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IN THE SUPREME COURT OF THE UNITED STATES

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LOS ANGELES COUNTY, CALIFORNIA, :

Petitioner :

v. : No. 09-350

CRAIG ARTHUR HUMPHRIES, ET UX. :

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Washington, D.C.

Tuesday, October 5, 2010

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:00 p.m.

APPEARANCES:

TIMOTHY T. COATES, ESQ., Los Angeles, California; on  
behalf of Petitioner.

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf  
of Respondents.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 09-350, Los Angeles County v. Humphries.

5 Mr. Coates.

6 ORAL ARGUMENT OF TIMOTHY T. COATES

7 ON BEHALF OF THE PETITIONER

8 MR. COATES: Mr. Chief Justice, and may it  
9 please the Court:

10 In Monell v. Department of Social Services,  
11 this Court held there could be no liability against a  
12 local public entity under section 1983 unless the  
13 plaintiff proved causation, namely that the injury that  
14 was inflicted was inflicted as a result of a custom,  
15 policy, or practice of that local public entity.

16 The Ninth Circuit, however, in this case has  
17 imposed ex post facto declaratory relief on the County  
18 of Los Angeles as well as a substantial fee award, while  
19 acknowledging that it has not, in fact, determined  
20 whether the injury suffered by the plaintiffs and  
21 subject to declaratory relief was the result of a  
22 policy, custom, or practice fairly attributable to the  
23 County of Los Angeles. It did so because the Ninth  
24 Circuit has developed a digression from the Court's  
25 jurisprudence in Monell; namely, in the Ninth Circuit,

1 claims for prospective relief, both injunctive and  
2 declaratory relief, are not subject to the Monell  
3 requirements.

4 We submit that this is flatly inconsistent  
5 with Monell and erodes the important principles of  
6 federalism that are the motivating factors for the  
7 Monell causation requirement.

8 JUSTICE SCALIA: What was the -- what was  
9 the basis for that -- for that exception, that  
10 declaratory judgment does not affect the fisc of the --

11 MR. COATES: Yes, essentially in the Chaloux  
12 case --

13 JUSTICE SCALIA: It does -- it does, though,  
14 if you have attorneys' fees. What -- what was the total  
15 attorneys' fee award in this case?

16 MR. COATES: As to the County, it's \$58,000.  
17 But the overall award is far above that, and that's just  
18 for appellate attorneys' fees. We're not even talking  
19 trial fees at this time.

20 JUSTICE SCALIA: What's far above? Like  
21 what? I suspect --

22 MR. COATES: 600-and-some-odd thousand  
23 dollars.

24 JUSTICE SCALIA: I suspect the case is  
25 mostly about attorneys' fees.

1 JUSTICE GINSBURG: But there was no  
2 objection on the part of the State. The State was to  
3 pay the lion's share of the fees, I think 90 percent,  
4 right?

5 MR. COATES: Correct. The State has not  
6 contested that.

7 JUSTICE GINSBURG: And the State is not  
8 contesting.

9 MR. COATES: The State has not contested  
10 that, correct.

11 JUSTICE KENNEDY: Does the State make that  
12 payment under an Ex parte Young theory?

13 MR. COATES: Yes, yes. It's a suit against  
14 the State under an Ex parte Young theory, since they  
15 maintain the statute.

16 JUSTICE KENNEDY: If you sue the  
17 municipality, if they deny a marriage license, do you  
18 have to sue under 1983, or you can just sue alleging a  
19 Federal cause of action under -- because of a denial of  
20 a constitutional right?

21 MR. COATES: Well, it would have to be under  
22 section --

23 JUSTICE KENNEDY: It would be like a Bivens  
24 action, I guess.

25 MR. COATES: It would have to be -- the

1 Court has recognized, against local municipalities'  
2 liability under section 1983.

3 JUSTICE KENNEDY: The only way to sue a  
4 municipality for a constitutional violation is under  
5 1983?

6 MR. COATES: In a direct civil cause of  
7 action, I believe that is correct, Your Honor.

8 JUSTICE SCALIA: Well, you could get the  
9 individual officer who's denying the marriage license or  
10 whatever the offensive act is. You could sue that  
11 person under 1983 and get -- and get injunctive relief,  
12 I suppose.

13 MR. COATES: That is correct. You could  
14 also sue the individual.

15 JUSTICE KENNEDY: But could you sue outside  
16 of 1983?

17 MR. COATES: The individual, for a Federal  
18 constitutional remedy?

19 JUSTICE KENNEDY: Just to get -- the  
20 marriage license example -- just to get an order  
21 demanding issuance of the license.

22 MR. COATES: No, I believe you would still  
23 have to have an operative statute to get it into Federal  
24 court for declaratory relief requires some -- some  
25 basis.

1 JUSTICE KENNEDY: And that has to be a  
2 statute -- it has to be 1983?

3 MR. COATES: I believe for a constitutional  
4 claim of this type, it would be section 1983. You might  
5 find an employment case where you might have Title VII  
6 concerns. It depends on the right that you're talking  
7 -- that's at issue.

8 JUSTICE SOTOMAYOR: What happens if the  
9 individual says I'm going to ignore the injunction? Can  
10 you go to the State and force the State to -- in that  
11 circumstance, to get someone to issue the license on  
12 your behalf?

13 MR. COATES: If it's -- we're talking about  
14 the State, or are you referring to the municipality?

15 JUSTICE SOTOMAYOR: Or the municipality. I  
16 misspoke.

17 MR. COATES: You would not, unless you  
18 showed that there was a policy, custom, or practice.  
19 You might have one outlying --

20 JUSTICE SOTOMAYOR: So what you're saying is  
21 that a State agent or a municipality can continue to  
22 ignore a constitutional violation until, what -- you're  
23 denied the license five times?

24 MR. COATES: Well, no.

25 JUSTICE SOTOMAYOR: How many times do you

1 have to show that you're not getting a license you're  
2 entitled to?

3 MR. COATES: Well, say, for example, that  
4 one brought to the attention of a policymaking official  
5 that this is what was going on --

6 JUSTICE SOTOMAYOR: They wouldn't know  
7 that --

8 MR. COATES: -- and then you have the  
9 deliberate indifference by a policymaking official. I  
10 submit that, under Monell, that might provide a basis  
11 under the Court's case law.

12 JUSTICE SOTOMAYOR: All right. So what do  
13 you do with CANRA section 11178(a)(2), which tells you  
14 that the municipality is responsible for the accuracy,  
15 completeness, and retention of the reports sent to the  
16 State?

17 It's not your policy to ignore your  
18 obligation and not figure out what to do about the  
19 retention of improperly submitted names?

20 MR. COATES: Well, the difficulty in this  
21 case with respect to that is there are no State  
22 standards in terms of evaluating the accuracy or when  
23 stuff is removed, when someone wants to be removed from  
24 the database. Even the Ninth Circuit recognized that,  
25 that it was kind of imposed on local public entities



1 through the back door, that there are no specific  
2 criteria in the statute for removing someone from --  
3 from the list.

4 And that would require the County to start  
5 trying to create its own policies or its own procedural  
6 schemes.

7 JUSTICE SOTOMAYOR: But that's what it's  
8 charged with doing. It's charged with the  
9 responsibility for the accuracy, completeness, and  
10 retention of these reports.

11 MR. COATES: But --

12 JUSTICE SOTOMAYOR: So if you're charged  
13 with the accuracy, completeness, and retention of the  
14 reports, why shouldn't you be responsible for the  
15 failure to maintain accurate reports?

16 MR. COATES: Because it's not so much that  
17 they are inaccurate; it's the standards used to remove  
18 someone from the list or not. Because we may have  
19 information showing culpability, information showing not  
20 culpability, but we don't have a standard to tell us  
21 when to remove them from the database and when to leave  
22 them in, because that's defined by the State.

