No. _____

In the Supreme Court of the United States

MITZI JOHANKNECHT,
In her official capacity as King County Sheriff,
Petitioner,

v.

EVA MOORE AND BROOKE SHAW, Individually
and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), this Court held that the *Monell* "policy or custom" requirement applies to § 1983 suits for prospective relief against municipalities, thereby overruling prior Ninth Circuit authority. Here, Respondents Eva Moore and Brooke Shaw brought an official-capacity action against Petitioner, the King County Sheriff, to enjoin her from executing facially valid state court orders mandating restoration of property. When the Sheriff averred that mere execution of a court order fails the *Monell* test, Respondents countered that *Monell* did not apply because they were seeking prospective relief under *Ex parte Young* – a doctrine designed to avoid Eleventh Amendment immunity through official-capacity actions against state officials. The Ninth Circuit – sidestepping both *Humphries* and *Monell* – held that § 1983 did not apply, thereby allowing Respondents to proceed under "the judge-made cause of action recognized in *Ex parte Young*." App. 17. The Ninth Circuit also held that the Sheriff's status as a local or state official was immaterial. *Id.* at 18.

The question presented is:

Whether *Ex parte Young* establishes a novel and unprecedented judge-made cause of action, separate from § 1983, that can be used through an official capacity action to obtain prospective relief against a municipality whose local Sheriff faithfully executes facially valid state court orders.

PARTIES

Petitioner Mitzi Johanknecht[1] appears before this court in her official capacity as the elected Sheriff of King County, Washington. King County is a municipality with a land mass larger than Delaware or Rhode Island and a population of almost 2.2 million. Its largest cities are Seattle and Bellevue.

Respondents Eva Moore and Brooke Shaw are individuals who reside in King County, Washington. They appear both individually and on behalf of a putative class of similarly situated individuals. Cherrelle and Nina Davis were also Plaintiff-Appellants before the Ninth Circuit, but were dismissed for lack of standing and are no longer part of this action.

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[1] Sheriff John Urquhart was the Defendant-Appellee before the District Court and the Ninth Circuit. While the case was on appeal, Sheriff Johanknecht replaced Sheriff Urquhart, which caused her to be "automatically substituted as a party" in this official capacity action under FRAP 43(c)(2).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

The Ninth's Circuit's decision overtly circumvents *Los Angeles County v. Humphries*, 562 U.S. 29 (2010). Rather than applying *Monell v. Department of Social Services*, 436 U.S. 658 (1978) to Respondents' claims for prospective relief against municipalities as directed by *Humphries*, the Ninth Circuit adopts a new, judge-made cause of action that stands apart from both 42 U.S.C. § 1983 and *Monell* considerations. App. 17. The source of its new cause of action is the Eleventh Amendment doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which the Ninth Circuit extends from state officials to purely local officials. App. 18. The reason for ignoring *Humphries* and turning *Ex parte Young* on its head? – to allow Respondents to bring an official-capacity action against Petitioner, the King County Sheriff ("Sheriff"), for the routine act of faithfully executing Writs of Restitution ("Writs"), which are Washington Superior Courts orders issued pursuant to state eviction statutes at the request of landlords.

It has long been the rule that local officials are expected to promptly and faithfully execute facially valid court orders. Under the Ninth Circuit's decision, however, local officials are now required to second-guess facially valid court orders – which undermines respect for state courts. A local official like the Sheriff, directed by the state court to execute a facially valid order, is caught between a proverbial rock and a hard place. She risks being hauled into federal court if she follows the commands of the state court order, but a federal court later invalidates it under the vagaries of procedural due process. Alternatively, if she questions the state court order, reviews the record, studies the

law, consults with counsel, and attempts to anticipate possible constitutional or statutory challenges, the Sheriff risks being held in contempt by the state court for failing to execute the order. Whatever problem the Ninth Circuit sought to address with its decision, its cure creates far greater problems.

