DOJ that the Index-listed report on the Humphries was still "substantiated" as of October 31, 2003. Pet. App. 25; ER 485-88, 511-25, 576-77, 591, 596-607. The Humphries had no notice of this "confirmation." ER 316-17.

The court of appeals observed that "[d]espite the fact that two independent California tribunals had found that the allegations underlying the Humphries' [Index] listing were 'not true' and that the Humphries are 'factually innocent," the CA DOJ continues to list the Humphries in the [Index] as substantiated child abusers. Furthermore, because the Humphries [are] listed pursuant to a 'substantiated report,' they will remain listed on the [Index] indefinitely." Pet. App. 25.

C. Proceedings Below

Following the refusal of the County and State to expunge respondents' names from the Index, respondents commenced this action in the District Court for the Central District of California asserting claims for declaratory and injunctive relief and damages under 42 U.S.C. § 1983.[10] Respondents subsequently filed an amended complaint requesting declaratory relief against the County, the Attorney General, 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.

They requested injunctive relief against all defendants ordering "the County of Los Angeles to notify the [California Department of Justice] 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." Pet. App. 28. The Humphries also requested damages from the County, the County Sheriff, and the two detectives for injuries resulting from the constitutional violations. *Id.* at 27-28.[11]

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[10] The amended complaint named five defendants: Los Angeles County; California Attorney General Bill Lockyer in his official capacity; County Sheriff Leroy D. Baca in his official and individual capacities; and Los Angeles Sheriff's Department Detectives Wilson and Ansberry in their official and individual capacities. Ct. App. E.R. 4-5.

[11] The amended complaint also included claims under Section 1983 relating to respondents' arrests and the removal of their children, as well as five state-law counts that were dismissed by the district court and not appealed. Pet. App. 27-29.

1. *The District Court's Ruling*. The district court granted summary judgment in favor of the defendants. Pet. App. 254. The court determined that the individual defendants were entitled to qualified immunity. It also granted summary judgment for the County and the State Attorney General on the due process claim, holding that respondents' interest "in remaining or being taken off of the Index simply does not fall within the types of 'liberty' interests courts traditionally recognize." *Id.* at 234.[12]

2. *The Court of Appeals' Decision*. The court of appeals unanimously reversed the grant of summary judgment on the due process claim, holding that the failure of the County and State to provide a mechanism for individuals to challenge and reverse their inclusion in the Index violated respondents' procedural due process rights.

The court of appeals first determined that, under this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), "the stigma of being listed in the [Index] as substantiated child abusers, *plus* the various statutory consequences of being listed on the [Index] constitutes a liberty interest, of which [respondents] may not be deprived without process of law." Pet. App. 30-31.

The court found that "CANRA creates too great a risk of individuals being placed on the CACI list who do not belong there, and then remaining on the index indefinitely." Pet. App. at 67-68. Thus it held that

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[12] The district court also granted summary judgment for defendants on the Section 1983 claims relating to respondents' arrests, and denied the motions for summary judgment by the County and Detective Wilson on the Section 1983 claim arising from the warrantless seizure of the children. Pet. App. 28.

procedural protections against the entry and retention of erroneous Index listings were "constitutionally inadequate." *Id.*; see also *id.* at 2 ("the State and County procedures used in maintaining the [Index] were constitutionally insufficient, and thus [CANRA] violates [respondents'] procedural due process rights").

The court concluded that due process requires prompt notification to an individual that his name has been included and "'some kind of hearing' by which he can challenge his inclusion." Pet. App. 68. "The opportunity to be heard on the allegations ought to be before someone other than the individual who initially investigated the allegation and reported the name for inclusion on the [Index], and the standards for retaining a name on the [Index] after it has been challenged ought to be carefully spelled out." *Ibid.*

Nothing in the governing statute "prevented the [LASD] from creating an independent procedure that would allow the Humphries to challenge their listing on the Index." Pet. App. 72. Instead, the LASD made Detective Wilson "investigator, prosecutor, judge, and jury with respect to the Humphries' CACI listing." *Id.* at 58. Because the County had "no standard, no superior outlet for review, and thus no danger of [Detective Wilson] being overturned—it is highly unlikely that an investigator will in effect, reverse himself." *Ibid.* Thus "any errors made in the initial referral to the CACI are, therefore, likely to be perpetuated" because respondents "have no statutory recourse elsewhere within the LASD." *Id.* at 57-58. That violated their due process rights.

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). It therefore remanded to the district court for further proceedings on that question. Pet. App. 208-09.

Following a petition for rehearing by the County, the court amended its opinion to make clear that it reached no decision regarding the *Monell* issue. See Pet. App. 75-76. It subsequently further amended its opinion to reflect the need to consider the County's liability under the *Monell* standard, rather than under a qualified immunity test. *Id*. at 7, 71-72.

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 thus entitled to an award of attorneys' fees" against the County and the State. Pet. App. 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, 111-12 (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 violated the *Monell* policy or custom standard, 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. 3-4 (citing *Chaloux* v. *Killeen*, 886 F.2d 247, 250 (9th Cir. 1989)).

The State, the court determined, was "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 was 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 master did not award attorneys' fees "for work performed on unsuccessful claims that are unrelated to the successful claims." *Id*. at 14. The County's 10% share is $59,258.09. *Id.* at 20. The County did not object to the master's report and recommendation. Oct. 2009 Ct. App. Order at 2 (Dkt. No. 152).

