

**In The
Supreme Court of the United States**

LOS ANGELES COUNTY, CALIFORNIA,

Petitioner,

vs.

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 OF PETITIONER

TIMOTHY T. COATES, ESQ.

Counsel of Record

ALISON M. TURNER, ESQ.

LILLIE HSU, ESQ.

GREINES, MARTIN, STEIN &
RICHLAND LLP

5900 Wilshire Boulevard,
Twelfth Floor

Los Angeles, California 90036

Telephone: (310) 859-7811

Facsimile: (310) 276-5261

E-Mail: tcoates@gmsr.com

MARK D. RUTTER, ESQ.

CARPENTER, ROTHANS & DUMONT

888 South Figueroa Street,
Suite 1960

Los Angeles, California 90017

Telephone No.: (213) 228-0400

Facsimile No.: (213) 228-0401

E-Mail: mrutter@crdlaw.com

Counsel for Petitioner Los Angeles County, California

QUESTION PRESENTED

Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity or are such claims exempt from *Monell's* requirement?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is to be reviewed are:

- Craig Arthur Humphries and Wendy Dawn Aborn Humphries, plaintiffs, appellants below, and respondents here.
- Los Angeles County, defendant, appellee below, and petitioner here.
- Bill Lockyer, Attorney General, in his official capacity as Attorney General of the State of California, defendant, appellee below, and nominal respondent here, no appearance having been made on his behalf in this court.

In addition Leroy Baca, Michael Wilson, and Charles T. Ansberry were defendants in the underlying action, appellees in the proceedings below, but not parties to the fee order that is the subject of this proceeding.

There are no corporations involved in this proceeding.

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The order of the United States Court of Appeals for the Ninth Circuit that is the subject of this proceeding was not reported and is found in the Appendix to the Petition For Writ Of Certiorari (“App.”) at pages 1-4. The court’s subsequent order setting an amount of attorney’s fees was not reported and is in the Appendix to the Reply To Brief In Opposition (“Rep. App.”) at pages 1-2. The Ninth Circuit’s initial opinion in the underlying appeal was published at 547 F.3d 1117 (9th Cir. 2008), but was subsequently withdrawn from the official bound volume and can be found in the Appendix at pages 143-209. The Ninth Circuit’s order of January 15, 2009 amending opinion and order denying appellee County of Los Angeles’ petition for rehearing and rehearing en banc, denying appellee Bill Lockyer’s petition for rehearing and rehearing en banc, granting appellants’ motion for clarification, and in part, appellants’ petition for rehearing or reconsideration and amended opinion is not published in the official reports and is found in the Appendix at pages 73-142. The Ninth Circuit’s second order amending opinion and amended opinion of January 30, 2009 is published in the official reports at 554 F.3d 1170 (9th Cir. 2009) and is found in the Appendix at pages 5-72.

The decision of the district court, granting in part and denying in part, defendants’ motions for summary

judgment was not reported, and is found in the Appendix at pages 210-54.



BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on November 5, 2008. (App. 143.) Petitioner and each of the respondents filed petitions for rehearing. On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of petitioner Los Angeles County and respondent Bill Lockyer, and granting in part plaintiffs' petition for rehearing as well as plaintiffs' motion for clarification and issued its amended opinion. (App. 73.) After petitioner filed a motion to correct a misstatement in the amended opinion, on January 30, 2009, the Ninth Circuit issued its second order amending the opinion as well as an amended opinion. (App. 5-72.) Following respondent Humphries' motion for attorney's fees on appeal and the filing of opposition by petitioner Los Angeles County and respondent Bill Lockyer, on June 22, 2009, the Ninth Circuit issued its order finding plaintiffs to be prevailing parties for purposes of an attorney fee award, directing that any fees be split 90%-10% between the State and the County, and remanding to the Appellate Commissioner for a report and recommendation concerning only the amount of fees. (App. 1-4.) On September 20, 2009, Los Angeles County timely filed a Petition for Writ of Certiorari in this court and

jurisdiction is proper in this Court under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND
STATUTORY PROVISIONS AT ISSUE**

The underlying action was brought by the respondents pursuant to 42 U.S.C. § 1983, which reads as follows:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The June 22, 2009 order of the Ninth Circuit was made pursuant to 42 U.S.C. § 1988(b) which provides as follows:

In any action or proceeding to enforce a provision of §§ 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681, et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] or § 1983 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, such officer shall not be held liable for any costs including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The respondents allege that petitioner Los Angeles County, as well as respondent State of California, through its then Attorney General Bill Lockyer, violated their rights under the Fourteenth Amendment to the United States Constitution, the relevant part of which reads as follows:

Fourteenth Amendment (Section I):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF FACTS

A. The California Child Abuse Index.

This case arises from respondents having been placed on the California Child Abuse Index (the “CACI”), a centralized database of reported child abusers maintained by the State of California as required by the Child Abuse and Neglect Reporting Act (California Penal Code § 11164 *et seq.*, “CANRA”).

Under CANRA, when a child protective agency such as the Los Angeles County Sheriff’s Department receives a report of child abuse, it must conduct an “active investigation.” California Penal Code §§ 11165.9, 11169. If the agency determines the allegations are “not unfounded,” it must submit a § 11169 report to the California Department of Justice, which maintains an index of such reports. California Penal Code §§ 11169, 11170(a). Allegations of child abuse are “not unfounded” if the investigating agency determines they are not “false” or “inherently improbable” and do not “involve an accidental injury” or “constitute child abuse.” California Penal Code § 11165.12(a). A report

of alleged child abuse may be “substantiated,” meaning (under the statutory definition in effect when the Los Angeles County defendants submitted the § 11169 report on plaintiffs) the agency has determined it is “based upon some credible evidence;” or it may be “inconclusive,” meaning the agency has determined it is not unfounded but “there is insufficient evidence to determine whether child abuse . . . occurred.” California Penal Code section 11165.12(b) & (c) (1990) (amended and rewritten by Stats. 2000, ch. 16).

