No. 14-542

In The
Supreme Court of the United States

MICHAEL BARNES, VENTURA COUNTY SHERIFF'S OFFICE, and PATRICIA MURPHY,

Petitioners,

v.

FREDERICK JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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AMICUS CURIAE SUBMITS THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties (CSAC) respectfully submits this brief as *amicus curiae* in support of Petitioners.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae CSAC is an association of all 58 of the California counties. The present Ninth Circuit opinion[2] unjustly exposes California counties to unprecedented liability under 42 U.S.C. § 1983 (§ 1983) for alleged failure to supervise a sheriff's deputy who failed to give a *Miranda*[3] warning to a detainee, whom a jury ultimately convicted of first degree murder without learning of the unwarned self-incriminatory statement.

The present opinion violates or ignores several of this Court's most important precedents: the *Monell*[4] doctrine against § 1983 *respondeat superior* liability,

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amicus curiae* made a monetary contribution to this brief's preparation or submission. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

[2] *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

the *Chavez*[5] opinion precluding § 1983 liability for mere failure to give *Miranda* warnings, and (of unique importance to California counties) the *McMillian*[6] opinion holding that state law determines whether sheriffs act for the state or county when enforcing a state's criminal law. The present opinion also rejects a decade-old opinion of the California Supreme Court[7] holding that under California law, California sheriffs and counties are not subject to *Monell* liability under § 1983 arising from enforcement of California criminal law.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The present opinion holds that a "policy of inaction" of a "Sheriff's Department" of "failure to supervise" its deputies supports *Monell* liability. That amounts to *respondeat superior* liability in violation of *Monell*. To achieve that result, the Ninth Circuit

[5] *Chavez v. Martinez,* 538 U.S. 760 (2003).

[6] *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781 (1997).

[7] *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004).

ignored *McMillian*, in which this Court held that state (not federal) law determines the legal authority conferred on sheriffs for § 1983 liability purposes. The result will be *respondeat superior* liability against California counties in cases where unconstitutional conduct is alleged against sheriff's deputies – an unnecessary result because § 1983 already provides an adequate remedy against individual wrongdoers.

ARGUMENT

THE PRESENT NINTH CIRCUIT OPINION CREATES THE EQUIVALENT OF *RESPONDEAT SUPERIOR* LIABILITY UNDER § 1983

This Court has consistently held that "vicarious liability is inapplicable to § 1983 suits" and *respondeat superior* cannot be the basis for the § 1983 liability of local government entities.[8] The present opinion superficially acknowledges that "a local government body [ ]cannot be held liable under § 1983 '*solely* because it employs a tortfeasor,'" but then approves § 1983 liability for a "policy of inaction" consisting of a "Department's complete failure to supervise the practices of [its] deputies."[9] This holding

[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); see also *Monell*, 436 U.S. at 691; *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011).

[9] *Jackson*, 749 F.3d 755, 762-63 (emphasis in original), *quoting Monell*, 436 U.S. at 691.

is irreconcilable with longstanding precedent of this Court and the California Supreme Court.

As an initial matter, California counties cannot have any policy other than a "policy of inaction" over a sheriff's law enforcement functions, because California law prohibits them from interfering in that area, as the California Supreme Court explained in its *Venegas* opinion.[10] Second, the "failure to supervise" component of the Ninth Circuit's present opinion vastly expands this Court's holding in *City of Canton v. Harris*, in which this Court recognized limited circumstances in which a municipal entity could be liable under § 1983 for "inaction" in failing to *train* employees, but said nothing about liability stemming from failing to *supervise*.[11]

In *Monell*, this Court determined that the language of § 1983 and its legislative history "compel[led] the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."[12] Accordingly, this Court held that those who seek to impose liability on local government entities under § 1983 must prove that "action pursuant to official municipal policy" was the "moving force" behind their injury.[13] "Official municipal

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[10] *Venegas*, 32 Cal.4th 820 (2004).

[11] *City of Canton v. Harris*, 489 U.S. 378 (1989).

[12] *Monell*, 436 U.S. at 691.