This Court's *Monell* doctrine ensures that municipalities – whether sued directly or for the official capacity acts of their officials – are liable only for constitutional deprivations caused by the municipalities' own policies and customs. There is no *respondeat superior* liability under § 1983, nor should there be a doctrine of *respondeat inferior*, whereby a municipality is held liable for the unconstitutional acts of its parent state. Yet, this is the impact of the Ninth Circuit's decision. The Sheriff does not initiate the Writ process, nor is she a party to it. She is not responsible for the wording of the Writ, nor the court process that results in its issuance – but she is mandated by the state court to follow the Writ's precise commands. The Ninth Circuit's new cause of action leaves the Sheriff and her municipality as the designated defendant to answer for the claimed procedural due process problems of a Washington State statute that is outside the Sheriff's discretionary enforcement responsibilities, and a Writ issued under that statute by a state court judge that operates independent of the municipality's influence or control.

Because the Ninth Circuit's decision substantially departs from *Monell* and twists *Ex parte Young* into spaces it was never meant to occupy, this Court should grant certiorari.

OPINIONS BELOW

The published opinion of the Ninth Circuit is reported at *Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018) and reproduced at App. 1 to App. 24. The Sheriff's motion for panel rehearing or rehearing en banc was denied on October 10, 2018. App. 38. The District Court's dismissal order is found at 2016 WL 7243751, at *1 (W.D. Wash. Dec. 15, 2016) and reproduced at App. 25 to App.37.

JURISDICTION

The jurisdiction of this Court is being invoked under 28 U.S.C. § 1254(1). A December 27, 2018 order by Justice Kagan extended the time to file this petition to and including, February 7, 2019. *Johanknecht v. Moore*, No. 18A675 (Dec. 27, 2018).

STATUTES

The United States Code, 42 U.S.C. § 1983, provides that:

> 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.

STATEMENT OF THE CASE

The facts in this matter are not in dispute. The following facts are drawn from the First Amended Complaint and Washington State Superior Court records properly noticed by the Ninth Circuit.

A. Respondents' Landlord Obtained a Writ of Restitution for Execution by the Sheriff.

Similar to other states, Washington allows property owners to institute unlawful detainer actions in Superior Court to evict tenants for nonpayment of rent. *See* Wash. Rev. Code Ch. 59.18. The Sheriff is not a party to these actions. However, if a landlord satisfies statutory requirements, the state court will issue a Writ of Restitution, which orders the Sheriff to restore possession of the property to the landlord. The King County Sheriff receives several thousand Writs each year and generally executes them without incident. *See* Ninth Circuit Supplemental Excerpts of Record ("SER") 130.

On May 23, 2016, after Respondents Moore and Shaw failed to pay their rent, their landlord initiated an Unlawful Detainer action in Superior Court. Ninth Circuit Excerpts of Record ("ER") 52. Moore and Shaw filed a letter with the court requesting a hearing, but it appears that no hearing was immediately set. SER 52-53.

On June 20, 2016, Respondents' landlord filed a motion for issuance of a Writ. SER 55-56. The Superior Court granted the motion. The next day, the court's clerk issued the Writ:

> THE STATE OF WASHINGTON, *TO THE SHERIFF OF KING COUNTY*, GREETINGS:
>
> A Judge of the above-entitled Court *signed an order* granting a Writ of Restitution under Wash. Rev. Code § 59.18.
>
> NOW, THEREFORE, *You the Sheriff, are hereby commanded to deliver to the [landlord], possession of the following premises*: Sterling Ridge Apartments, 11328 SE Kent Kangley Road #D-206, Kent, King County, Washington, 98030 *to remove the defendant(s) and all others occupying the premises and make return of this writ according to law*. If you are not able to return the writ within 10 days, the return of this writ shall be automatically extended for a second 20-day period. You are also authorized to break and enter as necessary.

SER 64 (emphasis added). The Sheriff served the Writ by posting it on Respondents' apartment door. *Id.* at 63.

The Writ, however, was never executed. On June 27, 2016, Moore and Shaw filed a motion to stay execution of the Writ, which was granted. SER 68-70; 72-73. Respondents asked the Superior Court to declare Wash. Rev. Code § 59.18.375 – the statute authorizing the process used by their landlord to obtain the Writ – unconstitutional for violating procedural due process. SER 75-82. The Superior Court stayed

execution of the Writ and set a show cause hearing to consider Respondents' claims. SER 72-73.