23 More importantly, we don't have any  
24 procedures on how to go about that, because the  
25 statutory scheme doesn't have any for doing that.

1 JUSTICE ALITO: Well, the Respondents here  
2 argue, don't they, that you should have created a  
3 procedure on your own, right?

4 MR. COATES: Correct.

5 JUSTICE ALITO: Now, if the -- presumably,  
6 that could be brought to the -- that could be brought  
7 before someone who is a County policymaker, couldn't it,  
8 when you are talking about something that's going --  
9 that's ongoing in the future?

10 MR. COATES: That's true. That could be  
11 brought to the attention of a policymaker.

12 JUSTICE ALITO: And then that would fall  
13 within Monell.

14 MR. COATES: Correct.

15 JUSTICE ALITO: So that's why I'm somewhat  
16 puzzled about what this case is about.

17 When are we going to get into a situation in  
18 which the plaintiffs are asking for prospective relief  
19 and the matter cannot be brought before a municipal or  
20 County policymaker?

21 MR. COATES: No, I agree with Your Honor. I  
22 mean, I think that most of these cases do fit neatly  
23 within the Monell framework if a plaintiff pursues them  
24 within that framework.

25 The Ninth Circuit doesn't require that,

1    though, and kind of just simply lumps the County  
2    together with the State and says the State statute's  
3    unconstitutional.  You're charged with enforcing it.  
4    Declaratory relief against both of you.

5                   CHIEF JUSTICE ROBERTS:  You concede, I take  
6    it, or acknowledge that one episode can be the basis --  
7    I mean, going forward -- for a determination that the  
8    defendant has a policy, custom, or practice.

9                   MR. COATES:  You can.  If you have a  
10   policymaker who understands the situation, makes a  
11   deliberate decision, yes, I think can you come forward  
12   with a Monell claim.

13                  JUSTICE SOTOMAYOR:  Well, that's your  
14   adversary's argument, which is by this lawsuit, you have  
15   been told that there's something wrong -- it seems  
16   pretty natural -- that a report would be kept on the  
17   registry that has been declared just plain wrong.

18                  The court has said there's no foundation  
19   whatsoever for the accuracy of what's in that report,  
20   and you have failed to establish a procedure to remove  
21   the name.  Why aren't you liable under Monell?

22                  MR. COATES:  Well, as a factual matter, the  
23   one thing the Ninth Circuit said it wasn't doing was  
24   figuring out whether this met the policy, custom, or  
25   practice requirement of Monell, because under its case

1 law it doesn't have to do so. And, in fact, in the fee  
2 order, it said -- declined to do so and, in fact, it has  
3 remanded on the damage portion of the case,  
4 acknowledging that Monell claims remain open.

5 We also contend that for purposes of  
6 potential Monell liability that we may not be free under  
7 State law to add additional procedural protections.  
8 That area may be pre-empted by the State through implied  
9 pre-emption under California law.

10 JUSTICE ALITO: Now, if that's the case, why  
11 wouldn't one of the following be possible?

12 If you -- you say we have no discretion  
13 here. We are required to -- we are totally bound by the  
14 State procedures; we can't add any new procedure. They  
15 say, well, that's unconstitutional. So -- and you're  
16 choosing to do something that's unconstitutional because  
17 it's required by State law.

18 Then, haven't -- in that situation, won't  
19 you have adopted a policy?

20 MR. COATES: The way the lower courts have,  
21 in the context of liability, viewed this requirement  
22 where State law requires a local entity to do something  
23 is they have virtually said that they're standing in the  
24 shoes of the State. Under those circumstances, it's  
25 essentially the State making the decision. They are

1 just using the County as a -- the local entity, as an  
2 instrument. And so it's essentially an Ex parte Young  
3 Eleventh Amendment-type case.

4 JUSTICE ALITO: It would be an Ex parte  
5 Young situation.

6 CHIEF JUSTICE ROBERTS: And they have sued  
7 the State here, right?

8 MR. COATES: They have sued the State.

9 CHIEF JUSTICE ROBERTS: Or under Ex parte  
10 Young?

11 MR. COATES: They have indeed sued the State  
12 here. And we submit that they can get full relief with  
13 respect to the database from the State, should they  
14 choose to pursue that.

15 JUSTICE SOTOMAYOR: Who would they sue to do  
16 that? As I am reading CANRA, it makes the California  
17 Department of Justice only the repository of reports.

18 MR. COATES: They may --

19 JUSTICE SOTOMAYOR: So who -- who do they  
20 sue in the State to --

21 MR. COATES: They've sued the Attorney  
22 General, because the Department of Justice maintains the  
23 database. The Department of Justice issues the  
24 regulations on how local entities go about -- are  
25 required to report to the database. And so that's --

1 that is the defendant in this case, and that's who they  
2 would sue. And I submit they could get relief by being  
3 removed from the database or require the State to enact  
4 procedures to allow them to have a determination made as  
5 to whether they should be removed or not.

6 As it now stands, the statutory scheme  
7 doesn't have that, and the County's view is that it's  
8 not free to just go out and invent procedures, and other  
9 counties throughout the State of California aren't free  
10 to invent their own procedures. And that's one of the  
11 elements of this case that I think really underscores  
12 the Monell concerns with federalism, because it's an  
13 important question of the manner in which States relate  
14 to their municipalities and the way States divide up  
15 responsibility for who does what, and in a fairly  
16 important area of the law.

17 JUSTICE ALITO: Well, what would happen  
18 under California law if you said, we agree with the  
19 Respondents that additional procedures are  
20 constitutionally required. So, even though California  
21 law doesn't allow this, we are going to create these  
22 procedures because we have to comply with the  
23 Constitution.

24 What would your situation be under  
25 California law? Would you be subject to -- what could

1 the State do to you?

2 MR. COATES: Well, there would be a possible  
3 pre-emption argument. They could halt California --  
4 they could halt Los Angeles from enacting the statute,  
5 from utilizing the procedural protections.

6 JUSTICE ALITO: I'm sorry --

7 MR. COATES: They could say the area is  
8 pre-empted and move for an injunction from doing it,  
9 because they're interested via maintaining the database.

10 JUSTICE GINSBURG: Who is the "they" who  
11 would do this?

12 MR. COATES: The State of California could  
13 come in and argue that the County was pre-empted from  
14 using these regulations. They could argue that it slows  
15 down the database or what have you. But they could  
16 theoretically do that under California law.

17 JUSTICE GINSBURG: This -- this is getting  
18 further removed from the situation that we're dealing  
19 with, because the State has already admitted liability  
20 and not has contested that its fees -- it owes fees.

21 So, what is the relief that is left? If the  
22 -- if the State has admitted liability, what happens at  
23 that point? Shouldn't the record be expunged?

24 MR. COATES: I believe the appropriate  
25 argument for the plaintiffs would be to apply in a

1 district court if they believe they have a valid  
2 injunction and valid declaratory relief vis-à-vis the  
3 State and move forward from there.

4           They could certainly do that and have  
5 themselves removed from the database or order the State  
6 to create statutory procedures to allow them a hearing  
7 to determine whether they should be removed from the  
8 database. They're perfectly free to do that, because  
9 it's the State statute and it's the State database, and  
10 the State is a party here.

11           JUSTICE GINSBURG: But the State has already  
12 conceded. It's been adjudicated a constitutional  
13 violator, and the State is now saying, yes, we are not  
14 going to contest that anymore. Doesn't the State have  
15 to do something?

16           MR. COATES: They should. They absolutely  
17 should. And if the State drags its feet, the  
18 appropriate remedy is to file a motion for an injunction  
19 as against the State, to have them issue the proper  
20 procedural protections or to remove them from the  
21 database.