[13] *Id*. at 691, 694.

policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."[14] In limited circumstances, this Court has also recognized that "a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983."[15]

For claims based on failure to train, municipal liability is at its "most tenuous,"[16] and the standard for proving such liability is strict: "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[17] That standard requires a stringent showing of fault and causation.[18] As this Court explained, it would be wholly insufficient to hold a municipal entity liable under § 1983 if one of its employees just happened to apply a valid policy in an unconstitutional manner, because liability

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[14] *Connick*, 131 S. Ct. at 1359.

[15] *Id.*

[16] *Id.*; see also *Oklahoma City v. Tuttle*, 471 U.S. 897, 822-23 (1985).

[17] *Canton*, 489 U.S. at 388.

[18] See *Canton*, 489 U.S. at 388-90; *Connick*, 131 S. Ct. at 1359-60; *Bd. of the County Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407, 410-412 (1997).

would then rest on *respondeat superior*.[19] Rather, the plaintiff must prove a "deliberate" or "conscious" choice by the relevant municipal policymakers to retain a deficient training program that they were on actual or constructive notice caused municipal employees to violate citizens' constitutional rights, and the plaintiff must also prove that the identified training deficiency actually caused the plaintiff's claimed injury.[20] Additionally, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."[21]

Despite this Court's admonition that municipal liability is at its "most tenuous" when based on failure to train, some circuits (including the Ninth Circuit in the present case) have blurred the distinction between training and supervision.[22] The difference is

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[19] *Canton*, 489 U.S. at 387.

[20] *Canton*, 489 U.S. at 389-91; *Connick*, 131 S. Ct. at 1359-60.

[21] *Connick*, 131 S. Ct. at 1360 *quoting Bryan Cty.*, 520 U.S. at 409.

[22] See, e.g., *Jackson*, 749 F.3d at 763*; Mize v. Tedford*, 375 F. App'x 497, 500 (6th Cir. 2010) ("[t]his 'failure to supervise' theory of municipal liability is a rare one. Most agree that it exists and some allege they have seen it, but few actual specimens have been proved."); *Varela v. Jones*, 746 F.2d 1413, 1419 (10th Cir. 1984) ("Such a custom or policy may include its continuing failure to train, supervise, or discipline its police force."); *Thomas v. Roach*, 165 F.3d 137, 145 (2d Cir. 1999) ("A municipality may be liable under § 1983 . . . where the City's

(Continued on following page)

critically important. A failure-to-train claim focuses on the adequacy of a training program, and the correlation between the alleged deficiencies in the training program (of which policymakers were aware) and the constitutional violation at issue.[23] In *Canton*, this Court explained it would not "suffice to prove that an injury or accident could have been avoided if an officer had better or more training sufficient to equip him to avoid the particular injury-causing conduct;" rather, the injured party must prove that the deficiency in training actually caused the officer's constitutional violation.[24]

An entity is not a living human being, and can only act through authorized officers. Rarely (if ever) do officers near the top of a large entity's pyramid supervise its low-level employees on a one-to-one basis. Applying *Canton*'s reasoning, it should be insufficient to plead entity liability based on an allegation that a low-level employee was unsupervised; rather, the accuser should have to allege, at a minimum, that lack of supervision actually caused (not merely allowed) the low-level employee to violate the Constitution.[25] That would be an impossible standard, because merely failing to hover over subordinates does not actually cause them to misbehave.

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failure to supervise or discipline its officers amounts to a policy of deliberate indifference.").

[23] *Canton*, 489 U.S. at 388-91.

[24] *Id*. at 391.

[25] See *id.*

The opinion holds that a § 1983 *Monell* claim was adequately stated by alleging a sheriff's department's "policy of inaction" in that a deputy routinely declined to read *Miranda* warnings as a "ploy" and because of the "regular nature" of his conduct, the "Department" knew or should have known this was occurring.[26] Such allegations are deficient under the pleading standard set forth in *Ashcroft v. Iqbal*,[27] because there can be no "plausible" § 1983 claim based on *Monell* without a conscious act on the part of policymakers to deliberately engage in a course of action or inaction such that it could be said that the Department "caused" the unconstitutional conduct.[28]

Moreover, this Court has held that an officer's failure to give a *Miranda* warning does not, in and of itself, amount to a constitutional violation.[29] In holding otherwise, the Ninth Circuit has effectively

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[26] *Jackson*, 749 F.3d at 763-64.

