No. ___-_____

IN THE

Supreme Court of the United States

EMMA JONES, AS ADMINISTRATRIX OF THE ESTATE OF MALIK JONES,

Petitioner,

v.

TOWN OF EAST HAVEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Courts Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does municipal liability for an unlawful "custom or usage" under 42 U.S.C. § 1983 require actual policymaker knowledge of the custom or usage, as the court below held; or is it sufficient, as other courts of appeals have held, to show that policymakers should have known of it?

2. Should the distinction in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), between vicarious liability and liability based on municipal policies be reconsidered?

PARTIES TO THE PROCEEDING

Petitioner is Emma Jones, as administratrix of the estate of her son Malik Jones, plaintiff–appellee–cross–appellant below. Respondent is the Town of East Haven, defendant–appellant–cross–appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emma Jones, as administratix of the estate of Malik Jones, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit panel opinion (Pet. App.3a) is reported at 691 F.3d 72. The Second Circuit's order denying panel rehearing and rehearing *en banc* is unreported. Pet. App. 1a.

JURISDICTION

The Second Circuit panel issued an opinion on August 1, 2012. Pet. App. 3a. The Second Circuit's judgment became final when it denied panel rehearing and rehearing en banc on January 14, 2013. *Id.* at 1a. An extension of time until May 30, 2013 to file a petition for certiorari was granted by Justice Ginsburg in chambers on April 1, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision, 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

A jury held the Town of East Haven, Connecticut liable under 42 U.S.C. § 1983 for the fatal shooting of an unarmed African-American man, and the district court upheld its finding on the basis that the evidence, viewed most favorably to the verdict, showed that the shooting was part of a "deeply embedded custom" of racism in the (all-white) police department. Pet. App. at 105a. As discussed below, the evidence allowed a jury to find that at least a majority of the department's officers endorsed or participated in the unlawful and racially biased use of excessive force.

The Second Circuit reversed, finding that plaintiff's evidence failed because he could not show that the custom of racial bias "must have been known to supervisory authorities," Pet. App. at 28a or, equivalently, that "officers of the [Police] Department expressed among themselves an inclination to abuse the rights of black people with sufficient frequency or in such manner that the attitude would have been known to supervisory personnel." Pet. App. at 82a. This requirement of actual, subjective knowledge conflicts with the objective standard of constructive knowledge applied by the other courts of appeals to

have considered the issue. *See pp.* 14-15, *infra,* (citing cases from the First, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits).

Except in the context of failure-to-train cases, where it has adopted an objective standard, *see City of Canton, Ohio v. Harris,* 498 U.S. 378 (1989), the Court has not addressed whether municipal policymakers must have actual knowledge of a "custom or usage" of municipal officials for the custom or usage to subject the municipality to liability under § 1983. The issue is important, and this case is an appropriate one in which to resolve it.

Alternatively, the Court's conclusion in *Monell,* 436 U.S. 658 at 691 that Section 1983 does not provide for *respondeat superior* liability has not withstood historical analysis, and this important area of law now labors under what is generally agreed to be a misconception. *See Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 430-37 (1997) (Breyer, J, dissenting). This case is an appropriate vehicle for revisiting that issue.

STATEMENT

Viewed in the light most favorable to the plaintiff's verdict, the evidence showed that an East Haven police officer, Robert Flodquist, approached a stopped car after a car chase. He came up to the vehicle and shot the driver, a young African-American man named Malik Jones, at least four times, killing him. Jones was unarmed.

The jury found that the killing was unlawful

under the Fourth Amendment but that the officer was entitled to qualified immunity. Plaintiff also brought an Equal Protection claim under 42 U.S.C. § 1983 against the Town (but not the officer), and the jury found for the plaintiff on that claim. It awarded no compensatory damages but two million dollars in punitive damages against the Town. The trial judge, District Judge (now Chief Judge) Alvin W. Thompson, set aside the punitive damages award in light of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and directed a retrial on compensatory damages, at which the jury awarded $900,000. A panel of the Second Circuit reversed, holding that there was insufficient evidence of municipal policymakers' knowledge of the Police Department's custom of racism to subject the town to liability under *Monell*. *See* Pet. App. at 4a, 21a. The Court denied rehearing. *See* Pet. App. 1a.