22           But we submit that it's, at this point, not  
23 appropriate relief as against the County. That issue  
24 still remains open. We could still go back into  
25 district court and lose that, but at this point you



1 still have to make the inquiry whether it's a county  
2 policy, custom, or practice that's inflicting the injury  
3 that's the subject of declaratory relief here.

4 And, I mean, I think at bottom, at the end  
5 of the day, the point is that Plaintiffs really haven't  
6 identified any circumstance in which, in a proper case  
7 applying the Monell standards, you would not be able to  
8 get relief. And the danger of going forward with the  
9 Ninth Circuit's kind of amorphous standard where you  
10 just impose declaratory relief, independent of whether  
11 or not there's a policy, custom, or practice, is the  
12 kind of sloppy order that we have here, granting  
13 declaratory relief where we have a 90-10 fee split, and  
14 it's unclear how that decision was made, because it's  
15 not made through the prism of any sort of causation  
16 standard articulated by this Court.

17 So we would submit that Monell provides  
18 clear guidelines, although sometimes difficult to apply  
19 in certain cases, but they are clear guidelines. And  
20 the Court in Monell said that those causation  
21 requirements applied to damages, injunctive and  
22 declaratory relief. And we believe that is a solid rule  
23 that supports the interests of federalism and --

24 JUSTICE GINSBURG: It's true that all cases  
25 that at least have come to us under Monell have involved

1 damages.

2 MR. COATES: That is correct. They have  
3 been damages cases. But the -- but Monell itself  
4 doesn't talk in terms of guarding the public fisc, which  
5 is how Chaloux, the Ninth Circuit case that departs from  
6 Monell with injunctive and declaratory relief -- the way  
7 it characterizes it. It doesn't.

8 Monell was concerned with interpreting the  
9 language of section 1983, the "shall subject," the  
10 "shall cause" someone else to subject a person to a  
11 violation. They said that did not really conform to  
12 respondeat superior principles. And looking at the  
13 legislative history, the 42nd Congress in enacting  
14 section 1983 was critical to Justice Brennan in Monell  
15 that the rejection of the Sherman Amendment, which he  
16 said was concerned mostly with not imposing coercive  
17 liability on the municipality for the actions of others.  
18 They were concerned not to save money necessarily, but  
19 the way in which a Federal court would exercise coercive  
20 power over a local public entity.

21 And we submit that it is just as important  
22 to have those guidelines when directly coercing through  
23 injunctive and declaratory relief as it is indirectly  
24 doing it through the threat of damage claims.

25 JUSTICE KENNEDY: Can -- can Bivens actions

1 be brought against municipalities?

2 MR. COATES: I do not believe so, Your  
3 Honor. I believe via section -- strictly 83.

4 JUSTICE KENNEDY: And can you -- can you  
5 cite me authority for that? And would -- do you think  
6 that the rationale for that is that since Congress has  
7 created an express cause of action, this impliedly  
8 pre-empts Bivens-type actions?

9 MR. COATES: Yes, that's -- that's my  
10 recollection.

11 JUSTICE KENNEDY: And have -- have we said  
12 that in a case?

13 MR. COATES: Off the top of my head --

14 JUSTICE KENNEDY: Because it seems to me it  
15 would help you in this case, because you would say,  
16 well, if there's a real problem, the city -- the injured  
17 party can sue for an injunction. Perhaps the State was  
18 against the party first, and he can -- he can raise a  
19 constitutional defense or he can bring an action for an  
20 injunction, and it doesn't have to be under 1983. And  
21 it would seem to me that that would resolve it. And you  
22 then wouldn't have to pay attorneys' fees because  
23 there's no provision in the statute for it.

24 MR. COATES: Well, I mean, it is independent  
25 of what remedies might occur under State law. I'm not

1     trying to say that that's the exclusive -- that section  
2     83 is the exclusive means for all relief. You can  
3     certainly -- there is State law --

4                 JUSTICE KENNEDY: No, I'm talking about  
5     under Federal law.

6                 MR. COATES: My understanding with respect  
7     to a general constitutional claim is that it is section  
8     1983, that that is the Congress's -- that's how Congress  
9     has specified the remedy. There are other portions for  
10    other types of conduct -- section 1986, section 1985,  
11    for example -- but I think this sort of general  
12    constitutional claim is subject to section 1983.

13                And if the Court has no further questions,  
14    I'd reserve the balance of my time for rebuttal.

15                CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16                Mr. Pincus.

17                ORAL ARGUMENT OF ANDREW J. PINCUS

18                ON BEHALF OF THE RESPONDENTS

19                MR. PINCUS: Thank you, Mr. Chief Justice,  
20    and may it please the Court:

21                Let me begin, perhaps, by trying to answer  
22    Justice Alito's question about what is at stake here.  
23    Monell held that 1983 has a causation requirement. And  
24    the Court has, in a series of decisions, elucidated what  
25    a plaintiff must prove in the context of claims for

1 damages to satisfy that causation requirement, and it's  
2 held in particular that the mere fact that a city  
3 employee committed a violation under color of State law  
4 in the past is not itself a sufficient link to the  
5 municipality itself. And the decisions have been  
6 devoted to elucidating precisely what else is required  
7 in order to show the sufficient link to the  
8 municipality.

9                   The question here arises in what, we submit,  
10 is the very different factual context of ongoing  
11 constitutional violations. And we think that although  
12 the jurisprudence that's developed under Monell has been  
13 done a -- has been devoted to fleshing out this other  
14 context, the Court should take a look at whether that  
15 jurisprudence is the appropriate way to determine  
16 whether the causation test is satisfied when there is an  
17 ongoing violation, because there's an easier way to do  
18 it.

19                   JUSTICE SCALIA: It's the same statutory  
20 language that you're relying on, right, that was held to  
21 require causation in the one case? Why wouldn't it  
22 require a similar causation in the other?

23                   MR. PINCUS: Your Honor, we believe it does  
24 require causation, but the question is what kind of  
25 facts have to be shown to prove causation. And, in

1 particular, once a plaintiff has shown what is required  
2 otherwise to show the violation, to show standing for  
3 prospective relief and obtain prospective relief, we  
4 think those elements will necessarily encompass the  
5 showing that's required to prove a link to the  
6 municipality itself. And what our concern here --

7 JUSTICE KENNEDY: But then you're not really  
8 hurt if -- or the system isn't really hurt by the rule  
9 that the city asks for. If it's so easy to establish a  
10 policy or custom requirement in cases where prospective  
11 relief is sought, then that's the answer. You can  
12 establish it. End of case. But you don't get it unless  
13 you establish the custom and practice.

14 MR. PINCUS: Your Honor, we think it should  
15 be easy. It should be present in every case. Our  
16 concern is that courts might be confused by the idea  
17 that what they are supposed to do is apply the  
18 jurisprudence that's really been developed to target who  
19 was responsible for this act that happened in the past,  
20 and not realize that there's really a quite more  
21 expeditious way to determine in the future.

22 Here, it's quite clear. The court of  
23 appeals said there's an ongoing failure by the County to  
24 provide due process.

25 JUSTICE KENNEDY: Well, I'm -- I'm not sure

1 I understand your submission. And it could be I'm just  
2 obtuse on this point.

3 I interpret your remarks as saying that  
4 Monell does apply when there's an injunction. Do I  
5 misinterpret you?

6 MR. PINCUS: I guess I would clarify --

7 JUSTICE KENNEDY: And you say, oh, it's so  
8 easy to do, it doesn't make any difference. Well, then,  
9 why are we here? Why isn't the city right?

10 MR. PINCUS: Because I think what the city  
11 has said, Your Honor, is what Monell requires is for the  
12 plaintiff to show something in addition to what the  
13 plaintiff has to -- to what the plaintiff has to show to  
14 (a) prove a constitutional violation, and (b) prove an  
15 entitlement to prospective relief.