[27] *Ashcroft*, 556 U.S. at 678-79.

[28] See *Canton*, 489 U.S. at 389-91; *Connick*, 131 S. Ct. at 1359-60.

[29] See *Chavez v. Martinez*, 538 U.S. 760, 772 (2003) (failure to read *Miranda* warnings to suspect did not violate suspect's constitutional rights and "cannot be grounds for a § 1983 action"); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (stating that *Miranda* rights are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected"); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendment . . . but is instead justified only by reference to its prophylactic purpose").

eliminated the need for a plaintiff to demonstrate a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation," much less a link that meets the rigorous *Canton* standards.[30]

The standards of fault and causation applicable to § 1983 against local government entities must be sufficiently rigorous to ensure that liability is attributed to the entity only for the actions of the entity itself because, as this Court previously recognized, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."[31] The Ninth Circuit's present opinion ignores these standards and opens local government entities to "unprecedented liability under § 1983" that this Court has warned against, and has consistently tried to avoid.[32]

A "SHERIFF'S DEPARTMENT" IS NOT A COUNTY POLICYMAKER IN MATTERS RELATED TO ENFORCEMENT OF CALIFORNIA CRIMINAL LAW

Last year, a Ninth Circuit panel majority in *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir.

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[30] *Canton*, 489 U.S. at 385, 391-92.

[31] *Canton*, 489 U.S. at 392.

[32] *Canton*, 489 U.S. at 391.

2013) ruled that a district attorney's failure to create a *Brady*[33] index was attributable to a county rather than to the state. The opinion stopped short of repudiating an on-point opinion of the California Supreme Court in *Pitts v. County of Kern*, which held that California district attorneys act for the State of California and are not persons subject to suit under § 1983 in matters related to enforcement of California criminal law.[34] Having taken an inch in *Goldstein*, the present opinion takes a mile, rejecting the California Supreme Court's on-point *Venegas* opinion, even though both the *Pitts* and *Venegas* opinions rested on largely the same statutory framework applicable to both district attorneys and sheriffs.[35] As a result, California counties now face liability for policies of "inaction" in areas where they have no legal authority to make policy, and where they are commanded by California law not to interfere.[36]

In a § 1983 policymaker context, this Court has held that "'whether an official had final policymaking authority is a question of state law.' [Citation.] Thus the identification of policymaking officials is not a question of federal law. . . . The States have extremely wide latitude in determining the form that local government takes. . . ."[37] This Court has held that the

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[33] *Brady v. Maryland*, 373 U.S. 83 (1963).

[34] *Pitts v. County of Kern*, 17 Cal.4th 340, 356-62 (1998).

[35] *Jackson*, 749 F.3d at 764-66.

[36] See Cal. Gov't Code § 25303.

[37] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

views of a state's highest court with respect to state law are binding on federal courts.[38] That is equally true when the outcome of a federal claim depends on an interpretation of state law.[39]

In *McMillian v. Monroe County*, this Court concluded that sheriffs in Alabama act for the state in law enforcement matters, based on state law.[40] The California Supreme Court, using the same methodology and relying on the groundwork laid in its *Pitts* opinion, reached the same conclusion for California sheriffs in its *Venegas* opinion.[41] If the California Legislature disagreed with the California Supreme Court's interpretation of California statutory law in such matters, it could have amended California statutes to compel an opposite result, as it has done in analogous situations. For example, the California Supreme Court held (in 1979) that law enforcement officers could be presumed negligent if they violated procedures set forth in their tactical manuals.[42] The California Legislature disagreed that tactical manuals exemplified official policy, and responded by enacting a statute providing that negligence cannot

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[38] *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

[39] *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

[40] *McMillian v. Monroe Cty.*, 520 U.S. 781, 792-93 (1997).

[41] *Venegas*, 32 Cal.4th 820 (2004).