A. The *Monell* Evidence

The evidence on the *Monell* Equal Protection claim included a range of items described both by the district court, *see* Pet. App. at 31-71 and, less completely, by the Second Circuit. *See* Pet. App. 8-15. A summary follows.

East Haven, a virtually all-white town bordering New Haven, had an all-white police department with 52 sworn personnel. *See* Pet. App. at 32. On two separate occasions, groups of officers brutalized suspects; the incidents between them involved nine of East Haven's officers, or 17% of the force. *See* Pet. App. at 9-11. What linked the two events was that, in both, the officers – in the presence of colleagues and in

one case a supervisor – repeatedly referred to African-Americans as "niggers" deserving of brutal treatment. In the first incident, involving four separate officers, a white man named Donald Jackman was told that "if [he] were a nigger [he'd] be fucking dead" and that he was going to jail "to be butt–fucked by the niggers." The other officers present, including a supervisor, did nothing to suggest that this conduct was untoward. Pet. App. at 10a-11a. In the second, an African-American woman named Patricia Snowden, middle-aged and weak from illness, was repeatedly dragged and punched and called a "nigger" by a group of five officers. Pet. App. at 11a.

Other officers also participated in brutalizing or covering up brutality against black suspects. In 1990 Flodquist, attempted to shoot an African-American man named Shane Gray who was fleeing from him on foot. Flodquist struck Gray with his vehicle and shot at him but missed. Then he falsely claimed Gray had a gun. When Gray complained to the members of the Department who took him into custody and processed him, they ignored his complaints. Pet. App. at 44a. Anthony Criscuolo, then a captain and later chief at the time of the Jones killing, exonerated the officer without interviewing the victim or taking note of the version Gray gave to numerous department members. *See Id.*

In the Jones shooting incident itself, not only did the officer again attempt to kill an unarmed black suspect – and this time succeed – but his fellow officers also demonstrated what a jury could find was a conviction that they could brutalize black suspects with impunity. The two other officers present at the

scene removed Jones from his car and left him on the sidewalk face down as he was dying, with his hands cuffed behind his back and his feet still inside the car. *See* Pet. App. at 66. A jury could find that Flodquist and his two fellow officers were all confident of their ability to get away with racist misconduct.

Between the number of officers involved with Jackman (four), Snowden (five), Gray (several), and Jones (three), the trial evidence directly implicated about a third of the Department as participating actively or passively in expressions of support for racist brutality. This evidence allowed a reasonable jury to infer not just that the third of the members of the Department they heard about would participate in or endorse egregiously racist conduct but that racism in the Department was pervasive. Jones was shot and Jackman and Snowden were abused by three different officers. Other officers – two, three, and four respectively – were present at the incidents as willing participants. What is the probability that all nine of these "other" officers would participate in or endorse egregiously racist conduct if racism were not pervasive in the Department?

The jury could use its common sense to conclude that the probability was very low. A more formal mathematical approach confirms that it would be correct to do so.

As plaintiff explained to the court of appeals, excluding the Chief and the three officers who shot Jones and abused Jackman and Snowden there were 48 officers in the Department. If a total of D out of the 48 "other" officers would endorse or participate in

racist conduct, then the total number of ways to draw 9 officers from these D racist officers is "D-choose-9", or D!/(9!*(D-9)!)=D!/(362,880*(D-9)!). M. Finkelstein, *Statistics for Lawyers* (2d Ed.) 123-25. Thus there are 48-choose-9=1,677,106,640 ways to draw 9 officers from a total of 48 total officers in the EHPD. The probability that every officer in a size-9 sample of randomly drawn officers would endorse and participate in racist brutality therefore equals D!/(362,880*(D-9)!) divided by 1,677,106,640. *Id.*

