NO. 09-571

IN THE

# Supreme Court of the United States

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HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

*Petitioners,*

v.

JOHN THOMPSON,

*Respondent.*

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*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

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## BRIEF OF *AMICI CURIAE* ALLIANCE DEFENSE FUND AND CATO INSTITUTE IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether governments should be subject to *respondeat superior* liability in the same way private employers are?

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## INTEREST OF *AMICI CURIAE*[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of American who object to the erosion of religious liberty in our society. Its allies include more than 1,800 lawyers and public interest law firms. ADF has advocated for the rights of Americans to exercise their religious beliefs in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 such cases and legal matters, including cases before this Court such as *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted,* 130 S.Ct. 3350 (May 24, 2010) (09-987), *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksgerg*, 521 U.S. 702 (1997). The limitation of *respondeat superior* liability established in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978), creates a sometimes-

[1] The parties gave blanket consents to the filing of amicus curiae briefs. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

insurmountable obstacle to obtaining full redress for many ADF clients whose constitutionally protected rights have been violated.

The CATO INSTITUTE was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in a variety of cases calling for the elimination of roadblocks to government accountability, including *Pottawattamie County v. McGhee*, 130 S.Ct. 1047 (2010), *Alvarez v. Smith*, 130 S.Ct. 576 (2009), and *Dupuy v. McEwen*, 495 F.3d 807 (7th Cir. 2007), *cert. denied*, 128 U.S. 2932 (2008). The instant case concerns Cato because it calls for all levels of government to be held accountable to constitutional mandates and to deeply rooted legal principles.

## SUMMARY OF ARGUMENT

This should be a simple case: Mr. Thompson's rights were violated by the actions of a prosecuting attorney – an agent of the Parish District Attorney – who was plainly acting in the course and scope of his employment. If the doctrine of *respondeat superior* were applied as it would be in most other contexts, the Parish District Attorney (entity) would be liable

for the constitutional violation committed by one of its employees.

This Court declared in 1978, however, that Congress did not intend for the Civil Rights Act of 1871 to hold local governments liable for constitutional violations committed by their agents and employees. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692-695 (1978). This conclusion involved an issue that was not raised by the facts and had not been addressed by any party. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting). Nonetheless, this Court's later *Tuttle* decision described *Monell*'s discussion of *respondeat superior* as a "holding" and followed it on *stare decisis* grounds, scarcely discussing whether the *Monell* analysis accurately stated the law. *Tuttle*, 471 U.S. at 818 n.5. In so doing, *Tuttle* shifted the analysis: instead of considering whether a constitutional violation had been committed by an agent of a government acting within the scope of his authority, the question became whether the violation had been committed pursuant to some stated or implied "policy" of the governmental entity. As a result, this Court currently is forced to resolve the issue presented here: whether a parish district attorney can be held liable for constitutional violations committed by its assistant prosecutors in the course of bringing charges on its behalf.

*Amici* believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the

statute. They therefore urge that the *Monell* rule be overturned so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*.

Although the *Monell* rule is entitled to respect as a past holding of this Court, a precedent decision can and should be abandoned where adherence to *stare decisis* "puts us on a course that is sure error." *Citizens United v. Federal Election Com'n*, 588 U.S. ___, ___, 130 S. Ct. 876, 911-912 (2010). As this Court explained in 2009, "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana,* 556 U.S. ___, ___, 129 S. Ct. 2079, 2088-2089 (2009) (overruling *Michigan v. Jackson,* 475 U.S. 625 (1986))." *Id.* at 912. This Court has also examined whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan,* 555 U.S. ___, ___, 129 S. Ct. 808, 816 (2009) (overruling *Saucier v. Katz,* 533 U.S. 194 (2001)).

This brief will explain why the *Monell respondeat superior* rule was poorly reasoned and legally incorrect, and should therefore be overturned.

## ARGUMENT

### I. REFUSING TO APPLY *RESPONDEAT SUPERIOR* TO GOVERNMENTAL ENTITIES CONTRAVENES THE POLICIES AND EQUITIES UNDERLYING THE DOCTRINE.