If a previously filed report later proves to be unfounded, the California Department of Justice must be notified and may not retain it. California Penal Code section 11169(a). Otherwise, the report is removed from the Index after ten years, provided the Department of Justice receives no further child abuse reports regarding the listed person. California Penal Code section 11170(a)(3).

B. Allegations And Subsequent Investigations Of Child Abuse Lead To The Humphries Being Listed In The CACI.

In July 2000, S.H., a minor, came to California to live with plaintiffs, her father and stepmother; she

had previously lived with her mother in Utah. (ER 5.)¹

S.H. asserted that plaintiffs began abusing her around December 2000. (ER 144; SER 7.) For example, S.H. stated plaintiffs would “quiz” her on her studies and, when her answers were unacceptable, would yell epithets at her and hit her, often with a book or cooking utensil; she also reported they would force her to study in her underwear or to jog in place in her underwear while they hit her and sprayed her with water. (ER 144-48; SER 7-18.)

On March 18, 2001, S.H., then 15, took plaintiffs’ car and drove to her mother’s home in South Jordan, Utah, where she reported the abuse. (ER 148, 144; SER 17-20.) An emergency room physician diagnosed her with non-accidental trauma, noting “multiple linear and circular contusions” on her extremities, which appeared to have been incurred over a period of time. (ER 144-45; SER 6-8.) A South Jordan police officer photographed bruises on S.H.’s arms and legs, some of which appeared to have been caused by a stick or other long, skinny object, and one of which looked like a large handprint. (ER 145; SER 13.)

¹ The district court docket (included in appellants Humphries’ Excerpts of Record in the Ninth Circuit at 832-55) is cited as “TR” followed by docket number. The Excerpts of Record is cited as “ER,” and the County defendants’ Supplemental Excerpts of Record as “SER.”

On March 26, 2001, Wilson, a detective with the Los Angeles County Sheriff's Department, received a report of the alleged abuse from the Utah Department of Human Services, Division of Child and Family Services. (ER 143-44.) He contacted the South Jordan Police Department and requested assistance in interviewing S.H. (ER 145.) On April 3, 2001, the South Jordan Police Department conducted a videotaped interview of S.H., and she wrote a statement detailing her abuse. (ER 145-46; SER 15, 17-20.)

On April 10, 2001, Wilson received the South Jordan Police Department's report, the videotaped interview of S.H., and her statement. (ER 145.) Wilson also discussed the allegations with S.H. and her mother by telephone. (ER 148-49.)

Based on S.H.'s written statement, the videotaped interview of S.H., the reports from the South Jordan Police Department and Utah Department of Family Services, the emergency room report detailing S.H.'s injuries, photographs of the injuries, and statements by S.H. and her mother in the telephone conversations, Wilson obtained a warrant to arrest plaintiffs for violations of section 273a(a) (Cruelty to Child) and section 206 (Torture). (ER 149; SER 22-26, 28-32.)

On April 16, 2001, Wilson, accompanied by Ansberry, arrested plaintiffs. (ER 149.) Plaintiffs were booked only for felony torture under section 206. (ER 203, 210, 255-56.) Ansberry interviewed Respondent Wendy Humphries. (ER 151; SER 60-62.) Respondent Craig

Humphries refused to talk to the detectives. (ER 151; SER 82-83, 45-46.)

The same day, plaintiffs' two remaining minor children were taken into protective custody and placed in foster care. (SER 74-81, 100-01.) Both children were interviewed and confirmed various aspects of S.H.'s allegations. (ER 150-51.)

On April 17, 2001, as required by California Penal Code section 11169, Wilson submitted a report of child abuse to the California Department of Justice (the "§ 11169 report"), so plaintiffs' names could be entered into the Index database of known or suspected child abusers. The form indicated the charges against plaintiffs were "substantiated." (ER 241, 469-70; SER 34, 88-89.)

On April 18, 2001, Wilson filed a misdemeanor complaint in the Los Angeles County Superior Court, charging plaintiffs with corporal injury to a child under section 273d(a) and cruelty to a child by endangering health under section 273a(b). (ER 433-34.) These charges were later dismissed "in the interests of justice." (ER 792, 436, 562-63, 566-69; *see also* SER 116.) The felony torture charges on which the Humphries had been booked were also dismissed. (ER 262-63.) The Humphries then successfully petitioned the court under California Penal Code section 851.8 for orders finding them "factually innocent" of the felony torture charges, and requiring the arrest records pertaining to that charge sealed and destroyed (the "sealing orders"). (ER 262-63.) The sealing orders did

not apply to the misdemeanor charges. (ER 262-63, 792-94, 802; *see also* SER 115-16.)

On April 19, 2001, the County filed a dependency petition against plaintiffs in the Los Angeles County Superior Court, juvenile division (“juvenile court”). (ER 159-70.) The juvenile court’s order adjudicating the dependency petition stated the petition’s allegations were “not true.” (ER 427-31.)

Subsequently, the Humphries’ attorney contacted Sheriff’s Department Sergeant Michael Becker and informed him of the criminal court’s sealing orders and “factual innocence” finding and the juvenile court’s “not true” finding. Becker reviewed plaintiffs’ case, obtaining additional information about the sealing orders and the juvenile court’s finding, and ultimately, he concluded the findings and additional information did not warrant notifying the Department of Justice that plaintiffs should be removed from the Index. (*See* SER 178-79, 191-92, 194, 112.) In response to a California Department of Justice questionnaire in October 2003, the Sheriff’s Department confirmed it was maintaining investigation records and that the § 11169 report was still substantiated. (ER 576-77.)

C. Plaintiffs File Suit Against The State Attorney General And The County.

The Humphries initially filed a federal complaint on August 27, 2002 (TR 1) with the operative first amended complaint (“complaint”), filed on January 14,

2003, naming as defendants the County of Los Angeles, Sheriff Baca, detectives Wilson and Ansberry, and California Attorney General Bill Lockyer. (TR 13; ER 1.)