SUMMARY OF ARGUMENT

Petitioner contends that a plaintiff who is suffering continuing injury from an ongoing—*and proven*—violation of the Constitution, and who has satisfied the standing and other requirements for issuance of prospective relief, still may not obtain that relief in suits against municipalities and state or local government officials. Endorsement of that proposition by this Court would work a dramatic change in the federal courts' power to provide redress for constitutional violations. Nothing in this Court's precedents support such a result.

Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978), held that claims against a municipality under Section 1983 require proof of a causal link between the plaintiff's injury and a municipal policy or custom. All of the subsequent cases in which the Court has elucidated the standard for proving that link have involved only claims for damages.

This case requires the Court to address for the first time how Section 1983's causation requirement applies to claims for prospective relief. Extending to this very different context the standard developed for damages claims is unnecessary and inappropriate for four basic reasons.

First, the legal standards applicable to a claim for prospective relief with respect to a continuing constitutional violation—Article III's standing constraints and the other principles governing the issuance of such relief—already require a plaintiff to show that the municipality caused the violation. To prove an entitlement to prospective relief with respect to a continuing constitutional violation *is*, in other words, to prove a custom or policy.

The concern that motivated the *Monell* "policy or custom" requirement—ensuring a causal link between the municipality and the underlying violation—will therefore always be satisfied in the context of a successful claim for prospective relief against a continuing offense. These requirements for obtaining prospective relief, of course, do not apply to damages claims, which is why a separate showing of causation is necessary in the damages context but is not needed here.

Second, a municipality's decision to continue to engage in conduct notwithstanding a lawsuit challenging the conduct on constitutional grounds—and defend against the claim in court—itself constitutes a municipal policy that is a moving force behind the continuation of the deprivation of constitutional rights. It is equivalent to the "deliberate indifference" that the Court has found sufficient to satisfy the causation requirement in the damages setting.

Third, transferring wholesale the standard from the damages context will deprive courts of the power to stop continuing violations of constitutional rights in a variety of situations. For example, petitioner points to lower court decisions holding that a municipality may not be held liable in damages for enforcing a state policy or custom and argues that principle extends to claims for prospective relief as well.

But how would a plaintiff proceed with respect to an unconstitutional state statute that provides for enforcement by the State's municipalities? Because the State does not enforce the statute, obtaining prospective relief against it would not remedy the ongoing violation of the plaintiff's rights. But a municipality would argue, as petitioner argues here, that—because there is no municipal policy or custom causing the violation—it is immune from prospective relief. That outcome would leave the individuals suffering continuing injury to their constitutional rights without any means of remedying that ongoing violation. Standards developed to fit the particular characteristics of damages actions simply do not fit the very different context of claims for prospective relief.

Fourth, this Court has explained that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily suffi-

cient to invoke the" *Ex parte Young* doctrine and permit an official capacity action against a state official to go forward without violating the immunity granted to states by the Eleventh Amendment. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). If petitioner's argument were accepted, municipalities would receive greater protection against federal suits for prospective relief than that accorded to States. Given the States' as sovereigns, that result makes no sense.

Petitioner's contention that that the two situations are parallel, and that claims for prospective relief against States also must satisfy the policy or custom standard developed for damages claims, would limit even more dramatically the authority of federal courts to provide relief against ongoing constitutional violations. The Court should reject that approach, decline to extend the damages standard to claims for prospective relief, and hold that when a plaintiff seeks prospective relief, a separate showing of municipal responsibility is not required because the other standards applicable to such claims ensure the requisite connection between the municipality and the challenged conduct.

ARGUMENT

THE REQUIREMENT OF A SEPARATE SHOWING OF A MUNICIPAL POLICY OR CUSTOM DOES NOT EXTEND TO CLAIMS FOR PROSPECTIVE RELIEF.

This Court concluded in *Monell* that "a municipality cannot be held liable [under Section 1983] *solely* because it employs a tortfeasor"; there must be a causal link between the plaintiff's injury and a municipal policy or custom. 436 U.S. at 691 (emphasis

in original). *Monell* and the Court's subsequent cases addressing this issue all applied this principle in the context of claims for damages and other retrospective relief.

Respondents here seek prospective relief to remedy an ongoing constitutional violation from which they are suffering continuing, significant injury. The conduct that gave rise to respondents' Section 1983 claim has been held unconstitutional, and the County did not seek review of that determination. But the County nonetheless continues to engage in that unconstitutional conduct (by failing to provide respondents with due process).

In this situation—where conduct found to violate the Constitution is ongoing and the plaintiff seeks prospective relief—a separate showing of a municipal policy or custom is not a prerequisite for an award of declaratory or injunctive relief. The necessary causal link between the unconstitutional act and municipal policy or custom is established in two ways. First, because the legal requirements that a plaintiff must satisfy to obtain prospective relief themselves require the plaintiff to establish such a causal link. Second, because the position adopted in the litigation by the municipality, speaking through its authorized legal representatives—refusing to conform its conduct to the requirements of the Constitution—constitutes an act of the municipality that causes the plaintiff's continuing injury.