*Monell*'s cursory analysis of *respondeat superior* liability claimed that the justifications for the doctrine were inapplicable to the purposes of § 1983. That analysis was incorrect.

#### A. The Equitable and Policy Bases for *Respondeat Superior* Known by the Drafters of § 1983 Support the Doctrine's Application to Municipalities.

Every basis for applying the doctrine of *respondeat superior* to a corporate employer applies with equal logical and practical force to a municipal employer. Even the *Monell* decision conceded that interpreting § 1983 had to proceed from the nineteenth-century conception of the *respondeat superior* doctrine as applied then. *Monell*, 436 U.S. at 691-692 (legislative history as basis for decision); *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 & n.7 (1986) (*Monell* rested primarily on legislative history including inferences from rejection of the Sherman Amendment). If the underlying bases for the *respondeat superior* doctrine, known from even before § 1983 was enacted, still resonate with both commercial and municipal corporations, then the doctrine should apply to municipalities – and certainly so when the

municipalities' agents have violated constitutional rights.

### 1. Municipal Governments and Their Agents Stand In "Unity."

The *respondeat superior* doctrine's first basis is "unity." Nineteenth-century law considered the master-servant relationship as an instance of the "legal unity of the principal and agent." David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 And The Debate Over Respondeat Superior,* 73 FORDHAM L. REV. 2183, 2197-2198 (2005) ("Achtenberg"). The legal authorities and precedents affirmed the maxim that acts of the servant are deemed the acts of the master. *See McCafferty v. Spuyten Duyvil & P.M.R. Co.*, 61 N.Y. 178, 181 (1874) ("Every man is answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own"); *New Orleans, J. & G.N.R. Co. v. Bailey*, 40 Miss. 395, 452 (1866) ("[the] legal unity of the principal and agent, in respect to the wrongful or tortious, as well as the rightful acts of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history").

According to common understanding among Americans, police officers enforcing the laws *are* the police department. When people imagine what "the government" is going to do, the officers *are* "the government." Not mere employees, policemen who

perform the government's functions are officers with a higher responsibility and calling. Annot., *Policemen as public officers,* 84 A.L.R. 309 (1933) (collecting cases nationwide). Neither the mayor, nor the city council, nor the police chief, nor the administrative assistant, nor any judge will go knocking on a citizen's door to conduct a search, make an arrest, or generally enforce the law.

In the eyes of citizens, the police officers on the street *are* the government. Likewise, the prosecutors who bring charges *are* the government. Prosecutors are public officers who advance the laws on behalf of the government. Such officers are in unity with their governmental employer. The first basis for *respondeat superior* liability applies.

**2. Municipal Governments Control and Direct Their Agents.**

The doctrine's second basis is "control and direction." Liability flows naturally from the employer's legal power to control or direct his servant's actions. *See,* Achtenberg, *supra*, at 2198-2199. The prevailing view when § 1983 was enacted was that "[t]he responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant." *Callahan v. The Burlington & Missouri River R. Co.*, 23 Iowa 562 (1867); *accord, Ham v. City of New York*, 70 N.Y. 459, 461-462 (1877) ("the doctrine of *respondeat superior* . . . is based upon the right of the employer to select his servants, to discharge them if careless, unskillful or incompetent, and to direct and control them while in his employ"); *J.J. Du Pratt v. Lick*, 38 Cal. 691, 692

(1869) (the "power of selection or direction" is fundamental to *respondeat superior* liability). The employers' liability is the necessary consequence of their "duty to so control [their servants'] acts that no injury may be done to third persons." *Cuff v. Newark & New York R. Co.*, 35 N.J.L. 17, 23 (N.J. 1870) (powers to hire, control, and fire, give rise to responsibility for employees' misconduct on the job).

It is undisputable that a municipal government has the legal and actual power to control the selection, training, deployment and conduct of its police officers and of its prosecutors. Likewise the municipality directs the actions of these public officers, by regulations, by policies, and by the perimeter of the municipality's toleration of conduct. The municipality knows or has notice of what its employees are doing, and it can discipline or dismiss errant officers. It is to these substantial "control and direction" situations that *respondeat superior* especially applies.