[42] *Peterson v. City of Long Beach*, 24 Cal.3d 238 (1979).

be presumed for violating policies that have not been formally adopted as statutes, ordinances or agency regulations.[43] In that example, the Legislature intended to overrule the California Supreme Court on a question of state law affecting law enforcement liability, and effectively did so.[44] Nothing prevented the Legislature from legislatively overruling the *Venegas* opinion in the decade since it was handed down, if California's state lawmakers believed that the California Supreme Court misunderstood or misapplied California law.

In a case that did not arise under § 1983, the California Court of Appeal, applying well-established California law, held that "[i]nvestigation and prosecution of state criminal law are statewide concerns, not municipal affairs."[45] That opinion should have been followed by the Ninth Circuit, since it predated any of the Ninth Circuit opinions on the same subject cited in the present opinion.[46] A decision of a California Court of Appeal on an issue of California law is supposed to be binding on a federal court if there is "no California Supreme Court decision on point, and

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[43] Cal. Evid. Code § 669.1.

[44] See *Minch v. California Highway Patrol*, 140 Cal.App.4th 895, 907 (2006).

[45] *Rivero v. Superior Court*, 54 Cal.App.4th 1048, 1059 (1997).

[46] *Jackson*, 749 F.3d at 764.

no indication that the California Supreme Court would disagree."[47]

The California Supreme Court's 2004 *Venegas* opinion was presaged by its 1998 *Pitts* opinion, which employed the statutory interpretive presumption that the word "person" in a statute excludes the sovereign, and therefore excludes the state.[48] In accordance with that interpretive presumption, California courts traditionally interpret the word "person" in California statutes to exclude the State of California.[49] This Court likewise interprets the word "person" as used in § 1983 consistently with that interpretive presumption: a state is not a "person" under § 1983.[50] When sued in official capacity for law enforcement conduct, California sheriffs or their departments are interchangeable with the State of California, and therefore are not "persons" under § 1983.

This Court has held that "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or

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[47] *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 n.7 (9th Cir. 2011).

[48] See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000).

[49] *Trinkle v. California State Lottery*, 71 Cal.App.4th 1198, 1203 (1999) (a California state agency is not a "person" within the meaning of the California Unfair Competition Act).

[50] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

officials responsible for establishing final policy with respect to the subject matter in question . . . whether an official had final policymaking authority is a question of state law."[51] An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."[52] Therefore, an official-capacity suit based on policy liability is a suit against the entity for which the policymaker has final authority to make policy.

To impose liability against an entity under § 1983, a plaintiff must show, *inter alia*, that the entity had a policy that was the moving force behind the constitutional violation.[53] When an entity's officer is sued in official capacity under § 1983, it "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent."[54] In the present case, official-capacity liability depends upon whether state law vested the sheriff with relevant final policymaking authority to make entity (that is, county) policy, and whether the sheriff's relevant act resulted from a deliberate choice made from among various alternatives.[55]

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[51] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

[52] *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

[53] See *Plumeau v. School Dist. No. 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

[54] See *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

[55] See *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

This Court has held that Eleventh Amendment protection "applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes."[56] The California Constitution provides that the "State is divided into counties which are legal subdivisions of the State."[57] Without acknowledging the California Constitution or analyzing California law, the Ninth Circuit previously held that California counties are municipalities for purposes of § 1983 liability.[58] The present opinion carries the Ninth Circuit's disregard of California law a step further by rejecting an on-point opinion of the California Supreme Court interpreting California law on that subject. Only this Court can put matters right.

CONCLUSION

In this case, the event that gives rise to potential liability is the offender's truthful admission (without a *Miranda* warning) that he was at the crime scene, contradicting his phony alibi that he was with his girlfriend. If truth is at all relevant, no set of facts could present a less-compelling justification for expanding § 1983 liability. Such an expansion is wholly

[56] *Will*, 491 U.S. at 70.

[57] Cal. Const., Art. XI § 1(a).

[58] *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989).

unnecessary in light of the availability of § 1983 liability against individual wrongdoers. This Court should reject the Ninth Circuit's result-oriented interpretation of California law, reassert prior interpretations of § 1983 *Monell* liability, and reaffirm that state courts are the ultimate interpreters of state law.

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