If the 9 "other" officers involved in the three incidents were the only ones who endorsed or participated in racist brutality, then D equals 9 and the probability is the trivially small 1/1,677,106,640. Even if D equals 20, the probability that all 9 officers endorse or participate in racist brutality is less than 0.6%. To get to a probability above 5% requires that at least 27 of the 48 "other" officers – making 30 total out of 51(not counting the chief) – endorse or participate in racist brutality. (The 50% preponderance threshold is of course even higher.)

That is, simply from these three incidents a jury could reasonably conclude that a solid majority of the members of the Department had the same set of racist attitudes that led to racial abuse and the ready resort to the epithet "nigger." And the jury was not required to do the math; it could use its common sense to conclude that the attitudes of the many officers who unanimously condoned or participated in incidents of brutality accompanied by racism were simply typical of the department.

Other evidence that reinforced this conclusion

came from an episode involving the Department's unofficial softball team. At around the time of the Jones shooting[1], the team chose as its uniform a T-shirt captioned "Boyz on the Hood,"depicting suspects spread-eagled on a police car. "Boyz n the Hood" is a well-known and critically-acclaimed 1991 movie about African-American teenagers struggling to grow up in inner-city Los Angeles. By using a take-off on the movie title to caption an image of suspects spread-eagled on a police cruiser, the T-shirts bluntly and effectively conveyed what the wearer thought about such young men. While the court of appeals saw only race-based "disrespect," Pet. App. 84, the jury was entitled to understand that the all-white police force in this nearly all-white town was sending message glorifying police use of force against young African-American men: simply put, that boys in the 'hood belong on the hood of police cars.

B. Procedural History

After a three-week trial, the jury, as noted above, found that Officer Flodquist had used excessive force but that he was entitled to qualified immunity on

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[1]The police chief originally testified that the incident arose in the summer after the Jones shooting April 14, 1997. It then turned out that he had sent a memo about the T-shirts on May 27, the same day the shirts were discussed at a hearing of the Board of Police Commissioners. 2d Cir. Jt. App. JA410. The memo and meeting followed a newspaper article about the shirts that had appeared in a weekly newspaper at some point within the previous month. Addendum to petitioner's court of appeals brief A49. Considering the time needed to discover, report, and publish the story, the jury could infer that the shirts had begun to be worn before the shooting.

plaintiff's Fourth Amendment claim. Because plaintiff had not brought an Equal Protection claim against Flodquist, judgment entered in Flodquist's favor. (He was also exonerated on plaintiff's state law claims, as was the other individual defendant, Officer DePalma, on all claims.)

On the *Monell* claim, the trial judge charged the jury in a way that allowed it to find for the plaintiff based on either actual or constructive policymaker knowledge.[2] The jury found for plaintiff on that claim and assessed zero compensatory damages and two million dollars punitive damages.

In response to post-trial motions, Judge Thompson, as noted above, set aside the punitive damages award, upheld the verdict on the *Monell*

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[2]After explaining that municipal liability depended on a showing that the violation was caused by an "official practice or custom" of the Town, he continued:

> Whether an official practice or custom existed is a question of fact for you to determine. An official practice or custom is a persistent, widespread course of conduct by municipal employees that has become a traditional way of carrying out policy, and has acquired the force of law, even though the municipality has not formally adopted or announced the practice or custom. Thus, a plaintiff is not required to show that the municipality had an explicitly stated rule or regulation.
>
> The inference that a policy existed may be drawn from circumstantial proof, such as evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had violated complainants' civil rights.