### 3. Municipal Governments Expressly or Implicitly Warrante the Proper Actions of Their Agents.

The doctrine's third basis is "warranty." Achtenberg, *supra*, at 2200-2201. By entrusting work to employees, the courts have held, an employer implicitly represents to the public that the employees are careful, competent, and well-intentioned; and if that representation turns out to be false, the employer is liable based on breach of warranty. *Id.*; *see Carman v. Steubenville & I.R. Co.*, 4 Ohio St. 399, 416 (1854) ("public policy and the

safety of others require the master to warrant the fidelity and good conduct of the servant, and, although faultless himself, make him liable for the unlawful conduct of the servant"); *accord, New Orleans, J. & G.N.R. Co. v. Allbritton*, 38 Miss. 242, 265 (1859) (noting that "[i]t is a settled rule, that the principal not only holds out his agent or servant as competent to discharge the duties imposed on him, but 'warrants his fidelity and good conduct, in all the matters of his agency'" [citation omitted]).

*"To protect and serve"* – the admirable motto of the Los Angeles Police Department[2] – pithily states the city's promise to the citizenry. A warranty is "a promise that a proposition of fact is true." *Black's Law Dictionary* 1586 (6th ed. 1990), quoted in *Hartford Acc. and Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership*, 109 Md. App. 217, 246, 674 A.2d 106 (1996), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997). The citizens trust the police and the prosecutors because the municipalities impliedly warrant that their public officers are careful, competent and well-intentioned agents.[3] Like any commercial enterprise or professional business, municipalities are assumed to stand behind their officers and to take the responsibility for officers' misconduct on the job. Commonly and reasonably, the citizens expect municipalities to be at least as reliable and responsible as the grocery, the auto

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[2] *See http://www.joinlapd.com/motto.html* (accessed on July 29, 2010).

[3] *See Catsouras v. Dep't of Calif. Highway Patrol*, 181 Cal.App.4th 856, 864, 104 Cal.Rptr.3d 352 (2010) ("We rely upon the CHP to protect and serve the public").

repair shop, and the hospital, respectively, would be for their employees' conduct. The implied warranty factor supports applying the doctrine to municipalities.

**4. Because Municipal Governments Benefit From Their Agents' Conduct, It Is Equitable to Impose The Risks of Loss Upon the Party Standing to Gain.**

The doctrine's fourth basis is "reciprocity." Achtenberg*, supra*, at 2202. *Respondeat superior* has rested on the view that benefits and liabilities should be reciprocal. Entities who hope to benefit from an activity must also bear its costs. Because employers expect to achieve their objectives by their employees' work, it is fair for them to pay for their employees' torts, "thus making the benefit and liability reciprocal." *Id*., *citing Cardot v. Barney*, 63 N.Y. 281, 287 (1875); *accord, New Orleans*, 40 Miss. at 452.

A municipality is a corporation having functions it must carry out. The municipality acts through agents, and it achieves its objectives via those agents' work. As the Ohio Supreme Court stated long ago:

> Corporations are established in our country for almost every concern of life – political, pecuniary, and eleemosynary. *They govern town*s, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations *they*

> *act by agents*. Where benefits are derived, the corporation enjoys them. Where injury is inflicted, through their means, they ought to be responsible for it.

*Goodloe v. City of Cincinnati*, 4 Ohio 500, 513 (1831) (emphasis added).

An equity maxim underlies especially this aspect of the doctrine of *respondeat superior*: "no man shall be allowed to take any advantage of his own wrong." *New Orleans*, 40 Miss. at 452. The Court in *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-233, (1959), observed that maxim to be "[d]eeply rooted in our jurisprudence" and "has been applied in many diverse classes of cases by both law and equity courts."

Shielding a municipality from responsibility for the misconduct of its agents contravenes the maxim. "When the [municipality] grades the streets, the object is the benefit of the whole town. If an individual is injured, it is right he should have redress against all upon whose account the injury was perpetrated. *There is no justice in sending him to seek redress from an irresponsible agent*." *Goodloe,* 4 Ohio at 513-514 (emphasis added).