16 The plaintiff says there is an additional  
17 element that may or not be present, and our submission  
18 is that the Ninth Circuit, although its rationale may  
19 have been slightly off, was correct in saying once a  
20 plaintiff has shown an ongoing constitutional violation  
21 and that the plaintiff is entitled, under standing  
22 principles and principles governing prospective relief,  
23 to relief, the plaintiff has necessarily shown a link to  
24 the municipality. And there is --

25 CHIEF JUSTICE ROBERTS: So that's what you

1 think. So you agree -- it struck me that your argument  
2 could have been made by your friend on the other side.  
3 You say if you get an injunction, you must have shown  
4 municipal policy, practice, or custom. And, therefore,  
5 you agree that a municipal policy, custom, or practice  
6 is required. That's what he thinks.

7 MR. PINCUS: Your Honor, we agree that  
8 causation is required. I think the only slight fillip  
9 that I would make to your comment is I think in some of  
10 the jurisprudence that's developed focused on finding  
11 responsibility for past conduct, some of the ways courts  
12 have developed to decide those questions might be inapt  
13 in the --

14 JUSTICE SOTOMAYOR: Counsel, could you stop  
15 talking in the abstract --

16 MR. PINCUS: Sure.

17 JUSTICE SOTOMAYOR: -- and give me an  
18 example? Give me an example of a situation where a  
19 State official under Ex parte Young has been held to  
20 have violated the Constitution where a Monell finding  
21 had not been a part of it.

22 MR. PINCUS: I'm sorry, Your Honor -- where  
23 Monell couldn't be satisfied?

24 JUSTICE SOTOMAYOR: Exactly.

25 MR. PINCUS: Well, I think this case, to the



1 extent that what the city is saying is that Monell is  
2 not satisfied here, is a perfect example, because  
3 here --

4 CHIEF JUSTICE ROBERTS: Well, Monell doesn't  
5 apply to State officials, right?

6 JUSTICE SOTOMAYOR: No.

7 MR. PINCUS. No.

8 JUSTICE SOTOMAYOR: I was trying to do just  
9 an analogy in terms of -- because one of his arguments  
10 has been that -- that Ex parte Young doesn't have,  
11 inherently, a Monell requirement.

12 MR. PINCUS: Well, if I may, Your Honor,  
13 just to respond to the Chief Justice's statement --

14 CHIEF JUSTICE ROBERTS: Thank you.

15 MR. PINCUS: The Petitioner's position is  
16 that this standard would apply also in Ex parte Young  
17 actions against State officials. The Court's --

18 CHIEF JUSTICE ROBERTS: That, of course,  
19 isn't before us.

20 MR. PINCUS: It's not before you. The  
21 Court's jurisprudence is a little -- is a little  
22 uncertain as to whether that might or might not be true.  
23 There certainly hasn't been a holding to that effect.

24 But one of the reasons we think this is an  
25 important issue to be very clear about is because, at

1    least on Petitioner's view and possibly on the view of  
2    how -- depending on how the Court analyzes the case,  
3    this would affect not just the universe of cases against  
4    municipalities, but also whether relief is available for  
5    ongoing constitutional violations in the very broad  
6    group of cases against --

7                   CHIEF JUSTICE ROBERTS:  Well, that would  
8    require -- that would require us to get into the  
9    question of whether Ex parte Young is a fiction or  
10   substance, which I certainly wouldn't like to get into.

11                  MR. PINCUS:  Well, but it -- it might not,  
12   Your Honor, because it might turn just on whether -- I  
13   mean, Ex parte Young suits against State officials are  
14   under 1983.  And so to some -- I think the argument that  
15   Petitioner would make is if causation is required under  
16   1983, well, Ex parte Young is just a vehicle to get  
17   those people -- to make those people persons.  And so  
18   whatever the Court were to decide about causation would  
19   necessarily apply in those Ex parte Young actions.

20                  JUSTICE ALITO:  Well, I have a question  
21   similar to Justice Sotomayor's.  Suppose we were to hold  
22   that the Monell requirement applies to prospective  
23   relief, injunctive and declaratory relief.

24                  Can you provide an example of a -- an  
25   unacceptable consequence that would follow from -- from

1     that holding, a situation in which that holding would --  
2     would, in your judgment, be one that we would not want  
3     to accept?

4                   MR. PINCUS:   Well --

5                   JUSTICE ALITO:   What difference does it  
6     make?

7                   MR. PINCUS:   I think, Your Honor, we gave  
8     some examples in our -- in our brief.  And one I would  
9     give is the example of the marriage license clerk who is  
10    engaging in unconstitutional -- who is -- who is  
11    violating the Constitution and denying marriage  
12    licenses.

13                  JUSTICE ALITO:   All right --

14                  MR. PINCUS:   He or she is not --

15                  JUSTICE ALITO:   Now we have a situation.  
16    The clerk denies the marriage license.  And then I  
17    presume you can take the matter before a municipal  
18    policymaker, and the municipal policymaker will say:  
19    This is our policy, license denied.  Or this is not our  
20    policy.

21                  And then Monell is satisfied, right?

22                  MR. PINCUS:   Well, I --

23                  JUSTICE ALITO:   If the policymaker says, it  
24    is our policy to deny licenses under this -- under these  
25    circumstances, that's a policy.

1                   MR. PINCUS: It may be that -- I don't think  
2 the Court has required that there be some exhaustion of  
3 administrative remedies. I guess the way I would look  
4 at the case is, if -- if the party who is being injured  
5 filed suit against the municipality and against the  
6 official and said, I would like a marriage license, that  
7 -- and the court heard the case and found yes, there's  
8 an unconstitutional denial going on there, the fact that  
9 the lawsuit existed and there was an ongoing violation  
10 that had been, by virtue of the lawsuit, brought to the  
11 attention of the policymaker, and if in that case the  
12 judge decided that prospective relief is necessary,  
13 which necessarily means that there was some finding of  
14 ongoing violation under Lyons and those cases, that  
15 there would be a link to the municipality.

16                   And I -- my concern is not that, properly  
17 applied, a causation requirement would weed out cases.  
18 It's that because the focus of the Court's jurisprudence  
19 up till now has not been on the ongoing violation as the  
20 possible source of a policy, but rather was there a  
21 policymaker involved in the initial denial, unless if  
22 the Court were to say there's an extra step, it were to  
23 make very clear that the focus of attention is not the  
24 initial action, in terms of finding a policy, but on the  
25 day -- as the matter ends up on the day the district

1 court is deciding whether or not to grant relief, that  
2 those facts are relevant in deciding whether there is a  
3 policy, as well.

4 JUSTICE BREYER: What is -- what is the  
5 answer to Justice Alito's question? The -- a clerk  
6 doesn't give a license to someone he should. Right?  
7 Now, you bring -- that person brings a lawsuit against  
8 the city.

9 Now, if Monell applies, in order to win he  
10 has to show that it was the city's policy to deny it, or  
11 maybe all he has to show is the city's policy was to  
12 leave it up to the clerk. And if he finds it was the  
13 city's policy to grant it, he's going to lose, which he  
14 should, because there was no such policy. The clerk was  
15 wrong.

16 MR. PINCUS: Right.

17 JUSTICE BREYER: What's the harm in that?

18 Now, the next question would be: If we show  
19 the third, is there any ground for an injunction against  
20 the city? And on that one, I don't know. Maybe there  
21 is. Maybe conditions changed. I don't know.

22 But what's the harm to anybody in doing --  
23 requiring that in order -- just what I said? What's the  
24 harm?

25 MR. PINCUS: Your Honor, if the -- I think

1 in your hypothetical -- I may have misunderstood it --  
2 that this was a sort of a one-off decision by the -- by  
3 the clerk.