The complaint alleged claims under 42 U.S.C. § 1983 and state law based on three categories of events: (1) plaintiffs' inclusion in the Index, (2) their arrests for child abuse, and (3) the temporary removal of their children from their custody. (ER 2-28.) The district court dismissed the state claims without leave to amend. (ER 88-89, 95-96.) Under § 1983, the remaining claims sought, *inter alia*, damages based on the allegedly improper submission of a child abuse investigation report to the California Department of Justice and the subsequent failure to notify the Department of Justice that the report was unfounded, an injunction to compel the County defendants to notify the Department of Justice that the report was unfounded, and a judicial declaration that CANRA and the County's Index-related policies are unconstitutional because they do not provide procedures by which individuals such as plaintiffs may reverse their Index listings. (ER 18-19, 24, 28.)

On November 15, 2004, the County defendants moved for summary judgment. (TR 66-69.) With respect to plaintiffs' Index-related *Monell* claims, the County asserted that plaintiffs could not establish the merits of their underlying Due Process claim. (TR 66 at 13-28.) Plaintiffs opposed. (TR 93-101, 105-110.) The district court granted summary judgment to defendants on all of plaintiffs' Index-related claims and

on their claims regarding their arrests for child abuse, but denied it as to the claims for removal of their children. (ER 723-47; App. 210-54.) Because the district court found no violation of plaintiffs' substantive or procedural due process right arising from their listing on the Index, it concluded it need not decide whether the County would otherwise be liable under *Monell*. (App. 245.)

On September 21, 2005, plaintiffs appealed from the portions of the district court's order granting summary judgment on their Index-related claims. (ER 717-18.)

D. The Appeal.

Plaintiffs appealed the district court's dismissal of their due process claims for injunctive, declaratory and damages relief stemming from inclusion in the CACI. On November 5, 2008, the Ninth Circuit issued an opinion reversing the judgment as to the County and the State. (App. 143.) The court found that CANRA and the CACI did not afford due process with respect to allowing those listed in the database to be removed once charges had been determined to be unfounded. (App. 205-06.) As to the County, the court observed that unlike the individual defendants, it was not entitled to qualified immunity. (App. 208.) The court acknowledged the County could only be subject to liability under *Monell*, if a policy or custom deprived the Humphries of their constitutional rights. (*Id.*) The court noted that the district court "did not

address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights." (*Id.*) It then stated that in order to avoid summary judgment, a plaintiff need only show there was a question of fact regarding whether a city, custom or policy caused a constitutional violation. (App. 209.) The court then noted that while CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing in the Index, nothing in CANRA "prevented the LASD (Los Angeles County Sheriff's Department) from creating an independent procedure that would allow the Humphries to challenge their listing on the Index" and therefore "LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County's summary judgment on this issue." (*Id.*)

The County of Los Angeles petitioned for rehearing, arguing that the question of whether the actions of its Sheriff's Department personnel with respect to the CACI was the result of a policy, custom, or practice fairly attributable to the County under *Monell* had not been litigated in the motion for summary judgment or on appeal. Summary judgment had been granted solely on the basis that there was no constitutional violation in the first instance. (App. 244-45.) The County observed that under California authorities, it was not free to alter the State's statutory scheme governing inclusion or removal from the CACI, and hence, at the very least, the question whether the County could be held responsible for any constitutional violation under *Monell* was an open

question yet to be litigated. The other parties filed petitions for rehearing as well.

On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of the County and the State and granting in part plaintiffs' petition for rehearing and motion for clarification. (App. 73.) The court repeated its conclusion that "CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing" on the CACI, and that nothing in CANRA prevented the County Sheriff's Department "from creating an independent procedure that would allow the Humphries to challenge their listing on the Index." (App. 142.) It stated that "[b]y failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to *qualified immunity*." (*Id.*; emphasis added.)

Since the opinion previously noted that the County as a public entity was not entitled to invoke "qualified immunity," the County filed a request for the court to correct what appeared to be an error in the opinion. The County suggested that the court had inadvertently substituted the phrase "qualified immunity" for "*Monell*" liability and submitted proposed language to correct the mistake.

On January 30, 2009, the court issued a second order amending the opinion as well as an amended opinion. (App. 5, 7.) As to the County's *Monell* liability, the court repeated its earlier conclusion that it was possible that the County Sheriff's Department had adopted a custom and policy that violated the Humphries' constitutional rights and remanded "to the district court to determine the County's liability under *Monell*." (App. 72.) In the disposition of the case, the court stated: "For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion." (*Id.*)²

E. The Ninth Circuit Determines Plaintiffs Are Prevailing Parties For Purposes Of A Fee Award.

Plaintiffs filed a motion for attorney's fees on appeal, arguing that they were prevailing parties given the court's determination that the State statutory scheme under CANRA and the CACI violated their rights to due process, and that the County did not create additional procedural protections in order to

² The court, as it did in its prior opinions, affirmed the grant of summary judgment to the individual defendants based on qualified immunity. (App. 72.)

prevent their constitutional injury. Plaintiffs sought \$652,000 as Lodestar attorney's fees and a 2.0 multiplier.

The County opposed the motion for attorney's fees, arguing, among other grounds, that plaintiffs had not prevailed as against the County in that as the opinion recognized, plaintiffs still had to prove that the constitutional violation at issue was the result of a policy, custom, or practice attributable to the County under *Monell*. The County also noted that plaintiffs had not sought or obtained summary judgment with respect to their claims for declaratory relief and that in fact no judgment for declaratory relief existed. Rather, the court had simply remanded to the district court for further proceedings consistent with the opinion.

On June 22, 2009, the Ninth Circuit issued its order determining that plaintiffs were prevailing parties for purposes of a fee award as against both the State and the County. (App. 1-4.) Citing earlier Ninth Circuit authority, the court held that neither a formal order nor judgment for declaratory relief was necessary for purposes of a fee award. (App. 2.) It concluded that its opinion finding "that the State and County procedures used in maintaining" the Index were "constitutionally insufficient" and "violate[d] the Humphries' procedural due process rights" "'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff,'" so as to justify a fee award. (*Id.*)

The court also found that based upon its earlier decisions in *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989) and *Truth v. Kent School District*, 542 F.3d 634, 644 (9th Cir. 2008), the “limitations to liability established in *Monell* do not apply to claims for prospective relief.” (App. 4.) Hence, plaintiffs’ failure to establish the County’s *Monell* liability did not impact whether plaintiffs were prevailing parties for purposes of a fee award. (*Id.*) The court concluded, however, that because of the County’s relatively minor role in the procedural scheme, it would only be liable for 10% of any attorney’s fees. (App. 3.) The court directed the Appellate Commissioner to issue a report and recommendation solely concerning the amount of reasonable fees. (App. 4.)