Not just negligence but actual misconduct under color of law, committed by municipal officers, is part of the risk the municipality takes when it deploys agents to carry out its mission.[4] In that way a

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[4] The adoption of *respondeat superior* would not impose § 1983 liability for negligence. For example, this Court has concluded "that the Due Process Clause is simply not implicated by a

municipal corporation is no different from a commercial one, and there is no principled basis to distinguish the two. *Respondeat superior* doctrine allocates the risk of misconduct in a way that protects consumers and citizens alike. Restatement (Second) of Agency § 219 cmt. a ("with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit").

Outright misconduct by a municipal employee was understood, even in the 19th Century, to be a risk undertaken by municipalities. As the *Goodloe* court explained:

> All corporations act by agencies, and those agencies are *composed of men* who may be influenced by reprehensible motives, or tempted *to do acts not warranted by law*. In this case, the act is charged in the declaration to have been *illegal and malicious*. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is *the plain dictate of justice*, and we see no technical rule of law that forbids us to act upon it.

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negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams,* 474 U.S. 327, 328 (1986). Thus, even under a *respondeat superior* theory, municipal corporations would not be exposed to § 1983 liability for the negligent acts of its employees.

*Goodloe,* 4 Ohio at 514 (emphasis added); *see* Achtenberg, *supra*, at 2202 (citing American and English cases supporting the principle).

### B. The *Monell* Decision Contravenes the Anglo-American Constitutional Principle.

The decision in *Monell* runs directly contrary to Blackstone's and Chief Justice Marshall's declarations of settled Anglo-American law on a crucial point. *Monell* held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." The local government may be held legally liable under § 1983, however, when "execution of a government's policy or custom . . . inflicts the injury . . . ." *Id*., 436 U.S. at 694.

In short, *Monell* immunizes local governments from liability for their employees, agents and officers who violate the constitutional rights of citizens, unless the government's actual policy caused the violation of those rights. Respectfully, the *Monell* rule should be modified to extend vicarious liability to local governments on the principles of equity and equal treatment, which will better protect the rights of *all* citizens.

In opining that *respondeat superior* does not apply to municipalities, the *Monell* decision briefly addressed what the 19th Century drafters of § 1983 would have known about the doctrine. *Monell*, 436 U.S. at 693-694. But *Monell*'s treatment of the issue has been trenchantly criticized by commentators. *See, e.g.*, Achtenberg, *supra*, at 2198-2199; David P.

Strauss, Comment, *Vicarious Municipal Liability: Creating A Consistent Remedial Policy for Local Government Violations of Civil Rights*, 16 CAL. W. L. REV. 58, 88-89 (1980). A correction to the *Monell* dicta should flow from understanding the bases for *respondeat superior* liability.

### C. Governments of Free People Must Be Held Liable For Constitutional Violations.

The Supreme Court in the Founding Era thought it obvious that citizens should be empowered to enforce their constitutional rights when a government violates those rights. Chief Justice John Marshall, in *Marbury v. Madison*, 5 U.S. 137 (1803), presented the issue: "If [a citizen] has a right, and that right has been violated, do the laws of this country afford him a remedy?" *Id.* at 162. The Court's answer was that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.* at 163.

Quoting Blackstone's *Commentaries*, the *Marbury* decision continued: "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* (citation omitted). "The government of the United States has been emphatically termed a government of laws, and

not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id*.

That same principle is embodied in the maxim, "equity will not suffer a wrong to be without a remedy." 27A Am. Jur. 2d *Equity* § 85 (Online ed. 2010); *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459, 472, 46 S. Ct. 166 (1926); *see Terry v. Terry,* 10 La. 68 (1836) (noting the "absurdity of a wrong without a remedy"). Supreme Court jurisprudence should consistently protect citizens by maintaining a legal environment promoting the promises of both *Marbury* and equity.

*Marbury* promised Americans their constitutional rights would be protected by the courts. Equitable principles support the policy rationales recognized for centuries that would hold municipalities liable for constitutional violations perpetrated by their officers under color of law. The near-total absence of municipality *respondeat superior* liability, as declared by *Monell*, should be corrected to afford citizens effective redress for violations of their fundamental rights protected by the Constitution.