4 JUSTICE BREYER: There are two  
5 possibilities -- three possibilities. The clerk denied  
6 the license.

7 (A) there is a city policy which requires  
8 him to do it; (B) there is a city policy that permits  
9 him to do it; (C) there is a city policy that forbids  
10 him to do it. All right?

11 Now, those are the only three I can think  
12 of. And it seems to me in (A) or (B), you could recover  
13 against the city, and in (C) you couldn't.

14 MR. PINCUS: Well, I guess my --

15 JUSTICE BREYER: So -- so -- so, why --

16 JUSTICE SCALIA: Or there is no city policy.

17 MR. PINCUS: Well, I was just going to add  
18 that -- I was just going to add that example, where the  
19 city just is agnostic. The clerk is going on just --

20 JUSTICE BREYER: If there's no city policy,  
21 then the city hasn't done anything wrong under Monell.

22 Now, is that what you're arguing? That the  
23 city should, even though it has no policy, nonetheless  
24 have to have attorneys' fees, is open to suit, et  
25 cetera, and forget about Monell? Is that your argument?

1                   MR. PINCUS: My argument is this, Your  
2 Honor, that if -- if there is one clerk who issues  
3 marriage licenses and that clerk continues to deny the  
4 marriage license up until the day of the lawsuit, that  
5 the plaintiff in that case is entitled to relief, to  
6 injunctive relief, because the city, by virtue of  
7 tolerating the conduct, has adopted a de facto policy of  
8 permitting it. And the alternative is --

9                   JUSTICE BREYER: If you're right about  
10 that --

11                  MR. PINCUS: -- that there's no relief.

12                  JUSTICE BREYER: All right. If you're right  
13 about that, there's no problem for you because you are  
14 saying, yes, you need a city policy, and this counts as  
15 a policy.

16                  MR. PINCUS: That's exactly right, Your  
17 Honor. And our concern is that the Court's  
18 jurisprudence, because it has been focused on  
19 retrospective one-off, for the most part, actions,  
20 doesn't make clear what the answer is in that situation,  
21 and this --

22                  CHIEF JUSTICE ROBERTS: Justice Breyer's  
23 question said you need a city policy, and you said  
24 that's exactly right. So I think the case is over. The  
25 issue is whether you need a city policy, and your friend

1 thinks so, and you think so.

2 MR. PINCUS: Well, Your Honor, I -- I think  
3 that --

4 JUSTICE KENNEDY: But the Ninth Circuit  
5 didn't think so.

6 MR. PINCUS: Well, first of all, the Ninth  
7 Circuit didn't. And I -- I go back to --

8 JUSTICE KENNEDY: Did or did not? The Ninth  
9 Circuit did not?

10 MR. PINCUS: Did not.

11 JUSTICE KENNEDY: You agree with that  
12 statement, yes?

13 MR. PINCUS: And I go back to our position,  
14 which is if causation is required, which it is, the  
15 question on which I think guidance to the lower courts  
16 would be very helpful is not to simply say Monell is --  
17 Monell applies, adopt our jurisprudence that was focused  
18 on retrospective conduct or prospective conduct; but  
19 rather, yes, Monell's causation requirement applies, but  
20 we recognize that in this context it's likely to be  
21 satisfied by the other things that the plaintiff is  
22 required to prove.

23 JUSTICE GINSBURG: That's not what the Ninth  
24 Circuit -- the Ninth Circuit said, we're not deciding  
25 the Monell question; we're leaving that -- we're leaving



1     that open. But Monell -- we're not deciding because  
2     Monell doesn't apply to forward relief -- declaratory  
3     relief or injunctive relief. And so the Ninth Circuit  
4     has rejected the statement in Monell itself that it  
5     applies to all forms of relief.

6                     And so that's the question we are confronted  
7     with. Because we have had experience in Monell cases  
8     only with damage actions, was -- was the Monell decision  
9     wrong in saying that that framework applies to  
10    declaratory and injunctive relief as well?

11                    MR. PINCUS: And, Your Honor, my response to  
12    that is that Monell was not wrong. I don't know that  
13    Monell squarely addressed the question, but clearly the  
14    statute has a causation element and it has to be met.

15                    But what Monell didn't grapple with, because  
16    it itself was a case involving only a past  
17    non-continuing event, is how does that causation  
18    requirement get met in a case involving an ongoing  
19    violation?

20                    And we think that although the Ninth Circuit  
21    may not have had its reasoning quite right, what --  
22    the -- the bottom line was right, in the conclusion that  
23    when there is an ongoing violation and the other  
24    requirements for relief are met, Monell/the 1983  
25    causation requirement doesn't impose an incremental

1     burden on the plaintiff.  It's necessarily satisfied by  
2     the other things that the plaintiff has to prove.

3                   JUSTICE SOTOMAYOR:  I -- I -- I'm still --  
4     I'm sort of asking for a hypothetical and to take it  
5     from the abstract.

6                   Tell me what's -- here, you define the  
7     ongoing violation as the failure to institute  
8     procedures, I'm assuming, to remove a name from the  
9     registry, correct?

10                  MR. PINCUS:  Uh-huh.

11                  JUSTICE SOTOMAYOR:  That's the ongoing  
12     failure that you're alleging entitled you to injunctive  
13     relief?

14                  MR. PINCUS:  I think that --

15                  JUSTICE SOTOMAYOR:  Or was it that you  
16     thought that the city could remove the name?

17                  I'm not quite sure what it is that you  
18     think -- what was the continuing violation?

19                  MR. PINCUS:  The continuing violation here  
20     is that every day for the past 9 years, our Respondents  
21     have suffered a violation of their due process rights,  
22     because they have not been given any sufficient process  
23     to show that they are wrongfully included in the index.

24                  JUSTICE SOTOMAYOR:  So to prove a future  
25     violation, you have to show that the municipality can do

1     that, correct?

2                   MR. PINCUS:   And the court of appeals held  
3     that twice in this case.

4                   JUSTICE SOTOMAYOR:   Right.

5                   MR. PINCUS:   The court of appeals twice  
6     said --

7                   JUSTICE SOTOMAYOR:   So why isn't that a  
8     policy, practice, or custom?   That's what I'm trying to  
9     understand, how --

10                  MR. PINCUS:   We think it is, Your Honor.

11                  JUSTICE SOTOMAYOR:   -- their failure or  
12     omission could be anything but.

13                  MR. PINCUS:   We think it is, Your Honor, and  
14     that's why we --

15                  CHIEF JUSTICE ROBERTS:   But you don't think  
16     that --

17                  MR. PINCUS:   -- think this is an easy case.

18                  CHIEF JUSTICE ROBERTS:   I think your friend  
19     agrees.   But -- but how can the city have caused the  
20     violation in the absence of a city policy, custom, or  
21     practice?

22                  You say you have to show causation to get an  
23     injunction.   The only way to show that the city caused  
24     the problem is to show that they've got a policy,  
25     custom, or practice, including one that might be shown

1 by inaction. But you still have to show that, and  
2 that's all Monell requires.

3 MR. PINCUS: And there is that inaction  
4 here, because the court of appeals --

5 CHIEF JUSTICE ROBERTS: Well, now you're  
6 arguing whether Monell was satisfied or not, and you're  
7 going to get a chance to do that on remand because the  
8 Ninth Circuit said we're -- we're making the city pay,  
9 and now we're going to find out if they violated  
10 anything.

11 MR. PINCUS: I agree, Your Honor, but -- but  
12 by -- by issuing a declaratory judgment and by finding  
13 that there was standing for it here, the lower court  
14 necessarily concluded that the city -- that there was --  
15 the redressability element was satisfied and that the  
16 continuing harm element was satisfied.