On December 2, 2009 the court issued an order adopting the October 2, 2009 report and recommendation of the Appellate Commissioner regarding the amount of fees. (Rep. App. 1-2.) It awarded the Humphries a total of \$590,950 in fees and \$1,630.92 in costs, with the State of California, through its Attorney General to pay \$533,322.83 of that amount, and Los Angeles County to pay \$59,258.09. (*Ibid.*)



SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this court expressly held that municipalities “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." *Id.* at 690, emphasis added. Despite this clear language, in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), the Ninth Circuit, alone among the federal appellate courts, expressly declined to follow *Monell* and held that claims for declaratory and prospective injunctive relief are not subject to *Monell's* policy, custom, or practice requirement.³ The result is that in this case, the respondents have been declared prevailing parties for purposes of an award of attorney's fees on appeal based upon the Ninth Circuit's determination that its opinion declaring a state law and county procedures unconstitutional *ex post facto* constituted declaratory relief as against the County. The Ninth Circuit did so even though it acknowledged that the question of whether the County inflicted any constitutional injury on the plaintiffs by virtue of a policy, custom, or practice remained at issue. (App. 2-3.)

³ Two circuits have expressly declined to follow *Chaloux*, holding that it is flatly inconsistent with the plain language of *Monell*. *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002); *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007). Two other circuits, without reference to *Chaloux*, have found that *Monell* governs claims for prospective relief. *Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332, 1342-47 (11th Cir. 1994).

Chaloux's limitation of the *Monell* causation factors to claims for damages does not withstand scrutiny. It is contrary to this Court's interpretation of the language and legislative history of § 1983 and undermines the basic principles of federalism that underlie the policy, custom, or practice causation requirement.

First, contrary to *Chaloux's* assertion, *Monell's* rejection of *respondeat superior* liability was not premised on the view that Congress had attempted to alleviate financial burdens on municipalities. Rather, congressional concern in the form of rejection of the Sherman amendment, focused on setting a limit on the sorts of obligations that the federal government could impose on municipalities by exposing them to damage claims. *Monell*, 436 U.S. at 694-95. Congress did not believe it could impose an obligation on municipalities to enforce laws that they were not otherwise empowered to enforce under state law and balked at holding them accountable for the acts of others. However, where municipalities were authorized to enforce the law, it could require that those laws be enforced in a manner consistent with the Constitution. Yet, that control over the actions of municipalities was limited to those circumstances where the entity itself inflicted the constitutional injury. The statutory language limiting liability to those who "subject or cause another to subject" the plaintiff to a constitutional violation necessarily repudiated *respondeat superior* as a basis for invoking the remedies of § 1983, which included both damages and equitable relief.

Second, following *Monell*, the court has repeatedly reaffirmed that the policy, custom, or practice requirement is a rule of causation going to core principles of federalism by limiting the circumstances in which federal power through § 1983 may invade the internal operations of municipalities. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997). While the court has announced this rule in the context of cases concerning claims for damages, these causation requirements and concerns of federalism apply with equal, indeed arguably even greater force with respect to claims for declaratory and prospective relief against municipalities. As the *Monell* court observed, damage claims act indirectly to compel particular actions by municipalities through deterring particular types of conduct. Yet, declaratory and prospective relief act directly upon public entities, with courts undertaking to review and declare the adequacy or inadequacy of particular actions or procedures. It is illogical to impose a higher standard of causation, i.e., proof of a policy, custom, or practice for purposes indirectly controlling municipalities through potential damage claims, while applying a lesser standard to more direct judicial intervention via declaratory or prospective injunctive relief.

Third, allowing claims for declaratory relief to proceed on a lesser standard of causation than applicable to claims for damages, leads to inconsistent and illogical results. For example, here, the Ninth Circuit has declared the County's procedures with

respect to the CACI to be violative of due process, without specifically identifying the particular procedures, and more importantly, acknowledging that it is an open question whether in fact these procedures constitute a policy, custom, or practice fairly attributable to the County under *Monell*. The result is that the County could prevail on liability based upon the absence of any unconstitutional procedure fairly attributable to the County yet, in contradictory fashion, be determined to have maintained an unconstitutional policy for purposes of declaratory relief. Moreover, in allocating attorney's fees 90%-10% between the State and the County, the Ninth Circuit necessarily made some determination of fault, albeit completely untethered to any standard for assessing liability enunciated by this Court.

Fourth, contrary to *Chaloux's* reasoning, application of the *Monell* requirements to a claim for declaratory or prospective relief is consistent with the manner in which this Court has treated official capacity claims against state officials under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *Chaloux* asserts that when an unconstitutional state law is left solely to municipal officials to enforce, then *Ex Parte Young* allows declaratory relief without attempting to show that the statute in question was attributable to a policy, custom, or practice of the municipality. But *Chaloux's* reasoning is particularly inapt here, where the State Attorney General responsible for enforcing the state law in question and indeed, in maintaining the Index, is a party to the

action. Moreover, *Chaloux*'s misreading of this Court's decision is even more fundamental. This Court has repeatedly invoked *Monell* in the context of official capacity suits against state officials noting that "the entity's 'policy or custom' must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Nothing in this Court's Eleventh Amendment jurisprudence supports abandonment of *Monell*'s policy, custom, and practice requirement with respect to claims against municipalities for declaratory relief.

As this Court has made plain in *Monell*, and in the long line of decisions following it, the policy, custom, or practice requirement is a rule of causation defining the limits of federal power. Unless a plaintiff establishes constitutional liability under that standard, no remedy, whether it be damages, injunctive or declaratory relief, is appropriate.