### D. Enforcing the doctrine of *respondeat superior* will simplify § 1983 litigation and better allocate legal resources.

Enforcing the doctrine *respondeat superior* will simplify § 1983 litigation and better allocate legal resources. This is true for at least two reasons.

First, litigation over the doctrine of qualified immunity, which has caused great confusion and uncertainty, would be drastically reduced. *See Pearson v. Callahan,* 555 U.S. ___, ___, 129 S. Ct. 808, 816 (2009) (overruling *Saucier v. Katz,* 533 U.S. 194 (2001)). Without the imposition of *respondeat superior*, § 1983 actions are brought against individual employees who are entitled to qualified immunity. With the imposition of *respondeat superior*, however, § 1983 actions will be brought against municipal corporations that are not afforded qualified immunity. *Owen v. City of Independence,* 445 U.S. 622, 650 (1980). The question of whether an agent of a government was acting within the scope of his authority is a simple one. The vast legal recourses spend on arguing the doctrine of qualified immunity can be better allocated to important questions of constitutional injury.

Second, suits based on negligent training, which require much discovery and in many cases expert witnesses, will be virtually eliminated. If a municipal corporation is liable for its employees' conduct, the question of training becomes irrelevant. The type and amount of training will be left to the discretion of the municipal corporation because it bears the risk of misconduct of its employees. The focus of litigation will be where it should be — on the conduct of the government employee and not on how the employee was trained.

## II. THIS COURT'S DEFERENCE TO *MONELL*'S DICTA HAS PREVENTED EXAMINATION OF THE LEGAL AND FACTUAL MERITS OF APPLYING THE *RESPONDEAT SUPERIOR* DOCTRINE TO MUNICIPALITIES.

Although *Monell*'s rejection of *respondeat superior* has sometimes been described as a holding, it plainly was not. Indeed, Justice Stevens refused to join that portion of the Court's opinion because it was "merely advisory and [] not necessary to explain the Court's decision." *Monell*, 436 U.S. at 714 (Stevens, J., concurring in part). As Justice Stevens explained in a subsequent decision, "the commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court's actual holding." *Tuttle*, 471 U.S. at 842 (Stevens, J., dissenting).

Because the *Monell* discussion of *respondeat superior* was unbriefed dicta, it should not have been followed with *stare decisis* deference. As this Court has explained, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006). Indeed, this Court's longstanding refusal to rely on dicta as binding precedent extends back nearly two centuries to when Chief Justice Marshall explained, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for

decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

While the *Monell* dicta was cited in this Court's holdings in *Tuttle* and other cases entitled to *stare decisis* deference, its origin as *unbriefed* dicta should weigh heavily against continued reliance upon *Monell*'s purported rule without the thorough historical and statutory analysis it deserves. As demonstrated at length herein, a proper analysis would conclude that § 1983 *does* incorporate the doctrine of *respondeat superior* where agents or employees of a local government commit civil rights violations while acting in the course and scope of their employment. *Amici* urge that this Court conduct such an analysis and correct the erroneous rule it declared in *Monell*.

## III. *MONELL*'S HISTORICAL ANALYSIS WAS BADLY FLAWED BECAUSE THE WELL-ESTABLISHED PRACTICE OF HOLDING MUNICIPALITIES LIABLE UNDER *RESPONDEAT SUPERIOR* WAS NOT REJECTED IN THE § 1983 LEGISLATIVE HISTORY.

The *Monell* rule was based on two misreadings of the law. First, *Monell* misread the common law treatment of *respondeat superior* at the time § 1983 was enacted. Second, *Monell* misread the statute's legislative history. *Monell* conflated statements of congressional concern about the unprecedented concept of holding municipalities liable for acts of purely private citizens, with the unremarkable practice of imposing liability for acts of government employees and agents.