Respondents and their landlord first agreed to continue the show cause hearing (and the stay) to July 14, 2016, and then, to July 28, 2016. SER 84-85. Due to this delay, the Writ expired on July 21, 2016 by its own terms. See SER 61. Thus, the Sheriff returned the Writ to the Superior court, noting that "said writ expired" and that it was never executed. *Id.* at 63-64.

No further Writs of Restitution were entered against Moore and Shaw. On July 28, 2016, Respondents and their landlord settled the matter, informing the Superior Court that "the parties have resolved all claims." SER 87-88. Due to the settlement, the Superior Court never ruled on Respondents' motion to declare Wash. Rev. Code § 59.18.375 unconstitutional. Under the terms of the settlement, Moore and Shaw paid their back rent and were allowed to remain in their apartment. ER 50-51.

B. Prior to Settling with Their Landlord, Respondents Sued the Sheriff and the District Court Later Dismissed Their Lawsuit.

On July 5, 2016, while their due process motion was still pending in the Unlawful Detainer case, Moore and Shaw initiated this action in King County Superior Court, on their own behalf, against both the Sheriff and the Superior Court. SER 1. Their complaint sought declaratory judgment finding the Wash. Rev. Code § 59.18.375 eviction process unconstitutional and enjoining the Superior Court and the Sheriff from issuing or executing Writs of Restitution under this statute. SER 1-4.

Less than two weeks later, Respondents filed a First Amended Complaint ("FAC") converting the matter into a class action and adding two additional class representatives, Cherrelle and Nina Davis. ER 49-58. The FAC dropped the King County Superior Court as a defendant, but sued the Sheriff in her official capacity.[2] *Id.* The FAC sought declaratory and injunctive relief prohibiting the Sheriff from serving and executing Writs in accord with the order of the Superior Court. *Id.* The sole claim for relief was an alleged violation of 42 U.S.C § 1983. ER 57. Respondents and the Davis' (together the "Putative Class Representatives") immediately sought class certification. *See* SER 5.

The Sheriff timely removed the case to the United States District Court for the Western District of Washington. ER 44. The matter was assigned to the Hon. Thomas S. Zilly.

After answering the FAC, the Sheriff filed a Fed. R. Civ. P. 12(c) motion to dismiss. SER 9. Among other things, the Sheriff argued that the Putative Class Representatives' official capacity suit required proof under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). SER 21-22. An official capacity action against a municipal official is a pleading artifact to sue the municipality itself, but the Putative Class Representatives had failed to satisfy *Monell* by identifying any King County policy or custom that

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[2] The FAC also named the King County Sheriff's Office Civil Unit as a defendant. The Civil Unit was dismissed by agreement of the parties because, under Washington law, it is not a legal entity with the capacity to be sued. SER 6-7.

caused their alleged injury – apart from the Sheriff's duty to comply with the dictates of a facially valid court order. *Id.* The Sheriff did not initiate the Unlawful Detainer Act, nor did she have any involvement in establishing the process that resulted in issuance of the Writ. *Id.* As an arm of the Superior Court when serving and executing Writs, the Sheriff was obligated to respect facially valid court orders and follow the Superior Court's directives, or face contempt charges. *Id.*

The Sheriff further pointed out that she had no position on the constitutionality of the Wash. Rev. Code § 59.18.375 process, no real interest in the matter, and was not a proper party to defend the statutory process. SER 153. Rather than suing the Sheriff, Respondents' should have proceeded to a decision with their previously filed Superior Court motion to declare Wash. Rev. Code § 59.18.375 unconstitutional, and appealed any adverse ruling. *Id.* They might have sued a relevant state official, like the Washington Attorney General, who has a more direct interest in defending state statutes against constitutional challenge. For these and other reasons, the Sheriff asked the District Court to dismiss the Putative Class Representative's lawsuit.

In response, the Putative Class Representatives argued that *Monell* had no application because they were not suing the Sheriff as a municipal actor under § 1983. SER 143. Instead, they claimed that the King County Sheriff was a *state* official subject to suit under the doctrine of *Ex Parte Young*, 209 U.S. 123, 156-57 (1908). SER 132-135. According to the Putative Class Representatives, the mere fact that the Sheriff enforced

state laws turned her into a state official for *Ex Parte Young* purposes. SER 134.