ARGUMENT

MONELL CORRECTLY CONCLUDED THAT ALL CLAIMS FOR RELIEF AGAINST A MUNICIPALITY UNDER § 1983, INCLUDING CLAIMS FOR DECLARATORY RELIEF ARE SUBJECT TO THE REQUIREMENT THAT THE PLAINTIFF PROVE THAT THE CONSTITUTIONAL INJURY WAS INFLICTED AS A RESULT OF A POLICY, CUSTOM, OR PRACTICE OF THE MUNICIPALITY.

In finding respondents to be prevailing parties as against the County for purposes of a fee award on appeal, the Ninth Circuit concluded that its opinion reversing summary judgment for the County and the State of California was tantamount to a grant of declaratory relief. (App. 2.) Although the County had opposed the fee motion on the ground that the court had expressly left open the issue of whether plaintiffs could establish that any constitutional violation was the result of a policy, custom, or practice under *Monell*, the court rejected the argument, relying on its previous decision in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), which held that claims for declaratory and prospective injunctive relief were not subject to the *Monell* requirements. (App. 3-4.)

In *Chaloux*, the plaintiffs challenged state garnishment procedures by filing suit against a county sheriff charged with enforcing the provisions under state law. 886 F.2d at 248. In finding that the claims for declaratory and prospective injunctive relief were not subject to the *Monell* policy, custom, or practice

requirements, the court construed those limitations as serving only “to alleviate the imposition of financial liability on local governments based solely on *respondeat superior* theory.” 886 F.2d at 250.

Yet, in *Monell*, the court plainly stated:

Local governing bodies . . . 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 or promulgated by that body’s officers.

Monell, 436 U.S. at 690; emphasis added.

As we discuss, review of *Monell* belies the Ninth Circuit’s narrow interpretation and confirms that based upon the statutory language and legislative history, a municipality is subject to the remedial scheme of § 1983 – whatever form the remedy may take – only where the constitutional injury was inflicted as a result of a policy, custom, or practice of the municipality.

A. The Language And Legislative History Of § 1983 Establish That Judicial Intervention, Whether In The Form Of Damages, Declaratory, Or Injunctive Relief Is Only Appropriate Against A Municipality Where The Injury Was Inflicted By The Municipality Itself, i.e., Through A Policy, Custom, Or Practice.

1. The Civil Rights Act of 1871 and rejection of the Sherman amendment.

In *Monell v. Department of Social Services*, 436 U.S. 658, the court reversed its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961) and held that municipalities were “persons” under § 1983. *Monell* arose from a challenge to official policies of the City of New York Department of Social Services and Board of Education, which compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. 436 U.S. at 660-61. Plaintiffs sought injunctive relief and backpay for periods of unlawful forced leave. *Id.* Suit was brought directly against the municipality and its various departments, as well as individuals in their official capacities. *Id.*

The district court granted summary judgment, finding the claims for prospective injunctive and declaratory relief moot because the city had changed its policies, and that plaintiffs’ claims for backpay were barred because the city and the individuals in their official capacities were not “persons” under § 1983 as

interpreted by *Monroe v. Pape*, 365 U.S. at 265. *Monell*, 436 U.S. at 662.

In reversing *Monroe*, Justice Brennan, writing for the Court, relied on virtually the same legislative history as the *Monroe* court concerning the Civil Rights Act of 1871, most particularly the 42nd Congress's actions with respect to what was termed the Sherman amendment.

There were three stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. Representative Shellabarger, acting for a House select committee, reported H.R. 320, as a bill to enforce the provisions of the Fourteenth Amendment, among other purposes. *Monell*, 436 U.S. at 665. That bill contained four sections, and section 1 is essentially codified as 42 U.S.C. § 1983. *Id.* As the court observed, section 1 “was the subject of only limited debate and was passed without amendment.” *Id.*, citing Cong. Globe, 42d Cong., 1st Session, 522 (1871) (hereinafter “Globe”). The remaining sections dealt with the other purpose of suppressing Ku Klux Klan violence and were the subject of the balance of congressional debate. *Monell*, 436 U.S. at 665.

Just prior to the vote on H.R. 320, Senator Sherman introduced an amendment to be added as section 7. Globe at 663. The amendment made the inhabitants of a municipality liable for damage inflicted by persons “riotously and tumultuously assembled. . . .” It allowed the recovery of damages in federal courts as suits against the county, city or parish in which

the damage had occurred. *Id.* However, execution of the judgment was not to run against the property of the government unit, but against the private property of any inhabitant. *Id.*

The House rejected several of the amendments made by the Senate, including the Sherman amendment, and the various versions of the bill went to conference committee. The conference committee draft of the Sherman amendment altered it substantially. It created a cause of action for persons injured by “any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . .” *Globe* 749, 755, quoted at *Monell*, 436 U.S. at 666, 702. In stark departure from the earlier version, it directly provided for municipal liability.

- The action could be maintained against the county, city or parish in which the riot had occurred. *Id.* at 667.
- If a judgment could not be satisfied by the individual defendants who had committed the violence, the judgment could be collected from the municipality by execution, attachment, mandamus, garnishment or any other proceeding, with the judgment itself a lien upon the municipal treasury. *Id.*

The House rejected this version of the Sherman amendment as well, with the result that a second conference substitute for the amendment abandoned municipal liability and, instead, made any person having knowledge of, and power to prevent, a conspiracy to violate civil rights, liable to any person injured by the conspiracy. *Monell*, 436 U.S. at 668-69; Globe 804. That amendment was eventually codified as 42 U.S.C. § 1986.

2. *Monell* construes rejection of the Sherman amendment as evidencing congressional understanding of the coercive power of civil claims and refusal to make municipalities vicariously responsible for the acts of others.