### A. *Respondeat Superior* Is a Fundamental Principle of Agency Law.

From its origins, imputed negligence, known also as vicarious liability or *respondeat superior,* has levied liability against masters for the tortious actions not only of servants, but also of slaves, spouses, and even inanimate objects. *See* W. Page Keeton *et. al*., *Prosser And Keaton On Torts* § 69 (5th ed. 1984). Early English law moved from strict liability jurisprudence for the acts of the servant imputed to the master in the 16th Century to court application of a "fiction of command to the servant 'implied' from the employment itself." *Id*. Today, *respondeat superior* doctrine provides for a "deliberate allocation of risk." *Id*. However, this doctrine cannot be viewed in a vacuum; the fundamental agency law principle still pertains: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219 (2010). Thus, *respondeat superior* analysis must focus not on the agent, but on the principal-agent relationship and the scope of employment.

### B. *Respondeat Superior* Jurisprudence Before the Civil War.

This Court has always imputed knowledge of the wrongful actions of an agent to the principal. *See The Hiram*, 14 U.S. 440, 444 (1816) ("The claimants are affected with knowledge, by the knowledge of their agents . . . it is superfluous to discuss the question of law, the facts are so clear."); *see also The Eleanor*, 15 U.S. 345, 354 (1817) (holding the

"innocence of the intention alone" will not release an agent from binding the principal under the theory of *respondeat superior*).

This jurisprudence was well settled and followed by most courts prior to the enactment of § 1983. Consider for example *Thayer v. Boston,* 36 Mass. 511, 516-517 (1837), where the Massachusetts high court stated: "That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned."

Extending beyond the original colonies, this jurisprudence was also followed by later-added states, including those adopting the Napoleonic Code. *See, e.g., Allen v. City of Decatur,* 23 Ill. 332, 335 (1860) ("Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued."); *Johnson v. Municipality No. One,* 5 La. Ann. 100 (1850) ("The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned.")

### C. *Respondeat Superior* and the Civil Rights Act of 1871.

Wrongful acts of law enforcement provide one notable historical source for *respondeat superior* liability. *See Hawks v. Charlemont,* 107 Mass. 414, 417-418 (1871) ("When officers of a town, acting as its agents, do a tortious act with an honest view to

obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done."). Such liability decisions were, in some ways, memorialized in the Civil Rights Act (CRA) of 1871 (later codified as amended, 42 U.S.C. § 1983), due to concerns about government agents' misconduct under color of law.

Concerned about the constitutionality of the Civil Rights Act (CRA) of 1866, Congress ratified the Fourteenth Amendment in 1868.[5] In 1870, two years later, the Fifteenth Amendment was ratified. These amendments did not end the increased violence occurring primarily in the South against the newly freed slaves and their supporters.[6] The CRA of 1871 (now 42 U.S.C. § 1983), also known as the

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[5] *See, e.g,* Ronald D. Rotunda *et al*., *Treatise On Constitutional Law: Substance And Procedure*, §§ 19.1-19.39 (1986); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11-56 (1955); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); John P. Frank & Robert F. Munro, *The Original Understanding of 'Equal Protection of the Laws*', 50 COLUM. L. REV. 131 (1950); Howard J. Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Will Maslow and Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality 1862-1952*, 20 U. CHI. L. REV. 363 (1953).

[6] *See Monell v. Department of Social Services*, 436 U.S. 658, 665-89 (1978); *Monroe v. Pape*, 365 U.S. 167, 172-84 (1961).

Ku Klux Klan Act of 1871,[7] was enacted by Congress at a time when newly freed slaves and their supporters were falling victim to increasing violence that went unpunished by state governments and their actors.[8]

In the post-Civil War period, victims faced a daunting task in bringing a complaint in Federal Courts based on tortious actions by the states' agents or officers.[9] In the 1871 CRA, legislators crafted new protection for civil rights plaintiffs. Section 1983 thus embodies Congress' effort to remove barriers and quell fears that legislative powers were inadequate to address the violence under existing laws.[10]

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[7] *See* Steven Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C.L. REV. 693, 698 (1993).

[8] *See* Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 547 (1989) (discussing history behind enactment of Civil Rights Act).

[9] *See* Gerhardt, *supra* note 4, at 547 (discussing problems with bringing actions against states under Fourteenth Amendment).