Judge Zilly granted the Sheriff's Motion to dismiss. ER 5-14. Without analyzing Washington law, the District Court held that the King County Sheriff acts as a state official for purposes of Eleventh Amendment immunity when executing Writs and other judgments. ER 11-12. Nonetheless, the Putative Class Representatives' *Ex parte Young* claim failed because the District Court, *sua sponte*, interpreted Wash. Rev. Code § 59.18.375 within the overall context of Washington's Residential Landlord-Tenant Act to avoid Respondents' claimed procedural due process violation. Based on its interpretation of the Residential Landlord-Tenant Act, the District Court held that "Plaintiffs have not raised the type of facial constitutional challenge necessary to invoke the doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny." ER 11. After finding that the complaint could not be amended in a manner that would cure the deficiencies in the lawsuit, the District Court dismissed the action. ER 14.

C. The Ninth Circuit Reversed, Avoiding Respondents' *Monell* Problems by Establishing a Judge-made Cause of Action under *Ex Parte Young* That Can Be Asserted Against Municipalities.

The Putative Class Representatives sought review from the Ninth Circuit. The Sheriff argued that the District Court lacked Article III jurisdiction due to standing and mootness problems. The Ninth Circuit agreed that the Davises lacked standing and dismissed them, but found that Respondents Moore and Shaw

satisfied standing requirements. App. 10. Although Respondents' case was moot due to the settlement with their landlord, the Ninth Circuit determined that it fell within the "capable of repetition, yet evading review" mootness exception that allowed them to continue as putative class representatives. App. 11.

The Ninth Circuit rejected the District Court's reasons for dismissing Respondents' lawsuit. First, the Ninth Circuit disagreed with the District Court's "misreading" of Washington's Residential Landlord-Tenant Act. App. 13. Both Respondents and the Washington Attorney General, as amicus, argued that the District Court's novel statutory interpretation was incorrect. The Sheriff, who had "no dog in the hunt" with regard to the proper interpretation of the Residential Landlord-Tenant Act, took no position on this issue. Answering Brf. at 20 (Dkt. 15).

Second, the Ninth Circuit rejected the District Court's holding that Respondents' lawsuit was barred by the *Rooker-Feldman* doctrine. Respondents did not "seek to overturn the state court judgment itself," but challenged "the facial validity of the statute under which their state court proceedings were conducted." App. 15-16.

Raising *Monell* as an alternative ground for affirmance, the Sheriff argued that Respondents failed to state a valid claim under § 1983. Answering Brf. at 32-36 (Dkt. 15). Consistent with her arguments before the District Court, the Sheriff averred that Respondents had no viable cause of action under *Monell* because the Sheriff was *not* the "moving force" behind Respondents' claimed constitutional deprivations. The crux of Respondents' procedural due

process claim is that Wash. Rev. Code § 59.18.375 establishes a Superior Court eviction process where Writs are issued "before the tenants are provided a hearing" and the opportunity to present evidence. Opening Brf. at 1-2 (Dkt. 8); Reply Brf. 32- 40 (Dkt. 28). However, the landlord initiates this eviction process and seeks the Writ through a Superior Court motion, without *any* involvement by the Sheriff and without her knowledge. ER 52, 55-56. The Superior Court then considers the motion, orders the Writ, and the court clerk issues it. SER 64. By the time the actual Writ reaches the Sheriff, the supposed due process violation is complete. The Sheriff is presented only with a facially valid court order for execution. *Id.* At that point, the Sheriff is obligated to execute the order and has no ability to cure Respondents' claimed violation.

Respondents' did not dispute their inability to satisfy *Monell*. Instead, they argued that they "need not establish the requirements for municipal liability under *Monell* because [they] are suing [the Sheriff] as a *state* actor" under the doctrine of *Ex parte Young*. Opening Br. at 37 (Dkt. 8). Their theory was that *Ex parte Young* applied because the local Sheriff was acting as a state official in serving and executing Writs. *Id.* Respondents thus argued that the "requirements of *Monell* do not apply." Reply at 4 n.2 (Dkt. 28). Both parties devoted extensive briefing to whether the King County Sheriff was a state or local official, with general agreement that *Ex parte Young* was relevant only to state officials. *See* Answering Brf. at 36-44 (Dkt. 15); Opening Brf. at 23-27 (Dkt. 8); Reply Brf. at 4-14 (Dkt. 28); Amicus Br. of the State of Washington at 16-19 (Dkt. 18).