17 CHIEF JUSTICE ROBERTS: So -- so the Ninth  
18 Circuit was wrong to send it back for a hearing?

19 MR. PINCUS: The Ninth Circuit --

20 CHIEF JUSTICE ROBERTS: Because you've  
21 already shown Monell was satisfied.

22 MR. PINCUS: The Ninth Circuit, I think,  
23 recognized that there were two different claims in this  
24 case. The Ninth Circuit sent it back for what might be  
25 a different question, which is damages liability. In

1 other words, damages -- the question is --

2 CHIEF JUSTICE ROBERTS: -- but -- yes,  
3 damages, but turning on whether Monell was satisfied.  
4 It was a hearing about Monell.

5 MR. PINCUS: And --

6 CHIEF JUSTICE ROBERTS: Go ahead.

7 MR. PINCUS: I'm sorry, Your Honor. I think  
8 this is one of the -- one of the issues, I think,  
9 with -- with simply saying, as my friend does, that  
10 Monell applies. For the damages question, for example,  
11 whether the damages started accruing on the very first  
12 day the process wasn't -- wasn't provided, there might  
13 be a question about whether on that day there was a  
14 municipal policy in 2002 when this controversy started.

15 It might be that on that day there was no  
16 municipal policy one way or another. Maybe no one had  
17 confronted it. Maybe nobody confronted it until 2006.

18 But I think one thing -- so for damages  
19 there's a somewhat different inquiry which is, for each  
20 day for which damages are claimed, was that -- is the  
21 policy requirement met? This is a different question  
22 which is on a going-forward basis to provide -- to -- to  
23 be entitled to the prospective relief, what kind of  
24 causation is made. And that's exactly the concern --

25 CHIEF JUSTICE ROBERTS: How can you get

1 relief -- how can you get relief going forward under  
2 Monell unless there has been a city violation before?  
3 Otherwise what the injunction you're getting is just an  
4 injunction saying don't violate the law, and the city  
5 has said we haven't because you haven't shown that we  
6 had policy, practice, or custom.

7 MR. PINCUS: But it is not necessarily true  
8 in this particular case that the policy -- that the  
9 policy was in effect from day one as opposed to  
10 something that -- that came into -- that -- the  
11 municipal responsibility might not have come to pass  
12 until later when a policymaker -- the city might say  
13 when -- when these decisions were additionally --  
14 initially made, no policymaker knew what our process was  
15 for determining the accuracy of --

16 CHIEF JUSTICE ROBERTS: If you were sued --

17 MR. PINCUS: This lawsuit got filed, and in  
18 2006 somebody decided because the city took the position  
19 in the lawsuit and has -- has determined that it is not  
20 going to implement a policy that violates the  
21 Constitution.

22 JUSTICE SCALIA: But the test would be the  
23 same going forward, right? The test would be the  
24 same --

25 MR. PINCUS: But the facts --

1 JUSTICE SCALIA: The same test would apply  
2 to both damages, going forward after the date of filing  
3 of the suit, and injunction according to your reasoning,  
4 right?

5 MR. PINCUS: If -- if the damages -- if the  
6 injunctive test is satisfied, yes. From the time that  
7 that is satisfied --

8 JUSTICE SCALIA: From the time the suit is  
9 filed both -- the injunctive test will also be the  
10 damages test.

11 MR. PINCUS: But the difference, I think,  
12 Your Honor, is to recover damages, the plaintiff doesn't  
13 have to show that the other elements of the damages  
14 claim don't encompass the kind of requirement of  
15 municipal -- of municipal involvement that is  
16 encompassed within the other elements of the prospective  
17 relief claim. So when a case has both, our submission  
18 is that there is no need -- the plaintiff does not have  
19 to show something more to show causation than he has to  
20 show to show the violation and to show the entitlement  
21 to ongoing relief.

22 JUSTICE SCALIA: Let me follow this. To  
23 bring a damages claim, do you have to show past damages,  
24 or can you just collect damages from the date you file  
25 suit?

1                   MR. PINCUS: I think it -- I mean, you would  
2     have to show all the requisites, but you can decide that  
3     you just want to collect damages from the day you filed  
4     the suit.

5                   JUSTICE SCALIA: Well, in -- if that's the  
6     complaint that you file, then -- then in that kind of a  
7     suit the test for damages and the test for injunction  
8     would be precisely the same, and you would be able to  
9     get damages on the basis of the mere fact that the suit  
10    exists, right?

11                  Because they wouldn't be fighting it if it  
12    wasn't their policy.

13                  MR. PINCUS: Well, there might be a question  
14    about the precise timing on which --

15                  CHIEF JUSTICE ROBERTS: No, I --

16                  MR. PINCUS: -- an official --

17                  CHIEF JUSTICE ROBERTS: I'm sorry -- answer.

18                  MR. PINCUS: On which -- it might not be the  
19    actual day of the filing of the complaint. There might  
20    be a question about whether or when an official got to  
21    know. This -- this suit has been going on for so  
22    long --

23                  CHIEF JUSTICE ROBERTS: Well, but it's  
24    not -- defending the suit doesn't give rise to a  
25    municipal custom, policy, or practice. They may have --



1     somebody comes in and says this is what's going on. And  
2     they say, well, we don't -- we don't think that's  
3     unconstitutional. So they're going to defend the suit.

4                 That doesn't mean that they have adopted a  
5     policy to do what they -- the individual employee has  
6     been alleged to have done.

7                 MR. PINCUS: And is continuing to do.

8                 CHIEF JUSTICE ROBERTS: Well -- or  
9     continuing to do, I mean, the suit doesn't satisfy the  
10    requirement of showing a policy or practice, because  
11    they may defend on the ground that it's not  
12    unconstitutional. They may say, look, this isn't our  
13    policy, this isn't our practice, but we're going to  
14    defend our employee because we don't think it's  
15    unconstitutional.

16                MR. PINCUS: And I think that is -- that is  
17    an example, to go back to Justice Sotomayor's question,  
18    of a case that would be problematic, because at the end  
19    of the day when the -- when the district judge issues  
20    his -- says, sorry, City, you're wrong, this -- this  
21    employee has continued to engage in unconstitutional  
22    action up until today, and then the question is, should  
23    the --

24                CHIEF JUSTICE ROBERTS: No, but --

25                MR. PINCUS: -- should the plaintiff in that

1 case be entitled to some prospective relief from that  
2 violation, or is there some additional requirement?

3 And our position is, once that showing has  
4 been made of a violation and once the showing has been  
5 made that would be under Lyons that would say, yes, the  
6 city -- this is attributable to the city, that should be  
7 enough --

8 CHIEF JUSTICE ROBERTS: And so the city --

9 MR. PINCUS: Under --

10 CHIEF JUSTICE ROBERTS: The city is in a  
11 catch-22 position. Whenever they are sued, they have to  
12 say if we defend this, we're going to be liable under  
13 Monell, but if we don't defend it, then, you know, our  
14 policy is being changed. Or we might -- we might want  
15 to have this policy; we might not. We didn't know this  
16 clerk was doing that, but we might think it's a good  
17 idea, we might think it's a bad idea.

18 The cases are not always going to be as  
19 clear as the hypotheticals in your -- in your brief. It  
20 seems to me that it's a bit much to tell the city you've  
21 got to choose -- when you have to choose whether to  
22 defend a suit, you are in fact choosing what policy or  
23 practice to have going forward.

24 MR. PINCUS: But the alternative is to say,  
25 even if it turns out that there is unconstitutional

1 action going on that the city has become aware of, that  
2 the plaintiff who shows that does not get any relief and  
3 has to continue to suffer the unconstitutional violation  
4 for some indefinite period of time. And that doesn't --

5 CHIEF JUSTICE ROBERTS: Well, he doesn't get  
6 relief against the city because the city is not  
7 responsible for what happened until they adopt a policy,  
8 practice, or custom.