As Justice Brennan explained in *Monell*, the House's rejection of the prior versions of the Sherman amendment appeared to be based upon concerns that through the threat of damage awards, it indirectly imposed obligations on local municipalities to enforce the law and control the actions of third parties. These were obligations that the federal government had no constitutional power to impose, since the states and only the states could say what law enforcement or other powers would be exercised by their local governments.⁴ The court observed that:

⁴ The court quoted extensively from the views of Representative Blair and noted his concerns were shared by other
(Continued on following page)

[T]here was ample support for Blair’s view that the Sherman amendment, by putting municipalities to the Hobson’s choice of keeping the peace or paying civil damages,

representatives. 436 U.S. at 674-75. These included the following observations by Blair:

- The “amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. . . .
- [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to.
- [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .
- It was held also in the case of *Prigg vs. Pennsylvania*, 16 Pet. 539, 10 L.Ed. 1060 (1842), that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty.” Globe 795, alterations in original.

attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to “destroy the government of the States.”

436 U.S. at 679.

The *Monroe* court had interpreted Congress’s rejection of the early versions of the Sherman amendment as evidencing an intent that municipalities not be considered “persons” subject to the provisions of § 1983 at all. *Monroe*, 365 U.S. at 187. In contrast, the *Monell* court observed that while rejection of the Sherman amendment indicated doubt that the federal government could impose new law enforcement functions on a state and its municipalities, there was little dispute that Congress could constitutionally require states and municipalities to enforce state laws they were already empowered to enforce in a manner consistent with the federal Constitution. *Monell*, 436 U.S. at 679-90. The court held, however, that rejection of the Sherman amendment signaled congressional reluctance to impose vicarious liability on a municipality, a concern reflected in the language of § 1983 as originally passed which subjected to liability:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities

secured by the Constitution of the United States. . . .

436 U.S. at 691, quoting 17 Stat. 13, alterations in original.

As the court observed:

The . . . language plainly imposes liability on a government that, under color of some official policy, “causes” an employee to violate another’s constitutional rights. At the same time, that 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. Indeed, the fact that Congress did specifically provide that A’s tort became B’s liability if B “caused” A to subject another to a tort suggests that Congress did not intend section 1983 liability to attach where such causation was absent.

436 U.S. at 692.

Significantly, the court also observed that in *Rizzo v. Goode*, 423 U.S. 362 (1976) it had previously rejected an often cited justification for *respondeat superior*, i.e., that liability follows the right to control the actions of a tortfeasor. In *Rizzo*, the court rejected injunctive relief against supervisors where they did not personally know of or participate in the constitutional violations attributed to their employees. As the *Monell* court explained, in *Rizzo*, “we would appear to have decided that the mere right to control without any control or direction having been exercised and

without any failure to supervise is not enough to support section 1983 liability.” 436 U.S. at 693 n.58.

Thus, the *Monell* court held:

We conclude, therefore, 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.

Although *Monell* arose in the context of a claim for monetary relief, by its plain terms and analysis, it applies to all claims for relief under § 1983. Contrary to *Chaloux*’s characterization, rejection of the doctrine of *respondeat superior* in *Monell* was not the result of any concern that damage awards would financially devastate local public entities. To the contrary, the *Monell* court rejected that as a consideration, asserting that it was not supported by the congressional debates. 436 U.S. at 664 n.9. Rather, as noted above, *Monell* rested its holding on the language of § 1983 viewed against the background of congressional understanding of the coercive power of allowing civil claims and a reluctance to impose obligations on municipalities to control or protect against the conduct of others.

B. The Court Has Repeatedly Held That The Policy, Custom Or Practice Requirement Is A Rule Of Causation Implicating Federalism Concerns By Setting Limits On Judicial Intervention Into The Operation Of Municipal Governments.

Following *Monell*, this Court has uniformly reaffirmed the policy, custom or practice requirement as a rule of causation, even if members of the Court have at times sharply disagreed as to its application in particular cases.

See:

- *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) [“municipal liability is limited to actions for which the municipality is actually responsible”];
- *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality) [“For our purposes here, the crucial terms of the statute are those that provide for liability when a government ‘subjects [a person], or causes [that person] to be subjected,’ to a deprivation of constitutional rights. Aware that governmental bodies can act only through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person’s constitutional rights,” alterations in original]. *Id.* at 138 (Brennan, J., joined by Marshall J. and Blackman, J. concurring [“the

touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for the deprivation of rights protected by the Constitution”];

- *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) [“It is only when the “execution of the government’s policy or custom . . . inflicts the injury” that the municipality may be held liable under § 1983,” alteration in original];
- *Board of the County Comm’rs v. Brown*, 520 U.S. 397, 403 (1997) [“in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal ‘policy’ or ‘custom’ that caused the plaintiff’s injury”];
- *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997) [“We held in *Monell* . . . that a local government is liable under § 1983 for its policies that cause constitutional torts. These policies may be set by the government’s lawmakers, ‘or by those whose edicts or acts may fairly be said to represent official policy’”].

This court has repeatedly recognized that the policy, custom, and practice requirement draws a proper line between permissible and impermissible judicial intervention in the internal operation of local governments. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the court held that municipal liability

premised upon failure to train law enforcement officers was only appropriate where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. It is only then that inadequate training could “fairly be said to represent a policy for which the city is responsible and for which the city may be held liable if it actually causes injury.” 489 U.S. at 390. The court observed that allowing such cases to go forward “on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities,” and

[W]ould also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

Id. at 392.

Similarly, in *Board of the County Comm’rs v. Brown*, 520 U.S. 397 (1997), the court observed:

A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose.

520 U.S. at 415.

While these cases admittedly concerned claims for damages, that is a distinction without a difference. These causation requirements apply with equal, indeed arguably even greater force with respect to claims for declaratory and prospective relief against municipalities. As we discuss, it would be no more acceptable to constitutionalize “particular hiring requirements” (*Brown*, 520 U.S. at 415) or allow federal courts to engage in “endless exercise of second-guessing municipal employee-training programs” (*Harris*, 489 U.S. at 390) via declaratory or prospective injunctive relief based on the isolated actions of a single municipal employee than it would be through imposing a damage award for the same conduct.