A. Persons Suffering A Continuing Injury Caused By A Constitutional Violation Should Be Able To Obtain Relief To Stop The Ongoing Violation.

This Court has long recognized the importance of judicial redress for ongoing violations of constitutional rights. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour,* 474 U.S. 64, 68 (1985).

The seminal decision in *Ex parte Young*, 209 U.S. 123 (1908), squarely addressed this question. There, the issue was whether the Eleventh Amendment barred the federal courts from hearing a suit seeking an injunction barring a State attorney general from enforcing a statute claimed to violate the federal Constitution. This Court held that

> [i]f the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60. This rationale encompasses mandatory as well as prohibitory injunctions. *Id*. at 158-59; see also *id*. at 168 (discussing federal court orders directing release of persons in state custody). *Young* "permit[s] the federal courts to vindicate federal rights

and hold state officials responsible to the supreme authority of the United States. * * * * [T]he *Young* doctrine rests on the need to promote the vindication of federal rights." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (citations and internal quotation marks omitted).

Petitioner argues for a significant limitation on federal courts' power to provide redress for ongoing constitutional violations. It urges this Court to hold for the first time that relief remedying an ongoing constitutional violation is available only if the plaintiff first satisfies the policy or custom test developed in the context of claims for damages. There is no warrant in precedent or in *Monell*'s rationale for introducing such a limitation.

B. The Court's Decision In *Monell*.

Monell addressed two distinct questions. First, whether municipalities were among the "persons" subject to liability under Section 1983. Second, how Section 1983's causation requirement applied in claims against municipalities.

1. Municipal liability under Section 1983

The principal question before the Court in *Monell* was whether to overrule *Monroe* v. *Pape*, 365 U.S. 167 (1961), which held municipalities immune from suit under Section 1983. The Court first reassessed the legislative history on which *Monroe* had relied. It focused in particular on Congress's rejection of the Sherman amendment, which would have given persons injured by mob violence a cause of action for damages against a municipality that failed to protect them from the mob. *Monell*, 436 U.S. at 669-83.

The Court concluded that Congress did not reject the amendment because it subjected municipalities to damages liability, but rather because it imposed on municipalities a new obligation to keep the peace, something that was beyond the authority of the federal government: "by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, [the amendment] attempted to impose obligations on municipalities by indirection that could not be imposed directly." *Monell*, 436 U.S. at 679.

After ascertaining that other aspects of the legislative history supported including municipalities within the scope of the "persons" subject to liability under Section 1983 (*Monell*, 436 U.S. at 683-89), the Court determined that "the legislative history * * * compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690.

Elaborating on that conclusion, the Court stated:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690 (footnote omitted). The Court went on to explain that "local governments, like every other [Section] 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal

approval through the body's official decisionmaking channels." *Id.* at 690-91.

Those statements made clear that municipalities—like every other defendant subject to suit under Section 1983—are potentially liable for any act taken "under color of state law." Indeed, the Court cited its decision in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), in which it explained the "color of state law" requirement. 436 U.S. at 691.

Thus, *Monell*'s express reference to actions for Section 1983 suites for "monetary, declaratory, or injunctive relief"—quoted above—relates to the Court's holding that municipalities are liable under the provision as long as the state action requirement is satisfied. The Court was emphasizing that the broad concept of state action applicable to other Section 1983 defendants applied to municipalities as well.[13]

2. Section 1983's causation requirement

The Court next turned to the second question: whether a municipality could be held liable on a *respondeat superior* theory.

This issue arose because *Monell* involved only a claim for retrospective monetary relief. The plaintiffs had challenged on constitutional grounds a municipal policy requiring all pregnant employees to take unpaid leaves of absence, even if such a leave was

[13] Petitioner is therefore wrong in intimating (Br. 24) that this statement somehow relates to the standard for establishing causation discussed in the next portion of the opinion.

not required for medical reasons.[14] They initially sought "injunctive relief and backpay for periods of unlawful forced leave." *Monell*, 436 U.S. at 661.

After the complaint was filed, the municipal defendants changed their policies to require a pregnant employee to take leave only if medically unable to perform her job. The district court held for that reason that the claims for injunctive and declaratory relief were moot. *Monell*, 436 U.S. at 661. As the case came to this Court, therefore, backpay was the sole relief sought by the plaintiffs. The Court had to determine whether such a claim could be based solely on *respondeat superior* principles or whether some additional showing of municipal involvement was required.

The Court began its analysis by observing that Section 1983's text imposes liability on any person who "shall subject, or cause to be subjected" another to the deprivation of rights secured by the Constitution. *Monell,* 436 U.S. at 691 (internal quotation marks and emphasis omitted). It stated that this language "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692.

"Equally important," the Court said, "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposi-

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[14] This Court held such policies violative of the Due Process Clause in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 651 (1974).

tion of such an obligation unconstitutional." *Monell*, 436 U.S. at 693. It concluded that

> a local government may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983.

Id. at 694.

The Court found that the claim before it "unquestionably involves official policy as the moving force of the constitutional violation" and cautioned that it had "no occasion to address, and [did] not address, what the full contours of municipal liability under [Section] 1983 may be. * * * [W]e expressly leave further development of this action to another day." *Monell*, 436 U.S. at 694-95.