2d Cir. Jt. App. JA211-212.

claim, and directed a retrial on compensatory damages. *See* Pet. App. C. He explained at length his decision to allow the *Monell* claim to go to the jury. After analyzing all the evidence described above and more, he found sufficient evidence to support a jury finding of "a deeply embedded custom" Pet. App. at 105a, of racial discrimination in law enforcement and that the Chief "had *actual or constructive* knowledge of a customary practice within the EHPD of deliberate indifference to the constitutional rights of African-Americans and other people of color." *Id.* at 106 (emphasis added).[3]

The Town filed an interlocutory appeal, which was dismissed, and after a retrial of the compensatory damages issue, at which the jury awarded $900,000 damages, the Town appealed the underlying liability verdict.

On appeal, the Second Circuit (Pooler, Walker, and Leval, JJ) concluded that the evidence was insufficient to support *Monell* liability. As the court of appeals saw the case, the question was whether the relevant policymakers actually knew that racist attitudes and behavior were present in the Department. Thus, as noted above, the Second Circuit found that plaintiff's evidence failed because he could not show that the custom of racial bias "must have been known to supervisory authorities," Pet. App. at

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[3]In addition to setting aside the punitive damages verdict and ordering a new trial on compensatory damages, the trial judge also explained his reasons for allowing a *Batson*-type challenge that resulted in the seating of the only African-American on the nine-person jury. Pet. App. at 119-29.

28a, or that "officers of [the Police] Department expressed among themselves an inclination to abuse the rights of black people with sufficient frequency or in such manner that the attitude would have been known to supervisory personnel." *Id.* at 21a. The Second Circuit reiterated its standard with other essentially identical formulations. It said that plaintiff could prevail by showing either that "abuse was the custom of the officers of the Department and that supervisory personnel must have been aware of it," Pet. App. at 21a, or "sufficient instances of tolerant awareness by supervisors of abusive conduct." *Id.* 22a.

Finally, the court below discounted individual pieces of evidence on the same basis, for example the racist statements in the Jackman incident – about which the court said "there was no showing that any policy-maker was aware of those remarks," *Id.* 84a, without taking into account the tendency of the statements to prove the existence of pervasive racism in the rank-and-file.

The Court of Appeals then denied rehearing. *Id.* 1a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH ALL THE OTHER CIRCUITS THAT HAVE ADDRESSED WHETHER *MONELL* LIABILITY REQUIRES ACTUAL, SUBJECTIVE POLICYMAKER KNOWLEDGE OF A CUSTOM OR USAGE OF UNLAWFUL CONDUCT.

Section 1983 imposes liability not only for actions "under color of" formal legislative enactments but also those under color of a "custom or usage." This Court explicated the statutory term "custom" in *Monell*: "Congress included customs and usages [in § 1983] because . . . the persistent and widespread discriminatory practices of state officials . . . could well be so permanent and well-settled as to [have] the force of law." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *see also Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 404 (1997) ("an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law").

The Court has not explicitly identified a general standard of policymaker knowledge that must be shown in order to impute a custom or practice to a municipality under *Monell.* It *has* adopted a standard for one category of cases, those involving an allegedly culpable failure to train. That standard is an objective, not a subjective, one: In such cases, the Court has

concluded, even without actual policymaker knowledge, "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton,* 489 U.S. at 389; *see also id., at* 390, n. 10; *see Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (describing *Canton*'s standard as "objective"and noting that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official").

Because the Court has thus far considered and applied the *Canton* standard only in failure-to-train cases, the court of appeals' opinion might perhaps be said not to be in direct conflict with one of this Court's opinions. But it does conflict with every other circuit to have considered whether policymakers' constructive knowledge – as opposed to their subjective "actual knowledge" – is adequate to establish *Monell* liability outside the failure-to-train context. At least the following six courts of appeals have considered the issue, and we have found no circuit – except the court below – that has required subjective policymaker knowledge:

D.C. Circuit. In *Warren v. District of Columbia*, 353 F.3d 36 (D.C. Cir. 2004), a case alleging abusive and unsafe medical practices in prison, the court relied on *Farmer's* description of the holding in *Canton* and recognized that municipal liability was determined by "whether the municipality knew or should have known

of the risk of constitutional violations but did not act," *id.* at 39 (internal quotation marks omitted), a test it recognized as "an objective standard," *id.*, turning on whether the municipality failed to act when "faced with actual or constructive knowledge that its agents will probably violate constitutional rights." *Id. See Baker v. District of Columbia*, 326 F.3d 1302, 1307 (D.C. Cir. 2003) ("Deliberate indifference is determined by analyzing whether the municipality knew or should have known of the risk of constitutional violations, an objective standard. *Farmer*, 511 U.S. at 841. Because the district court erroneously ruled that Baker had to prove subjective indifference by the District of Columbia, it therefore improperly analyzed the second prong.")

1st Circuit. *Bordanaro v. McLeod*, 871 F.2d 1151,1157 (1st Cir. 1989) ("Although there was no direct evidence that the Chief of Police had actual knowledge of this policy ... the evidence does support a finding of his constructive knowledge of it. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of their official responsibilities the municipal policymakers should have known of them.") (internal citation and quotation marks omitted).

4th Circuit. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1198 (4th Cir.), *cert denied*, 519 U.S. 819 (1996) (a *Monell* claim requires showing that the county "effectively condoned the employees' conduct by inaction in the face of actual or constructive knowledge" that it was occurring); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) ("where

a municipal policymaker has actual or constructive knowledge of such a course of customary practices among employees subject to the policymaker's delegated responsibility for oversight and supervision, the 'custom or usage' may fairly be attributed to the municipality as its own").

5th Circuit. *McGregory v. City of Jackson*, 335 Fed. Appx. 446, 448-449 (5th Cir. 2009) ("Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority. . . . Actual knowledge on the part of the policymaker must be shown directly, but constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities" (internal citations and quotation marks omitted); *Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984) (requiring policymaker's "[a]ctual or constructive knowledge of [the alleged] custom").

6th Circuit *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 369 (6th Cir. 2005) (municipal liability for inaction requires proof of "notice or constructive notice" on the part of the policymaker).

7th Circuit. *King v. Kramer,* 680 F.3d 1013, 1021 (7th Cir. 2012) (quoting *Warren* for the proposition that "If the County is "faced with actual or constructive knowledge that its agents will probably violate constitutional rights, [it] may not adopt a policy of inaction").

The decision below is out of step not only with the other circuits but with a coherent understanding of *Monell* liability. As the Court explained in *Farmer*, 511 U.S. at 841, subjective intentions belong to individuals, not municipal entities. A "policy" or "custom" is a course of behavior, not a state of mind. *Cf. Daniels v. Williams*, 474 U.S. 327, 330 (1986) ("Section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right."). Moreover, a regime that rewards supervisors' ignorance of what they should know invites lack of oversight, surely a perverse incentive structure in police departments.

In fact, the case for attributing conduct to a municipality despite lack of actual policymaker knowledge is considerably stronger in the case of a pervasive custom than in one where liability is premised solely on a failure to train. As the Court explained in *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011):

> A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 822-823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*").

In this case what is at issue is not a risk of officer error in the absence of training but a custom of racist misconduct. The connection between the custom and the violation is neither nebulous nor remote. If an

objective standard suffices to attach municipal liability for a failure to train, then it should be *a fortiori* sufficient in cases, like this one, that involve a pervasive custom.

This case identifies an issue that requires clarification. The courts of appeals have on their own generalized the objective standard that this Court has applied only to failure-to-train cases. The logic and policy of *Monell* and § 1983 warrant the extension of the standard to all cases alleging unlawful "custom or usage," and it would give clarity and guidance to the courts of appeals for the Court to say so.

Finally, this case is a particularly suitable vehicle for addressing the question it raises. It has gone to trial, so there is a full record and one which very crisply makes the distinction between individual and municipal liability. And, after adopting a subjective standard the Second Circuit set aside a plaintiff's jury verdict in a case that contained strong evidence to support liability on an objective standard.