[10] *Monroe v. Pape,* 365 U.S. 167*,* 172-73 (1961) (discussing legislative history of section 1983). Justice Douglas, writing for the majority, described a letter sent to Congress in 1871 from President Grant. This message read:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that

As discussed above, at the time the 1871 CRA was enacted, the doctrine of *respondeat superior* was well recognized in the common law of the United States and England. *See Monell,* 436 U.S. at 683-86. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions.[11] Given this settled doctrine, it is fair to assume the 1871 Civil Rights Act's authors recognized and intended for *respondeat superior* to apply to "a species of tort liability that on its face admits of no immunities." *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

Justice Stevens, in his *Tuttle* dissent, examined in-depth this legislative intent and judicial framework, and observed that tortfeasors as agents of a municipality should *not* enjoy any special protections in this Court's analysis:

> Indeed, we have repeatedly held that 42 U.S.C. § 1983 should be construed to incorporate common-law doctrine absent specific provisions to the contrary. . . .In the

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> the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

[11] In *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526, the Exchequer Chamber held that the owner of an omnibus company could be liable for injury inflicted on a rival omnibus company by a driver who violated the defendant's specific instructions.

> Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. [ ] One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

*Id.* at 838 (internal quotations and citations omitted) (the portion of the quoted passage after the ellipses is contained at *id.* n.12).

In the same the year the Ku Klux Klan Act was passed, the influential Massachusetts court reiterated that when municipal officers commit "a tortious act," even if the motive is laudable, the municipal entity "should be liable to make good the damage sustained." *Hawks,* 107 Mass. at 417-418. Undisputedly the post-Civil War courts recognized that *respondeat superior* applied to local governments and their agents.

### D. The Civil Rights Act of 1871 and the Fourteenth Amendment

In the CRA of 1871, Congress created a federal remedy against a person who, acting under "color of state law," deprives another of constitutional rights. The statute defines a species of tort liability for any tortfeasor who acts under color of law to violate civil

rights, certainly including an attorney operating in a prosecutorial position as an agent conducting a core government function on behalf of the principal.[12] However, this Court has found that public officials may enjoy immunity from liability under various circumstances. *See Imbler v. Pachtman,* 424 U.S. 409, 417 (1976) (absolute immunity of public official under Civil Rights Act of 1871 defeats suit at outset, so long as official's actions were within scope of immunity; qualified immunity of official will turn on circumstances and motivations of his actions, as established at trial).

The CRA of 1871 (now § 1983) broadly defines the class of potential defendant by using the phrase "every person." It is well settled that "person" encompasses municipal corporations.[13] Moreover, the historical context of § 1983 demands that it be read in conjunction with the Fourteenth Amendment, which preceded this legislation by a mere two years. Some sixty years later this Court noted: "Since . . . the *Civil Rights Cases,* 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is

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[12] In *Pachtman*, Justice White, in a concurring opinion joined by Justices Brennan and Marshall, expressed grave concern over the ramification of any blanket immunity for a prosecutor in light of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Pachtman*, 424 U.S. at 441, 446 n.9 (White, J., concurring).

[13] *Monell,* 436 U.S. at 687. Municipal corporations were routinely sued in the federal courts, and this fact was well known to Members of the 42nd Congress. *See, e.g., Louisville, C. & C.R. Co. v. Letson,* 43 U.S. 497, 558 (1844); *see also Cowles v. Mercer County,* 74 U.S. 118, 121 (1869).

only such action as may fairly be said to be that of the States."[14] *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). Accordingly, the Fourteenth Amendment applied to the states, and Section 1983 extended its application to the municipalities.

Congress has power to pass laws for regulating a subject in every detail, and the conduct and transactions of individuals in respect thereto (1) where Congress is clothed with direct and plenary power over a whole subject, and (2) where that power is accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations and among the several states. *See Civil Rights Cases*, 109 U.S. at 18. Accordingly, § 1983 does not authorize any recovery against an individual officer unless he has acted under color of official authority. But if the employer-employee relationship makes it appropriate to treat the officer's conduct as state action for purposes of constitutional analysis, then the relationship equally justifies the application of normal principles of tort law that would allocate responsibility for the wrongful state action. *Tuttle*, 471 U.S. at 840 (Stevens, J., dissenting).