C. The Policy Or Custom Requirement Elucidated By *Monell*'s Progeny Is Tied To The Particular Characteristics Of Claims For Retrospective Compensatory Relief.

Every case since *Monell* in which the Court has addressed the Section 1983 causation issue has involved *only* claims for damages. See *Bd. of Cnty. Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997); *Collins* v. *City of Harker Heights*, 503 U.S. 115 (1992); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 117 (1988) (plurality opinion); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986); *Oklahoma City* v. *Tuttle*, 471

U.S. 808, 810 (1985). See also *Tuttle*, 471 U.S. at 810 (characterizing *Monell* as addressing damages liability).

That is not surprising. The risk of imposing liability on a *respondeat superior* theory arises in the context of claims for retrospective relief.

Most claims for compensatory relief involve situations in which the municipal employee exercised his or her discretion in a manner alleged to violate the Constitution and the plaintiff seeks damages based on the injury inflicted by the employee. For example, a claimant may seek damages from law enforcement officers for illegal searches or the use of illegal force, in violation of the Fourth Amendment. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372 (2007). Or a claimant may seek damages because a prison official used excessive physical force in violation of the Eighth Amendment. See, *e.g.*, *Hudson v. McMillian*, 503 U.S. 1 (1992). In these situations, the policy or custom requirement protects the municipality from damages claims.

Sometimes, however, a claimant will seek to argue that a municipality's policies or customs gave rise to the constitutional deprivation, perhaps because the municipality failed to train, warn, or screen its employees adequately (see *Bd. of Cnty. Comm'rs*, 520 U.S. 397; *Collins*, 503 U.S. 115), or perhaps because it issued a policy that itself violates the Constitution (see *Praprotnik*, 485 U.S. 112). The municipality may be held only liable only if the plaintiff can satisfy the policy or custom standard developed in *Monell*'s progeny. The principles recognized in those cases restrict claims for damages against a municipality to those circumstances in

which the municipality can be said to have caused—in whole or in part—the constitutional violation.

This particular focus on claims for damages stems in large part from the economic burden that *respondeat superior* liability would place on municipalities. Indeed, commentators agree that *Monell*'s adoption of the policy or custom standard resulted from concern about subjecting municipalities to numerous suits for damages—a risk that States did not face because of the limited scope of *Ex parte Young*. See*, e.g.*, Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. Cal. L. Rev. 539, 542 (1989); Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409, 413 n.15 (1978) (describing *Monell*'s holding as a "response to the fiscal plight of municipal corporations"); George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on* City of Oklahoma City v. Tuttle *and* Pembaur v. City of Cincinnati*, The "Official Policy" Cases*, 27 B.C. L. Rev. 883, 896 (1986) (suggesting that the *Monell* majority "was indeed concerned with the impact of section 1983 lawsuits on municipal treasuries and eschewed loss-spreading arguments precisely because those who would bear the loss would ultimately be the taxpayers").[15]

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[15] Even the *Monell* Court's explanation of its reasons for rejecting justifications for respondeat superior liability were tied to the characteristics of damages claims. The first justification concerned "the common-sense notion that * * * accidents might nonetheless be reduced if employers had to bear the *cost* of accidents" (*Monell*, 436 U.S. at 693 (emphasis added))—in other words, liability for damages. Clearly, this justification relates to

Petitioner recognizes that all of this Court's post-*Monell* cases "concerned claims for damages" for past constitutional violations, but asserts that "that is a distinction without a difference." Pet. Br. 36. As we next discuss, however, the difference between retrospective compensatory relief and prospective relief to remedy an ongoing constitutional violation is a distinction that makes a considerable difference.

D. A Separate Policy Or Custom Requirement Is Not Necessary To Ensure The Presence Of The Requisite Causal Link In Cases Involving Prospective Relief For Ongoing Constitutional Violations.

The reasons for applying a separate policy or custom requirement in the context of damages actions do not support its expansion to claims for prospective

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liability for damage awards. The second justification posited "that the cost of accidents should be spread to the community as a whole on an insurance theory" (*id.* at 693-694)—an economic hypothesis relating to damages awards and other compensatory relief, not to injunctive or declaratory relief.

And the legislative history cited by the Court—in particular the rejection of the Sherman amendment—also related to damages claims. The amendment would have created a cause of action allowing plaintiffs injured by private "persons riotously assembled" to recover *damages* against the local municipality, regardless of whether the municipality "was in any way at fault for the breach of the peace for which it was to be held for damages." *Monell*, 436 U.S. at 666, 681 n.40 (internal quotation marks omitted). Senator Sherman himself lauded the bill's potential to hold municipalities financially "'responsible'" for damage inflicted from Ku Klux Klan-affiliated rioters. *Id.* at 667 & n.16 (quoting Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (the "Globe")). Opponents of the measure "were unwilling to impose *damages liability* for nonperformance of a duty [to keep the peace] which Congress could not require municipalities to perform." *Id.* at 668 (emphasis added).

relief such as the one in the present case. No separate requirement is necessary in this context because the additional legal standards applicable to a claim for prospective relief—necessitating proof of standing to obtain prospective relief and entitlement under the standards governing entry of that relief (standards not applicable to damages claims)—themselves ensure that a plaintiff will only obtain prospective relief for a constitutional violation that is caused by municipal policy. In addition, the municipality's position in the litigation, defending the ongoing conduct challenged as unconstitutional, itself establishes a link between the municipality and the plaintiff's injury.[16]

1. Other legal prerequisites for grants of prospective relief establish a causal link between the plaintiffs' injury and a municipal policy or custom.