After hearing oral argument, the Ninth Circuit found the Sheriff's contention that Respondents' action must be brought under § 1983 "plainly without merit." App. 17. The Ninth Circuit reasoned that § 1983 would apply to a suit to recover monetary damages, but Respondents were "seeking only declaratory and injunctive relief against the Sheriff in [her] official capacity—a declaration that [Wash. Rev. Code § 59.18.375] is facially unconstitutional and an injunction barring [her] from enforcing writs of restitution issued under the statute." *Id.* For such prospective relief, the Ninth Circuit held that Respondents "do not need a statutory cause of action." *Id.* Instead, "[t]hey can rely on the judge-made cause of action recognized in *Ex parte Young* . . . which permits courts of equity to enjoin enforcement of state statutes that violate the Constitution or conflict with other federal laws." *Id.*

The Ninth Circuit explained further that a plaintiff would need to proceed under a statutory cause of action only where Congress has enacted "statutes with a detailed remedial scheme that explicitly or implicitly displace[] the judge-made equitable remedy available under *Ex parte Young*." *Id.* The court found that Congress had enacted no such statute. *Id.* at 18. The Sheriff could not rely on § 1983 for this purpose, which "at most imposes limitations on the remedies available in certain actions brought against judicial officers," but "does not displace the availability of an *Ex parte Young* action altogether." *Id.*

The Ninth Circuit declined to address whether the King County Sheriff was a state or local official. App. 18. The court held that it was unnecessary to resolve

this question because "[a]ctions under *Ex parte Young* can be brought against both state and county officials." *Id.* The court further found that Respondents had met the "some connection" test applicable to *Ex parte Young* actions merely because "Washington law assigns county sheriffs the power and duty to serve and execute writs of restitution issued under [Wash. Rev. Code § 59.18.375]." *Id.*

After rejecting the Sheriff's remaining arguments, the Ninth Circuit reversed the District Court's order of dismissal and remanded for further proceedings. App. 24. The Sheriff's petition for panel rehearing and rehearing *en banc* was denied. App. 38-39.

REASONS THE PETITION SHOULD BE GRANTED

This case turns on legal rulings made in the context of a Fed. R. Civ. P. 12(c) motion to dismiss, which this Court reviews *de novo.* A grant of certiorari is appropriate because the Ninth Circuit's decision directly conflicts with several of this Court's decisions, the decisions of other Circuit Courts, and raises exceptional issues of public importance.

A. The Ninth Circuit's Decision Conflicts with *Humphries* and *Monell* by Allowing Prospective Relief Against Municipal Defendants Despite Noncompliance with *Monell* Standards.

Because Respondents have no viable cause of action against the Sheriff under 42 U.S.C. § 1983, the Ninth Circuit relied on *Ex parte Young* to create a "judge-made cause of action" against municipal governments. App. 17. In essence, this case reactivates the Ninth

Circuit's pre-*Humphries* approach of allowing prospective suits to proceed against municipalities absent *Monell* compliance. This holding flatly conflicts with *Humphries*.

In *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978), this Court held that civil rights plaintiffs suing municipal entities under § 1983 must show that their injury was caused by a municipal policy or custom. In other words, "a municipality could be held liable under § 1983 only for its *own* violations of federal law." *Humphries*, 562 U.S. at 36 (emphasis added; citing *Monell*). Although *Monell* resolved this issue for damages actions, the Ninth Circuit and some other Circuit Courts applied a different standard to suits for prospective relief. *Id.* at 33-34. Thus, the question presented in *Humphries* was whether the *Monell* policy or custom requirement also applies when a plaintiff seeks prospective relief against a municipality, including injunctive or declaratory relief. 562 U.S. at 31.