9 Now, if they are told this is  
10 unconstitutional and they decide to stick with it, then  
11 they're -- then that's their policy and custom, and you  
12 can get an injunction against them.

13 MR. PINCUS: But at the time of the lawsuit,  
14 the plaintiff can't get prospective relief against  
15 anyone because he can't get prospective relief against  
16 the city. My colleague's view is an official capacity  
17 suit against --

18 CHIEF JUSTICE ROBERTS: He's not -- he's not  
19 entitled --

20 MR. PINCUS: -- the city employee subject to  
21 the same limit.

22 CHIEF JUSTICE ROBERTS: He's not entitled to  
23 prospective relief against the city because the city has  
24 not caused the alleged harm until you establish a  
25 policy, practice or custom.

1 MR. PINCUS: But that --

2 CHIEF JUSTICE ROBERTS: If you establish  
3 what the employee is doing in a suit against the  
4 employee, which the city is defending because he's one  
5 of their employees, then the city is put to a choice.  
6 Once -- I suppose once the legal process has concluded,  
7 they have to decide whether to continue that or not.

8 MR. PINCUS: But, Your Honor, I think the  
9 consequence of that structure is that the city can leave  
10 the employee -- there is no remedy against an employee  
11 who is engaging in the unconstitutional conduct.

12 JUSTICE BREYER: -- against State.

13 MR. PINCUS: Excuse me --

14 JUSTICE BREYER: I mean, here you have a  
15 statute, and the statute doesn't have any method in it  
16 to get off -- get out of it, even when you should.  
17 Their claim is this is a State matter, the State's  
18 responsible, it's unconstitutional, go sue the State and  
19 tell the State to do it.

20 Now, that's a -- what's wrong with that  
21 position?

22 And either they had the power to do it under  
23 State law or they didn't. If they did have the power to  
24 do it, then you probably will show a practice. If they  
25 didn't have the power to do it, why should they bear

1 anything against them? You should tell the State go do  
2 it.

3 MR. PINCUS: Well, two answers, Your Honor.

4 JUSTICE BREYER: What is wrong with that?

5 MR. PINCUS: The Court of Appeals held that  
6 they do have the power to do it. And we think that's  
7 settled for purposes of this case.

8 JUSTICE BREYER: Why did the State -- why  
9 did they send it back? I thought they sent it back in  
10 order to determine whether there was some policy against  
11 doing it.

12 MR. PINCUS: Look, they sent it -- one of  
13 the reasons they sent it back was to -- for -- so that  
14 the procedures could be provided or an injunction could  
15 be entered, directing the County to do what the statute  
16 requires, which is exercise its responsibility under the  
17 statute to make sure that the submissions are accurate.

18 JUSTICE SCALIA: Mr. Pincus, why do you --  
19 why do you accept, as I think you did in response to the  
20 Chief Justice's question, that if the city has a policy  
21 which it believes is constitutional but in fact is  
22 unconstitutional, that is not a city policy for purposes  
23 of Monell?

24 MR. PINCUS: If I accepted that, I was  
25 wrong, Your Honor.

1 JUSTICE SCALIA: Well, I thought you did.

2 MR. PINCUS: I think -- I think it is a  
3 policy. And I think --

4 JUSTICE SCALIA: Even if they think it's a  
5 constitutional policy, it's still a policy, isn't it?

6 MR. PINCUS: Yes. They don't have to know  
7 that their conduct is unconstitutional. And the other  
8 thing that the Court has --

9 CHIEF JUSTICE ROBERTS: What I'm trying to  
10 figure out the answer to is whether or not merely  
11 defending the employee in court is sufficient to  
12 establish that the city has that policy, custom, or  
13 practice.

14 MR. PINCUS: I'm not sure that it's the act  
15 of defending it in court, Your Honor. I think it's the  
16 ongoing conduct, almost certainly -- maybe it would be a  
17 question of fact -- will by virtue of the lawsuit be  
18 brought to the attention of policymakers.

19 CHIEF JUSTICE ROBERTS: Oh, sure. Sure.

20 MR. PINCUS: And, in fact, the --

21 CHIEF JUSTICE ROBERTS: So you're back where  
22 Justice -- Justice Alito was commenting, well, that at  
23 some point you have to bring what you're complaining  
24 about to the attention of the city. And you dismiss  
25 that as an exhaustion requirement, but --

1                   MR. PINCUS:  No, I'm not -- I don't think  
2   that courts have said that filing a lawsuit is an  
3   impermissible way to do that.  And I think that it could  
4   be done by a letter also.  But the Court has said, for  
5   example, that there is a deliberative difference prong  
6   to the Monell retrospective test as well.  So that, in  
7   the hypothetical we've been talking about, if  
8   policymakers know of the ongoing conduct and they are  
9   indifferent to it, which they would be presumably if  
10  they're letting it continue, that that might be  
11  satisfied.

12                   But -- but, to us, that just goes to the  
13  notion that -- it's hard to come up with a situation  
14  where there will be an entitlement to prospective relief  
15  and the requisite causation won't be satisfied.  And,  
16  therefore, saying there is this additional element, it  
17  sort of creates more harm than good because it's going  
18  to serve -- send courts on a search for it.

19                   JUSTICE GINSBURG:  You would have liked the  
20  Ninth Circuit to have said there is a policy whatever,  
21  because the city is on notice and they've done nothing  
22  about it; therefore --

23                   MR. PINCUS:  Right.

24                   JUSTICE GINSBURG:  But the -- the Ninth  
25  Circuit didn't say that.  It said we're not going to

1     decide Monell liability; we are just going to say Monell  
2     doesn't apply. And if you were just thinking, well,  
3     what's at stake? You say all of our cases involve  
4     damages; that's money. What is involved here?  
5     Attorneys' fees; that's money. So where do we bracket  
6     this? Do we bracket this with the -- with damages,  
7     because that's money, and that's what's involved here,  
8     attorneys' fees? Then the only thing that's before us  
9     is the award of attorneys' fees, right?

10                 MR. PINCUS: That's the only thing that the  
11     County petitioned from, Your Honor, but I think more is  
12     at stake here because if this rule applied, then it  
13     would not only preclude attorneys' fees; it would also  
14     preclude the awarding of any relief. And so, although  
15     this -- it happens to arise here in the attorneys' fees  
16     context, but if this causation requirement is more than  
17     just an extra box to check in terms of something  
18     that's -- for which the requirements will be satisfied,  
19     if it does screen out some cases, then it will not just  
20     mean no entitlement to attorneys' fees; it will mean no  
21     entitlement to prospective relief, and we think that's  
22     significant.

23                 JUSTICE ALITO: I'm still waiting to hear --  
24     I'm still waiting to hear what cases it will screen out.  
25     I haven't heard an example of a case that it will screen



1 out.

2 MR. PINCUS: Well, Your Honor, we think,  
3 properly applied, it shouldn't screen out any case  
4 because --

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. PINCUS: Thank you.

7 CHIEF JUSTICE ROBERTS: Now, Mr. Coates, you  
8 have 13 minutes left.

9 REBUTTAL ARGUMENT OF TIMOTHY T. COATES

10 ON BEHALF OF THE PETITIONER

11 MR. COATES: I think it's telling that we  
12 don't have an example of circumstances where, applying  
13 the Monell standards, someone couldn't get prospective  
14 relief where it was appropriate, where the injury was  
15 actually inflicted by the municipality. I think  
16 Plaintiffs' view is that it's kind of the tail wagging  
17 the dog, that having established declaratory relief,  
18 that establishes causation, and that's backwards --

19 JUSTICE SOTOMAYOR: Well, they gave you an  
20 example. Clerk says: I'm not giving a marriage license  
21 to interracial couples; I think that's constitutional.  
22 Clerk resigns. And the municipality says: We think he  
23 was right, that's constitutional. It's not our policy.  
24 We didn't really think about it, but we think it's  
25 constitutional.