The Court has explained that the purpose of the "policy or custom" rule is to ensure that a municipality will not be held liable under Section 1983 "unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Bd. of Cnty. Comm'rs*, 520 U.S. at 400, 403 (emphasis in original). "The 'official

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[16] Of course, a plaintiff seeking both prospective and retrospective relief would have to make the separate showing required by this Court's post-*Monell* decisions in the damages context to establish the requisite causation for his damages claim. That is precisely what occurred in this case, where the court of appeals "remand[ed] to the district court to determine the County's liability under *Monell*" as part of the lower court's consideration of respondent's damages claim against the County. Pet. App. 72

policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 U.S. at 479 (emphasis in original). This requirement implements in the damages context Section 1983's statutory requirement that the defendant "subject[], or cause[] to be subjected" another person to a deprivation of constitutional rights. 42 U.S.C. § 1983.

Meritorious claims for prospective relief with respect to a constitutional violation will—because of standing requirements and the principles governing issuance of prospective relief—necessarily demonstrate that the municipality has caused the challenged injury. No separate showing based on the standard developed in damages cases is necessary.

a. Under Article III standing principles, a claimant may obtain prospective relief only upon a showing that "he is likely to suffer future injury." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). In the context of municipal defendants, this standing requirement generally may be satisfied in one of two ways: a claimant either demonstrates that a discrete injury is substantially likely to recur in the future *or* that the injury is continuing. In both situations, standing to seek prospective relief will necessarily demonstrate a causal link between municipal policy or custom and the plaintiff's ongoing harm.

When a discrete injury has occurred in the past—such as where an officer is alleged to have used excessive force or to have exceeded Fourth Amendment limitations on reasonable searches—a plaintiff may establish standing to seek prospective relief against a municipality only by showing that

the discrete injury is likely to recur. Because this requires substantially more than mere happenstance, the standing test necessarily requires a court to find municipal causation.

In *Lyons*, the claimant sought injunctive and declaratory relief against the city in order to limit the future use of chokeholds by police officers. 461 U.S. at 98. But this Court found that the claimant lacked standing: "[t]hat Lyons may have been illegally choked by the police on October 6, 1976 * * * does nothing to establish a real and immediate threat that he would again be stopped * * * by an officer * * * who would illegally choke him into unconsciousness." *Id.* at 105. Rather, "[i]n order to establish an actual controversy," Lyons was obligated to show not only that he was likely to encounter the police again, but also "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter * * * or, (2) that the City ordered or authorized police officers to act in such a manner." *Id.* at 105-06 (emphasis in original). In other words, Lyons had to demonstrate why he "might be realistically threatened by police officers who acted within the strictures of the City's policy." *Id.* at 106.

A claimant, like Lyons, seeking injunctive relief against a municipality for a rights deprivation that occurred in the past must show that the violation stemmed from either a municipal custom (*e.g.*, that *all* officers *always* choke citizens) or a municipal policy (*e.g.*, that the municipality "ordered or authorized" police officers to choke citizens). Absent such a showing of causation, an individual claimant lacks standing to seek prospective relief against a municipality based on a past violation of a constitutional right.

In other situations, however, a constitutional violation does not occur at a discrete moment in time, but rather is continuing. For example, a prisoner may be subject to unconstitutional conditions of confinement; the violation occurs until the unconstitutional conditions are remedied. See *Hutto* v. *Finney*, 437 U.S. 678, 687-88 (1978). Or a municipality continues to violate constitutional rights while it operates segregated recreational facilities. See *Watson* v. *City of Memphis*, 373 U.S. 526, 528 (1963). In these cases, a claimant seeks prospective relief not to remedy an injury that is likely to occur in the future, but instead to alleviate a constitutional deprivation that is ongoing.

A continuing violation by its very nature takes on the character of municipal policy. In *Watson*, therefore, injunctive relief was proper against the municipality solely based on the finding that the city continued to maintain segregated facilities; the continuing violation was, in effect, sufficient to demonstrate that the municipality had a policy or custom in violation of the Constitution. 373 U.S. at 533-34. These continuing violation cases, therefore, inherently challenge municipal policy or custom.

Similar considerations are reflected in the general standards guiding issuance of injunctive and declaratory relief against municipalities. In order for moving party to be entitled to injunctive relief, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Issuance of prospective relief against a municipality, therefore, requires a movant to demonstrate more than simply a *prior* constitutional violation; rather,

the movant must demonstrate a clear basis to indicate that the danger will recur.

Indeed, in a Section 1983 case (a case that motivated the *Monell* Court's decision to overrule *Monroe* v. *Pape*, *see Monell*, 436 U.S. at 663 n.5 & 691 n.54), this Court explained that prospective relief must be tied to "the nature and scope of the constitutional violation" and should not burden "governmental units that were neither involved in nor affected by the constitutional violation." *Milliken* v. *Bradley,* 433 U.S. 267, 280, 282 (1977).