C. The Statutory Language And Principles Of Federalism Underlying The *Monell* Policy, Custom, Or Practice Rule Of Causation Apply With Equal Force To Claims For Declaratory And Other Prospective Relief.

As noted, by its plain terms, *Monell* does not purport to limit the policy, custom, or practice causation requirement to claims for damages. To the contrary, *Monell* expressly states that this rule of causation applies to claims for “declaratory, or injunctive relief. . . .” *Monell*, 436 U.S. at 690. Indeed, *Monell* pointedly does not repeatedly tie the policy, custom, or practice requirement to damages claims, but rather, refers to it as a threshold requirement before a claim is even actionable under § 1983. In short, “a local government *may not be sued* under § 1983 for an

injury inflicted solely by its employees or agents.” *Id.*, emphasis added. It is only when “execution of a government’s policy or custom . . . inflicts the injury that the government as an entity is *responsible* under § 1983.” *Id.*; emphasis added; *see also Pembaur*, 475 U.S. at 478 [*Monell* is a case about responsibility”].

As stated in *Monell* and its progeny, it is only when a policy, custom, or practice of the municipality inflicts the constitutional injury that the defendant “shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress. . . .” 42 U.S.C. § 1983. Declaratory relief under 28 U.S.C. § 2201 is nothing more than an additional remedy to be afforded if and only if the plaintiff meets the causation requirements set forth in § 1983.⁵

⁵ 28 U.S.C. § 2201 reads in pertinent part as follows:

Section 2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall

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Moreover, as Justice Brennan stated in *Monell*, the 42nd Congress well understood that claims for damages under a federal statute were a means by which the federal government could indirectly impose obligations on states and municipalities to take particular actions. *Id.*, 436 U.S. at 679. As noted, the court concluded that Congress did not believe it could indirectly impose an obligation on municipalities to enforce state laws or undertake other acts that they were not empowered to enforce under state law. However, Congress could indirectly compel municipalities to enforce those laws they were authorized to enforce in a manner consistent with the United States Constitution by exposing them to potential damage claims, but only where injury was inflicted as a result of a policy, custom, or practice. Thus, indirect control over local public entities is subject to a policy, custom, or practice requirement. Yet, paradoxically, under the Ninth Circuit's view, direct control over a local public entity either through declaratory relief or prospective injunctive relief is subject to a lesser standard of causation. This illogical rule simply does not withstand scrutiny in light of the legislative history of § 1983 and the court's holding in *Monell*.

In addition, the federalism concerns this court has identified as inextricably linked to the policy, custom, or practice causation requirement apply with

have the force and effect of a final judgment or decree and shall be reviewable as such.

equal force to claims for declaratory or other prospective relief that operate directly on a public entity. While damage awards can pose a threat to a public treasury, declaratory and injunctive relief allow a court to directly control the manner in which a local public entity operates, and set specific standards or procedures for even the most basic government functions. As this court observed in *Rizzo v. Goode* in rejecting injunctive relief against municipal supervisors who had not personally violated the plaintiffs' constitutional rights:

The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees. However, on the facts of this case, not only is this novel claim quite at odds with the settled rule that in federal equity cases 'the nature of the violation determines the scope of the remedy,' . . . [Citation] but important considerations of federalism are additional factors weighing against it. Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' *Stefanelli v. Minard*, 342 U.S. 117, 120, 72 S. Ct. 118, 120, 96 L. Ed. 138 (1951), quoted in *O'Shea v. Littleton*, 414 U.S. [488] at 500, 94 S. Ct. at 678 [(1974)].

Rizzo, 423 U.S. at 378.

Similarly, here, the high level of intrusion into the operation of a municipality occasioned by declaratory relief is justified only when a plaintiff at least establishes that a constitutional injury has been inflicted as a result of some policy, custom, or practice fairly attributable to the public entity.

Further, claims for declaratory relief and prospective injunctive relief can have profound financial impact on a local public entity. Declarations with respect to the sufficiency or insufficiency of particular procedures, or prospective injunctive relief directing particular types of procedures be instituted, may spawn significant collateral costs. And as this case indicates, an award for declaratory relief can lead to fee awards, which in many cases may be substantial.

D. Applying A Lesser Standard Of Causation To Claims For Declaratory Relief Leads To Illogical And Inconsistent Results.

Allowing claims for declaratory relief to proceed on a lesser standard of causation than applicable to a claim for damages leads to inconsistent and illogical results. For example, here, the Ninth Circuit found that plaintiffs had essentially established declaratory relief as against the County because it had “held that the State and County procedures used in maintaining the Child Abuse Central Index . . . were constitutionally insufficient, and thus the Child Abuse and Neglect Reporting Act . . . ‘violates the Humphries’ procedural due process rights.’” (App. 2.) Yet,

what are the “procedures” of the County that have been declared violative of due process? The procedures in this particular case? Procedures that are the equivalent of a policy for purposes of *Monell*? Surely not the latter, since, as the Ninth Circuit acknowledged, at this stage of the litigation the existence of a policy, custom, or practice under *Monell* has not even been litigated and remains an open issue.

Moreover, in apportioning the fee award 90%-10% as between the State and the County, the court determined that the State would bear the lion’s share because it crafted “the statutory and regulatory provisions that created the CACI and its attendant review procedures[,]” while the County had failed “to craft its own additional procedural protections. . . .” (App. 3.) This allocation, however, necessarily required the court to make some assessment of fault and ultimate liability, albeit untethered to any substantive principle of liability. Thus, the County is liable for failing to craft additional procedures, without any showing that the County, through a responsible policymaking official, should have been so plainly aware of the need for additional training, procedures or policies, that the failure to take action rose to the level of deliberate indifference. *See, e.g., City of Canton v. Harris*, 489 U.S. at 388; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1988).