II. THIS COURT SHOULD RECONSIDER *MONELL'S* HOLDING THAT 42 U.S.C. 1983 DOES NOT IMPOSE *RESPONDEAT SUPERIOR* LIABILITY.

As at least three of this Court's members have acknowledged, *Monell*'s distinction between liability that is based on a policy and liability that is vicarious stems from an historical error and has resulted in unworkable doctrine. *See Bd. of the County Comm'rs*

v. Brown, 520 U.S. 397, 430-37 (1997) (Breyer, J, dissenting, joined by Stevens and Ginsburg, JJ.); *see also id.* at 430 (Souter, J., dissenting) (describing Justice Breyer's call to reconsider *Monell* as "powerful").

Monell justified its distinction between vicarious liability and liability based on customs, usages and other municipal policies ("policy liability") on an historical argument and a textual argument. The historical argument was "essentially that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the marauding acts of *private citizens*." *Brown*, 520 U.S. at 431 (Breyer, J., dissenting) (emphasis in original). But, as since been widely observed, vicarious liability for the acts of private citizens is distinct from vicarious liability for the acts of municipal employees. In fact, municipalities were often held vicariously liable for the acts of their employees at the time § 1983 was enacted and "[o]ne important assumption underlying the Court's decisions [concerning section 1983] is that members of the 42nd Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to [be incorporated in § 1983]." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

Scholars generally agree that *Monell*'s historical analysis was incorrect. *See* 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, 2204–12 (2005); Jack M. Beermann, "Municipal Responsibility for

Constitutional Torts," 48 *DePaul L.Rev.* 627, 629–35 (1999); Larry Kramer & Alan O. Sykes, "Municipal Liability Under § 1983: A Legal and Economic Analysis," 1987 *Sup. Ct. Rev.* 249, 257–61; Peter H. Schuck, "Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory," 77 *Geo. L.J.* 1753, 1755 n. 13 (1989); *see also Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011) (citing this academic literature and asserting that *Monell* is "based on what scholars agree are historical misreadings").

The historical error undermines *Monell*'s textual justification. *Monell* reasoned that section 1983 only imposes liability on "person[s]" who "subject [others] or cause [others] to be subjected" to civil rights violations. 42 U.S.C. § 1983. The statute does not specifically impose liability on persons who *employ* persons who subject others to constitutional violations. But if the 42nd Congress understood municipalities, like other corporate bodies, generally to incur liability through the acts of their agents, there is no reason to expect that the Congress would have stated with any more precision than it did that municipalities could be liable under a theory of *respondeat superior*. Instead, it is *Monell*'s counterintuitive proposition – that the only acts that create liability are those of the municipality *qua* municipality, and not simply those of the municipality's agents – that one would expect to be more explicitly stated.

The resulting distinction between policy liability and vicarious liability has resulted in a complicated doctrine that is difficult for lower courts and juries to apply and unlikely to have been intended by Congress.

For instance, to preserve the distinction between policy liability and vicarious liability, the Court has had to distinguish between the "exercise of discretion by an employee" and a "policymaker['s] . . . delegat[ion of] his policymaking authority" to an employee, *see City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988) (plurality opinion); *see id.* at 126-27 (acknowledging that "it may not be possible to draw an elegant line" between these categories).

Monell's distinction between policy liability and municipal liability has likewise required plaintiffs to prove municipal policies of inadequate training, even though this Court has recognized that "it may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989). These and other 'inelegant' and counterintuitive distinctions are not to be found in § 1983's text or history and were not intended by the 42nd Congress; none of them would be necessary if, as Congress intended, municipalities were subject to *respondeat superior* liability under § 1983. This case – which requires acknowledging that a municipal custom or usage can exist even if those capable of setting policy for the municipality are unaware of it – demonstrates the confusion that *Monell* continues to work and that warrants that case's reconsideration.

CONCLUSION

The Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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