And these same limitations are reflected in the standards controlling declaratory relief in the context of lawsuits seeking prospective remedies. Declaratory relief is only appropriate in cases where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969) (internal quotation marks omitted). Thus, like injunctive relief, declaratory relief issued in this context is tied to remedying future constitutional violations. A claimant who only offers speculative predictions as to ongoing and in some situations future injury "does not create the actual controversy that must exist for a declaratory judgment to be entered." *Lyons*, 461 U.S. at 104. Instead, declaratory relief is appropriate in cases where there is a "claimed continuing violation of federal law." *Green* v. *Mansour*, 474 U.S. 64, 73 (1985).

Because claims for prospective relief against municipalities necessarily require a causal link (unlike damages claims, which incorporate no such causal link absent a "custom or policy" requirement), there is no risk that prospective relief against continuing

violations would ever rest on *respondeat superior* liability. Instead, prospective municipal relief will *always* stem from a situation that involves a continuing injury sanctioned by the municipality, municipal policy, or widespread municipal custom. The creation of a separate policy or custom requirement accordingly would serve no purpose.

b. The requisite causation is also demonstrated by the litigation posture taken by the municipality.

Once a local government has become aware through the filing of a lawsuit of the ongoing denial of a constitutional right, its decision to continue to engage in the challenged conduct—and defend the lawsuit—itself constitutes a municipal policy that is the moving force behind the continuation of the deprivation of constitutional rights. The decision to continue engaging in the challenged conduct and to defend its constitutionality in court demonstrates the very "deliberate indifference" that the Court has found sufficient to satisfy the causation requirement. See *City of Canton*, 489 U.S. at 391. By defending a suit against the claim instead of remedying the violation (and thus mooting the claim), the municipality has caused the continuing injuries.

Here, Los Angeles County has been aware since the filing of this lawsuit in 2002 that respondents contend that they are suffering an ongoing violation of their due process rights. The County has decided not to change its conduct but instead to argue in court that it is not obligated to provide adequate process for the removal of respondents' names. Even after the court of appeals found the County in viola-

tion of the Constitution, the County continued to adhere to that position.[17]

* * * *

The inherent characteristics of successful claims for prospective relief from ongoing constitutional violations thus automatically establish the causal link that Section 1983 requires. The municipality's liability in such a lawsuit does not rest "solely on the basis of the existence of an employer-employee relationship with a tortfeasor" (*Monell*, 436 U.S. at 692) and therefore satisfies the causation test.[18]

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[17] The County's assertion (Pet. Br. 40-41) that a causal link has not been established here is nonsensical. The court of appeals explained that the County had the power to craft procedures to allow the Humphries to challenge their continued inclusion in the Index (Pet. App. 72), but that it instead made Detective Wilson "investigator, prosecutor, judge, and jury" with respect to that question. *Id*. at 58. The County's continued refusal to exercise that authority to revise its procedures along the quite detailed lines specified by the court of appeals (see *id*. at 68)—which supports respondents' standing to seek prospective relief and gave rise to the court of appeals' decision awarding the equivalent of declaratory relief, as well as the County's continued resistance in court, plainly suffices to establish that County is the "moving force" behind the refusal to provide respondents with due process.

[18] Petitioner points (Br. 31-32) to the *Monell* Court's reference (436 U.S. at 693 n.58) to *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976). But *Rizzo* involved a claim that "in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to the members of the classes they represented." *Id*. at 371 (emphasis added). That differs dramatically from the situation here, in which the plaintiffs before the court are suffering a *continuing* violation of *their* constitutional rights as a result of *ongoing* conduct that the municipal defendant is aware of as a result of the filing of the lawsuit.

2. Requiring a separate showing of a policy or custom under the standard applicable to damages claims would restrict the availability of judicial relief and encourage municipalities to ignore ongoing constitutional violations.

Imposing a separate "policy or custom" requirement in the context of claims involving continuing constitutional violations is not simply unnecessary; transferring the standard from the damages context would deprive courts of the power to stop continuing violations of constitutional rights in a variety of situations and, in addition, will give municipalities a significant incentive to turn a blind eye to ongoing constitutional violations.

To begin with, petitioner points out (Br. 42 & n.6) that some courts have held that a municipality may not be held liable for damages when the challenged actions are required by state law—on the theory that there is no *municipal* policy or custom. Whatever the merits of this principle in the context of damages claims, it would create considerable uncertainty with respect to claims for prospective relief.

How would a plaintiff proceed with respect to an unconstitutional state statute that provides for enforcement by the State's municipalities? Because the State does not enforce the statute, obtaining prospective relief against it would not remedy the ongoing violation of the plaintiff's rights. But a municipality would argue that—because there is no municipal policy or custom causing the violation—it is immune from prospective relief. That outcome would leave the individuals suffering continuing injury to their

constitutional rights without any means of remedying that ongoing violation.

Indeed, that appears to be petitioner's position in this case. It claims that it is not subject to prospective relief because it is executing a state policy, not a policy of its own making. See Pet. Br. 41-42.

And that result would be repeated in a myriad of different settings. For example, the school board defendants in the three cases decided in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), each were required by state law to maintain segregated school systems. See *id.* at 486 n.1. Under petitioner's view, those school boards should have been immune from declaratory and injunctive relief because their actions were compelled by state law. Nothing in this Court's decisions supports that unjustifiable result.