In addition, the very question of whether the County could, under state law impose its own procedures over and above those set forth in CANRA was an issue that went squarely to the County’s potential

liability under *Monell*. California law suggests that the County was not free to impose its own procedures under state law and substantial federal authority supports the proposition that *Monell* liability cannot be imposed on a public entity merely for enforcing state law.⁶

As the Ninth Circuit acknowledged in its opinion, the County's liability for damages under *Monell* remains at issue. (App. 72.) With respect to the damage claim, it could be determined that in fact no policy, custom, or practice fairly attributable to Los Angeles County inflicted any sort of constitutional injury on the plaintiffs. Whether any alleged injury was inflicted as a result of a random act of an employee,

⁶ See, *Birkenfeld v. City of Berkely*, 17 Cal. 3d 129, 150-52, 550 P.2d. 1001; 130 Cal. Rptr. 465 (1976) [city could not create additional procedures for unlawful detainer actions]; *American Financial Services Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1251, 104 P.3d 813, 23 Cal. Rptr. 3d 453 (2005) [city ordinance could not regulate predatory lending practices more stringently than state regulations]; *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 790-93 & n.4 (7th Cir. 1991) [merely enforcing state law is insufficient to establish a municipal policy under *Monell*]; *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) [county not liable under *Monell* for County Social Services Board's termination of director, where Board "enjoyed its discretion to fire (director) at the prerogative of and within the constraints imposed by the (state)"]; *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) [county not liable under *Monell* for county judge's ministerial role in enforcing unconstitutional state statute]; *Doby v. De Crescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ["when a county is merely enforcing state law, without adopting any particular policy of its own, it cannot be held liable under . . . *Monell* . . ."].

or whether, in the end the County cannot be held liable merely for enforcing state law, the result is the same – a determination that is squarely at odds with the finding of “liability” with respect to the declaratory relief claim.

The Ninth Circuit’s asymmetrical imposition of municipal liability depending upon the nature of the relief sought must be rejected. There is no justification for imposing a lower causation threshold on claims for declaratory or other prospective relief against public entities than for damages. As recognized by *Monell* and its progeny, the policy, custom, and practice requirement is a rule of causation defining the limits of federal power and absent establishing constitutional liability under those standards, no remedy, whether it be damages, injunctive or declaratory relief, is appropriate.

E. Application Of The *Monell* Requirements To Claims For Declaratory Or Other Prospective Relief Is Consistent With The Manner In Which The Court Has Treated Official Capacity Claims Against State Officials.

As noted, in *Chaloux*, the Ninth Circuit held that plaintiffs seeking to challenge Idaho execution and garnishment statutes could properly obtain declaratory and injunctive relief against a county sheriff and other county officials in their official capacities without satisfying *Monell*’s policy, custom, or practice requirement. As we have explained,

Chaloux premised its holding on an incorrect interpretation of *Monell* as being limited solely to damage claims against local public entities. It further found, however, that its approach – allowing plaintiffs to obtain declaratory and injunctive relief against local officials in their official capacity based on enforcement of state law – was consistent with this Court’s decision in *Ex Parte Young*, 209 U.S. 123 (1908) allowing claims for injunctive relief against state officials charged with the responsibility of enforcing state law. See *Chaloux*, 886 F.2d at 251. The Ninth Circuit concluded that because only county sheriffs could enforce the state law at issue, they were proper parties under *Ex Parte Young. Id.*

Yet, *Chaloux*’s reasoning does not withstand scrutiny. As a threshold matter, here, plaintiffs have brought an official capacity suit against the very state official charged with defending the constitutionality of all state laws and maintaining the Index – the California Attorney General. And, plaintiffs’ claim for declaratory relief against the County is premised on allegations not simply that the County was merely enforcing an unconstitutional state law, but also purported County policies, customs, and practices concerning what information it would provide to the state in requesting that individuals be taken off the database. (ER 24-25.) Thus, *Chaloux*’s rationale for invoking *Ex Parte Young* is simply inapplicable here since the actual state official charged with enforcing state law is a defendant and, more fundamentally, one aspect of plaintiffs’ declaratory relief claim is

premised upon the conduct of individual county employees.

More critically, *Chaloux* misreads this Court's Eleventh Amendment jurisprudence as purportedly making prospective relief available against state officials without establishing action fairly attributable to the state equivalent to those factors imposing *Monell* liability on municipalities. Yet, this Court has repeatedly invoked *Monell* in discussing the manner in which state officials may be sued in their official capacity for enforcing state law.

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

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. [Citation.] More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a “‘moving force’” behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell* [436 U.S.] at 694); thus, in an official-capacity suit, the entity's “policy or custom” must have played a part in the violation of federal law.

Id. at 166, parallel citations omitted, original emphasis.

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

Indeed, consistent with *Hafer* and *Graham*, in *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007) the court rejected claims for prospective injunctive relief against *state officials* because plaintiffs failed to satisfy *Monell’s* requirements of a policy, custom or practice attributable to the state as causing plaintiffs’ injuries.

The same is true with respect to claims for declaratory and other prospective relief against County officials in their official capacity or against a county directly itself. The challenged action or statute must be fairly attributable to the County itself. Nothing in this Court’s Eleventh Amendment jurisprudence supports, let alone compels abandonment of *Monell’s* policy, custom, and practice requirements to claims against municipalities for declaratory or other prospective relief.



CONCLUSION

Petitioner respectfully submits that any claim for declaratory relief is subject to the *Monell* policy, custom or practice requirement. Because petitioner's liability under *Monell* remains an open issue, respondents are not prevailing parties under *Hanrahan v. Hampton*, 446 U.S. 754 (1980) and the Ninth Circuit's order determining respondents to be prevailing parties and subsequent fee award, must be reversed.

Respectfully submitted,

TIMOTHY T. COATES, ESQ.

Counsel of Record

ALISON M. TURNER, ESQ.

LILLIE HSU, ESQ.

GREINES, MARTIN, STEIN & RICHLAND LLP

5900 Wilshire Boulevard, Twelfth Floor

Los Angeles, California 90036

Telephone: (310) 859-7811

Facsimile: (310) 276-5261

MARK D. RUTTER, ESQ.

CARPENTER, ROTHANS & DUMONT

888 South Figueroa Street, Suite 1960

Los Angeles, California 90017

Telephone No.: (213) 228-0400

Facsimile No.: (213) 228-0401

Counsel for Petitioner

Los Angeles County, California