1           You're arguing that because it was the agent  
2   who made that decision, the city had no policy, you  
3   can't give injunctive relief ordering the city to give  
4   you a license.

5           MR. COATES: Assuming that that -- that the  
6   city's acceptance of that policy wasn't what led the  
7   clerk to make that decision. It sounds like you're  
8   talking more of a ratification type thing on  
9   consideration. Yes, we think he did the right thing.

10          JUSTICE SOTOMAYOR: Well, how is that  
11   different from what the Chief Justice --

12          MR. COATES: Because --

13          JUSTICE SOTOMAYOR: -- proposed, which is,  
14   no, we didn't have a policy, but we're going to defend  
15   you anyway because we think it's okay.

16          Now you're calling that a policy.

17          MR. COATES: No. I'm saying that there are  
18   circumstances under which you have a policymaker that  
19   specifically ratifies and says this is affirmatively our  
20   policy, we think it's correct, as opposed to legal  
21   arguing we think it's --

22          JUSTICE SOTOMAYOR: They're not going to say  
23   that; they're going to say: Policy, no policy -- we  
24   don't even think that way. What he did was okay. We're  
25   going to defend it. It's constitutional. And the court

1 says: What he did is not constitutional. X has to be  
2 done instead by you, the municipality, even though the  
3 agent that you had before was acting on his or her own.

4 MR. PINCUS: In -- in those circumstances  
5 where the public entity is not a party, you can only  
6 hold the public entity liable when its policy actually  
7 inflicted that injury. These people re-apply for a  
8 license and they're denied, and a policymaker knows  
9 that, then they absolutely are going to come in under  
10 Monell, and I think it's going to be a slam dunk for  
11 them.

12 JUSTICE SOTOMAYOR: So we're now going to  
13 have a situation where what you are proposing is that  
14 you have to sue the individual actor, get a ruling on  
15 the constitutionality of whatever is being done, and  
16 then let that suit finish and ask the municipality to  
17 perform or not perform, and if it doesn't, then you  
18 relitigate all these issues?

19 MR. COATES: In the second lawsuit, the  
20 municipality is being held liable for its  
21 unconstitutional conduct. That's because the injury in  
22 the second case is absolutely inflicted as a result of a  
23 municipal policy, custom, or practice. That's why.  
24 It's fairly attributable there. In the first one,  
25 you're talking about an injury that has been inflicted

1 by the employee. You know, I see the significant point  
2 here, again -- and the Ninth Circuit Court recognizes  
3 because, again, it didn't apply Monell in granting  
4 declaratory relief and issuing the attorneys' fees. It  
5 conspicuously did not.

6 It expressly reserved the Monell issue in  
7 the main opinion. It did so because, on rehearing --  
8 the initial opinion didn't say anything about Monell.  
9 On rehearing, we pointed out that those issues were  
10 still open, more specifically the issue of whether we  
11 were even free under California law to create these  
12 additional procedures. That issue remains in this case.  
13 It's a significant issue. Even the Ninth Circuit admits  
14 that.

15 JUSTICE ALITO: But whether you were free to  
16 do it or not under California law, how can there not --  
17 how can it not be your policy that you have refused to  
18 provide these procedures which they say are  
19 constitutionally required? Your policy is to follow an  
20 arguably unconstitutional State requirement, rather than  
21 comply with what is arguably required by the  
22 Constitution. Why isn't that a policy?

23 Now, all that's at stake is -- and, of  
24 course, it's a matter of practical importance, but all  
25 that's at stake is a monetary dispute between the State

1 of California and the County of Los Angeles, which, as  
2 far as the federal Constitution is concerned, is the  
3 same thing as the State of California. So why should we  
4 be concerned about this at all? I don't understand why  
5 there's not a policy here.

6 MR. COATES: For a couple of reasons. The  
7 lower courts in talking about this issue in the context  
8 of Monell claims against local public entities have  
9 said, look, if you are just enforcing State law, if you  
10 have no discretion, you're not really making a conscious  
11 decision, you have to do this under State law, you're  
12 essentially acting as an arm of the State Eleventh  
13 Amendment Ex parte Young. I think we cite the Bockes  
14 case, which is an employment case where they sued a  
15 local entity for employment decisions that were dictated  
16 by a State board.

17 JUSTICE ALITO: Yes, but all that's involved  
18 is money between -- between California and a creature of  
19 California. As far as the Federal Constitution is  
20 concerned, California could abolish the County of Los  
21 Angeles. California could subsidize you for your  
22 attorneys' fees, or they could levy some sort of --  
23 something upon you and require you to pay them  
24 additional money. None of that -- what's the  
25 constitutional concern in all of that?

1                   MR. COATES: Well, the constitutional  
2 concern is that it injects a Federal court directly into  
3 the way that municipalities operate under California  
4 law. I mean, injunctive relief -- it's even worse. To  
5 issue an injunction against the County saying you have  
6 to do these procedural protections, notwithstanding the  
7 fact that the State says you shouldn't be able to do  
8 that, is inviting a lack of uniformity in these  
9 procedures throughout the State, and the State might  
10 want uniformity.

11                   If you hold a local public entity  
12 automatically liable for declaratory injunctive relief  
13 for -- for enforcing State law, you really have  
14 circumstances where a local entity is going to say: We  
15 don't need this fight. We're not going to enforce this  
16 law. It may be defensible, but it's not on our dime.

17                   And then you get local entities not  
18 enforcing State law, and that seems to be a significant  
19 State interest. And I submit that these are the kind of  
20 federalism principles that, you know, Mozell -- Monell  
21 is designed to take into account.

22                   JUSTICE ALITO: But do you think that the  
23 Federal court has to decide the issue of California law,  
24 namely whether you have freedom under this particular  
25 statute to add additional procedures to the California

1 statute?

2 MR. COATES: They'll have to say whether  
3 we -- yes, I believe they will, to determine whether  
4 it's, in fact, a county policy or custom.

5 JUSTICE ALITO: Why isn't that something  
6 that ought to be decided in State court? Why isn't this  
7 a beef between the State and the State's creature, the  
8 County of Los Angeles?

9 MR. COATES: It's very much like the  
10 McMillian -- the McMillian case, Your Honor, with the --  
11 the -- the State sheriff in Alabama, who's a county  
12 sheriff, and the question was, for Monell purposes, does  
13 he act on behalf of the State or does he act on behalf  
14 of the county? And the Court said that determination is  
15 informed by State law. It ends up being a question of  
16 Federal law, but it is informed by State law.

17 So, the short answer is that the court does  
18 that all the time in Monell damages actions --

19 JUSTICE KENNEDY: And California itself or  
20 the Ninth Circuit had a case in which the county sheriff  
21 was directed by a judge to garnish certain wages or  
22 certain accounts; the sheriff had no choice, apparently,  
23 other than to follow the judge; and the Ninth Circuit  
24 held Monell is not required when you seek declaratory  
25 relief against future actions, and so attorneys' fees

1 are given.

2 MR. COATES: Correct. Correct. That's the  
3 Chaloux case in which they said that Monell simply  
4 doesn't apply. We're not going to ask whether he's  
5 acting as a State official or a county official --

6 JUSTICE KENNEDY: It doesn't make any  
7 difference?

8 MR. COATES: It doesn't make any difference  
9 to the Ninth Circuit. Other circuits have been very  
10 careful in drawing that distinction as to how county  
11 officers -- how counties function.

12 As I noted, I think this goes to important  
13 principles of federalism. It goes right into the way  
14 the States interact with their local governments. And  
15 it can have a profound impact on the way in which local  
16 governments view their obligation to enforce State law.

17 If the Court has no further questions, I  
18 would submit the matter.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 1:56 p.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25



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