Similarly absurd consequences would result in another set of cases—those in which a municipal employee engages in a continuing violation of the Constitution. Suppose a municipal official refused to issue a marriage license to an interracial couple because of their race, and did so as a result of his own beliefs and in contravention of the locality's nondiscrimination policy.

The official's conduct would clearly violate the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1 (1967). Under petitioner's theory of Section 1983, however, the couple would not be able to obtain declaratory or injunctive relief in an action against the municipality seeking an injunction ordering issuance of the marriage license—because the employee's continuing refusal is not linked to a municipal policy or custom, such relief would be precluded.

And petitioner argues that such relief also would be precluded in an official capacity suit against the particular official refusing to grant the marriage license, contending that official capacity actions also are subject to *Monell*'s policy or custom requirement. See Pet. Br. 43-46.

This inability to remedy an ongoing constitutional violation could arise in numerous contexts. A municipal employee charged with processing construction permits could refuse to issue them to religious institutions or discriminate on other grounds prohibited by the Constitution. Or an employee responsible for purchasing could discriminate on those grounds. In each case, petitioner's approach would preclude courts from granting prospective relief remedying the ongoing violation of constitutional rights.

Indeed, under petitioner's rule, a municipality that becomes aware of an ongoing constitutional violation by one of its employees would have a strong incentive to do nothing. If a policymaking level official were to investigate the matter and decline to act, that course of conduct might open the door to an argument that the municipality's "deliberate indifference" to the ongoing violation—demonstrated by its investigation and decision not to change its conduct—sufficed to satisfy the *Monell* test. See *City of Canton*, 489 U.S. at 391 ("'deliberate indifference' to the rights of its inhabitants" can satisfies *Monell*). Declining to investigate therefore would be the best way to avoid Section 1983 liability, especially because the municipality would be able to argue, if petitioner were to prevail here, that the knowledge of an ongoing violation obtained as a result of the filing

of a lawsuit, and failure to act to remedy the violation, does not satisfy *Monell*.

Another adverse consequence that would flow from adopting petitioner's approach here is significant confusion about the *Monell* test, especially in the context of a municipality's failure to act. This Court's decisions indicate the difficulties presented by those questions. See, *e.g.*, *Bd. of Cnty. Comm'rs*, 520 U.S. 397; *Jett* v. *Dallas Indep. Sch. Dist.,* 491 U.S. 701 (1989); *Tuttle*, 471 U.S. 808.

Now, courts would have to confront those questions in the context of claims involving ongoing constitutional violations and prospective relief. The anomalous results discussed above could lead courts may begin to lower the threshold for finding "deliberate indifference" or for finding a "custom" in order to avoid situations in which plaintiffs suffering continuing injuries from ongoing constitutional violations are left without a remedy. Because the same standard would be applied to claims seeking retrospective compensatory relief, a decision in favor of petitioner here could have the ironic effect of expanding municipalities' exposure to damages liability.

These adverse consequences—which result from applying to claims for prospective relief a standard developed to fit the particular, and very different, characteristics of damages actions—can be avoided by declining to expand the *Monell* standard beyond claims for compensatory relief, and holding that when a plaintiff seeks declaratory or injunctive relief for an ongoing constitutional violation—a violation that continues to inflict cognizable harm on the plaintiff—a separate showing of municipal responsibility is not required. The municipality's continuation of the conduct in the face of the lawsuit chal-

lenging the ongoing conduct's constitutionality, combined with the standards that a court must apply in awarding declaratory or injunctive relief, are sufficient to ensure the requisite connection between the municipality and the challenged conduct.[19]

3. Prospective relief against States does not require a separate policy or custom showing, and there is no basis for according municipalities greater leeway than States to engage in continuing violations of the Constitution.

Transferring to the prospective relief context the causation standard developed for damages claims would also create an illogical asymmetry between local and state governments regarding the availability of prospective relief with respect to ongoing constitutional violations.

The Court has explained that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the" *Ex parte Young* doctrine and permit an official capacity action against a state official to go forward without violating the immunity granted to states by the Eleventh Amendment. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 281; see also *Will* v. *Mich.*

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[19] The adverse consequences of the rule proposed by petitioner have not arisen thus far because, as explained in the brief in opposition (at 17-21), petitioner has identified only two appellate decisions endorsing its position. A decision by this Court requiring a separate policy or custom showing, based on the standards developed in the context of damages claims, would have far-reaching effects for the reasons discussed in the text.

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). That is true even though such actions are functionally equivalent to actions against the State employing the named official. *Id.* at 71.

Under petitioner's theory, a party seeking prospective relief against a municipality would bear a greater burden than a party seeking such relief against a State. Only in the action against the municipality would the plaintiff be subjected to the additional burden of separately showing of a link between his injury and a municipal policy or custom. Municipalities do not enjoy sovereign immunity (*Will*, 491 U.S. at 71 n.10)), but States "retain[] 'a residuary and inviolable sovereignty'" (*Printz* v. *United States*, 521 U.S. 898, 919 (1997)). According municipalities greater protection against claims for prospective relief than States therefore makes no sense.