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[14] The Fourteenth Amendment was not intended to protect individual rights against individual invasion, but to nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States." *See Civil Rights Cases*, *supra*. Accordingly, Congress has no authority to create a code of municipal law for the regulation of private rights, as the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *U.S. v. Morrison*, 529 U.S. 598, 621 (2000) (*citing Shelley v. Kraemer,* 334 U.S. 1, 13 (1948)).

The holding in *Pembaur v. City of Cincinnati*, *supra*, confirms this notion. In *Pembaur,* the Court held that a "single incident" could constitute a violation of the statute. *Pembaur,* 475 U.S. at 480.

Historically, a municipality or other unit of local government had no immunity, neither qualified nor absolute. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980) (no tradition of local government immunity); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 n.6 (9th Cir. 2001) (same); *see Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (no immunity under § 1983); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1153 (2d Cir. 1995) (same). Unlike states, local governments do not have the protection of sovereign immunity. *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 382 (1990). Local governments are liable under Section 1983 for policies, formal or informal, that cause constitutional torts. *See e.g., DeGenova v. Sheriff of DuPage County*, 18 F. Supp. 2d 848, 849-850 (N.D. Ill. 1998), *aff'd*, 209 F.3d 973 (7th Cir. 2000).

There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of non-delegated 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 v. Bradley,* 433 U.S. 267, 291 (1977); *see Ex parte Virginia,* 100 U.S. 339, 347-348 (1879) (same).

In overruling the municipal immunity holding of *Monroe v Pape*, 365 U.S. 167 (1961), the *Monell* Court held that local government units are "persons"

able to be sued under § 1983. In *Monell*, however, the Court addressed what eventually was found to be an unconstitutional, officially adopted, formal municipal policy. Thus *Monell* addressed only that factual situation, not all situations of municipal agents violating civil rights.

The language of § 1983 expressly imposes liability on any person who, under color of state law, "shall subject or cause to be subjected" another to deprivation of federally guaranteed rights, "plainly imposed liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *See Monell,* 436 U.S. at 692 (citation omitted). Significantly, the *Monell* Court initially noted that an analysis of the legislative history of the statute revealed *no congressional intention to insulate local government units from liability. Id.* at 689-690.

**E. The Sherman Amendment.**

Unfortunately, the *Monell* Court concluded that a local government may not be sued under § 1983 solely on a *respondeat superior* theory. Rather, the Court opined, it could be held liable only 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 for which the government as an entity is responsible under § 1983. *Id.* at 695. In doing so, the *Monell* Court based much of its analysis upon the defeat of the Sherman Amendment during the Congressional debate over the Civil Rights Act of 1871, which would have

imposed liability on local governments for failing to protect citizens from unlawful acts of *citizens*. *Monell*, 436 U.S. at 692-694.

That legislative history should have been deemed irrelevant. Congress rejected the Sherman Act, which would have imposed governmental liability for the acts of lynch mobs or roving bands of Klansmen. That rejection had nothing to do with *governmental* liability for the tortious acts of a prosecuting attorney litigating on behalf of the governmental entity.

As Justice Stevens later pointed out, the Sherman Amendment would have been "an extraordinary and novel form of absolute liability on municipalities." *Tuttle*, 471 U.S. at 839 (Stevens, J., dissenting). Moreover, imposing liability on governments for actions of private citizens would have made little sense because "the Fourteenth Amendment does not have any application to purely private conduct." The Fourteenth Amendment cannot be violated by an individual unless he is a government agent whose "relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis." *Id.*

The doctrine of *respondeat superior* was well established as a remedy against municipalities by the time of § 1983's enactment, and the statute's legislative history does not reject the doctrine. Therefore, the statutory text of § 1983 should be read as encompassing this important common law doctrine.

## CONCLUSION

This Court should rule that Parish is liable on the basis of *respondeat superior* without any consideration of official policy. Such a ruling would eliminate the convoluted analysis of deliberate indifference and the adequacy of employee training.

Respectfully submitted,

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