Petitioner argues (Br. 45-46) that the references to *Monell* in *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985), and *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991), establish that a separate showing of policy or custom is required for official capacity actions against state officials. But the Court in these cases simply observed that a causation requirement applies to official-capacity actions. It did not hold that the standard developed in the damages context is an essential prerequisite to obtaining declaratory and injunctive relief with respect to ongoing violations of the Constitution. Indeed, such a conclusion would be inconsistent with the statements in *Coeur d'Alene Tribe* and

Will that suits for prospective relief qualify as official-capacity actions.

The Court's various statements regarding official capacity suits are easily reconciled by the principle discussed above: in an action for prospective relief, the other legal requirements will establish the necessary causal link and a separate showing is not required.

Finally, the consequences of petitioner's approach—under which the policy and custom standard developed in the damages context would also limit the availability of declaratory and injunctive relief in official capacity actions against state officials—would be dramatic. Courts' power to provide relief from state officials' ongoing constitutional violations would be subjected to all of the limitations just discussed. It would not be possible to obtain injunctive relief against a State implementing an unconstitutional federal statute. And ongoing unconstitutional conduct by state officials would be unreachable unless it was tied to an official state policy. That would produce a significant limitation on the accepted scope of available relief in Section 1983 official capacity actions.[20]

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[20] We therefore agree with petitioner that official capacity actions against government officials and actions against municipalities for forward-looking relief against a continuing constitutional violation should be governed by the same standard. But we believe the applicable standard does not include a separate policy or custom requirement because the requisite causal link is necessarily established by the very nature of the claim.

4. Neither legislative history nor general federalism principles justify the County's position.

Petitioner asserts that the legislative history relied upon in *Monell* and general federalism principles each support application of a separate policy or custom requirement in the context of claims for prospective relief. It is wrong on both counts.

With respect to the legislative history, petitioner seems to argue that the conclusions drawn by the *Monell* Court with respect to the Sherman amendment's damages provision justify restrictions on courts' ability to remedy ongoing violations of the federal Constitution. Pet. Br. 38; see also *id.* at 32.

In fact, *Monell*'s analysis of the legislative history expressly rejects this conclusion. The limitation that *Monell* derived from the legislative history was that Congress did not wish to "impose obligations on municipalities by indirection that could not be imposed directly" (436 U.S. at 679)—in particular, an obligation to keep the peace stemming not from state law but from the threat of large damages under a federal cause of action.

The Court in *Monell* made clear that this restriction "put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. * * * So long as federal courts were vindicating the Federal Constitution, they were providing the 'positive' government action required to protect federal constitutional rights and no question was raised of enlisting the States in the 'positive' action." 436 U.S. at 680-81; see also *ibid.* (observing that "Representative Poland * * *, reasoning from Contract Clause precedents, indicated that Congress

could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities liable for using their authorized powers in violation of the Constitution").

Far from supporting petitioner's view, therefore, *Monell*'s analysis of the legislative history confirms Congress's desire to provide a remedy where municipalities either use, or fail to use, their authority in a manner that violates the Constitution.

Petitioner next argues (Br. 38-40) that federalism concerns militate in favor of extending the policy or custom requirement to claims involving ongoing harm from continuing constitutional violations.

But this Court has squarely rejected that contention, holding unanimously that "[t]he Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken*, 433 U.S. at 291; see also *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (Section 1983 altered "the relationship between the States and the Nation with respect to the protection of federally created rights; [Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights").[21]

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[21] The County tries to bolster its federalism argument by pointing out (Br. 40) that claims for prospective relief can have financial consequences. But this Court has repeatedly affirmed that "federal courts [may] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken*, 433 U.S. at 289; see also *Edelman* v. *Jordan*, 415 U.S. 651, 667

To be sure, federal courts must give significant weight to federalism concerns in crafting declaratory and injunctive relief. That is the import of the language from *Rizzo* quoted by petitioner (Br. 39), and the principle has been affirmed repeatedly by the Court. *E.g.*, *Milliken*, 433 U.S. at 280-81; *Horne* v. *Flores*, 129 S. Ct. 2579, 2593-94 (2009).

But petitioner would go beyond that principle and insulate against any prospective remedy at all ongoing unconstitutional conduct that continues to inflict cognizable harm on the plaintiffs before the Court. Given the broad latitude courts have to shape prospective relief, there is no basis in federalism concerns to impose such a dramatic limitation on Section 1983.

That is especially true given the Court's repeated admonition that Section 1983 should be "broadly construed" to further its remedial purpose. *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 105 (1989); *Monell*, 436 U.S. at 686, 706; see also *id.* at 685 n.45 (quoting Globe App. at 81) ("Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be 'the enforcement * * * of the Constitution on behalf of every individual citizen of the Republic * * * to the extent of the rights guarantied [sic] to him by the Constitution'").

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is

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(1974). If that is true for States, which are protected by the Eleventh Amendment, it surely is true for municipalities, which do not enjoy sovereign immunity. *Will*, 491 U.S. at 71 n.10.

clothed with the authority of state law.'" *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (quoting *Monroe*, 365 U.S. at 184). It would be "'uniquely amiss'" if "the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to" continue to violate rights guaranteed by the Constitution, beyond the reach of all prospective judicial relief. *Id.* at 651 (internal quotation marks omitted). But that will be the inevitable consequence of the legal principle urged by petitioner in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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