Relying on the text and legislative history of § 1983, this Court held that the *Monell* policy and custom requirement applies to all suits against municipalities, including those for damages or prospective relief. *Id.* at 34. This Court found that "[n]othing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought." 562 U.S. at 37. To the contrary, the text supported application of the policy and custom requirement regardless of the relief being sought. *Id.* A contrary approach would undermine "*Monell's* logic" – "[f]or whether an action or omission is a municipality's 'own' has to do with the nature of the

action or omission, not with the nature of the relief that is later sought in court." *Id.*

The Ninth Circuit's creation of a new cause of action for prospective relief under *Ex parte Young* that bypasses *Monell*, represents a blatant, end-run around *Humphries*. The only possible distinction between this case and *Humphries* is Respondents' decision to sue the Sheriff in her official capacity, rather than suing King County directly. However, any claimed distinction between prospective suits brought directly against municipalities and official capacity actions brought against municipal officials is facile.

First, it is well established that an official capacity lawsuit against a municipal official requires proof of the *Monell* policy or custom requirement. This Court has long recognized that "official capacity" lawsuits are merely another way to plead a lawsuit directly against a municipality:

> Official-capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon, supra,* 469 U.S., at 471–472, 105 S.Ct., at 878. It is *not* a suit against the official personally, for the real party in interest is the entity.

Kentucky v. Graham, 473 U.S. 159, 165–66 (1985). *See also McMillian v. Monroe Cty., Ala.*, 520 U.S. 781 n.2 (1997) (A suit against a governmental officer in his official capacity "is the same as a suit 'against [the] entity of which [the] officer is an agent.'"). As a result, in an official capacity action against a local official, "a governmental entity is liable under § 1983 *only when the entity itself is a 'moving force' behind the deprivation*." *Graham*, 473 U.S. at 166 (emphasis added).

Second, the way a plaintiff chooses to sue a municipal government – directly or through the official capacity artifice – does not matter under the logic of *Monell*. Just as the question of whether an action or omission is a municipality's own does not depend on the nature of the relief later sought in court, *Humphries*, 562 U.S. at 37, it also does not depend on how that relief is plead against the municipality. "As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 415 (1997).

Finally, respondents' decision to plead the current case as an official capacity action matters not because *Monell* itself was an official capacity action. It included a number of individual defendants who "were sued solely in their official capacities," and the question presented was whether local government officials were persons within the meaning of § 1983 when sued for damages "in their official capacities." *Monell*, 436 U.S. at 661, 663. The *Monell* holding thus applies equally to

both official capacity actions and direct lawsuits against local governments. *Id.* at 691 n.55.

Here, Respondents' complaint contains no allegations establishing King County as the moving force behind their claimed procedural due process deprivation. The Sheriff, acting in her official capacity or otherwise, has nothing to do with the alleged issuance of Writs by the Superior Court without a hearing, sufficient notice or an opportunity to be heard.[3] Respondents have no colorable claims under *Monell* demonstrating that the alleged due process violation is the result of King County's own actions through policy or custom.[4] Instead, the Ninth Circuit has created a new form of *respondeat inferior* liability that allows actions against local officials who merely execute orders issued under state law.

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[3] The Sheriff's lack of *any* real interest in the outcome of Respondents' due process challenge to Wash. Rev. Code § 59.18.375 makes her a problematic defendant on remand. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting *and self-interested parties vigorously advocating opposing positions*.").

[4] Where federal courts have considered this issue, the Sheriff's duty to execute facially valid court orders as directed by the issuing court does not satisfy the *Monell* requirement. *See, e.g., Nelson v. Walsh*, 60 F. Supp. 2d 308, 313 (D. Del. 1999), *aff'd,* 225 F.3d 649 (3d Cir. 2000) (summary judgment granted for Sheriff's office because execution of court-issued writ did not satisfy *Monell* criteria); *Shipley v. First Fed. Sav. & Loan Ass'n of Delaware*, 619 F. Supp. 421, 435 (D. Del. 1985) (No *Monell* liability when Sheriff sued in official capacity because function of executing court order does not "reflect the policy or custom of the County.").

With official capacity actions and direct suits against municipalities properly understood to be the same thing, there is no basis for the Ninth Circuit's decision to allow Respondents' claims for prospective relief to proceed without regard to the *Monell* policy and custom requirement. Although the Ninth Circuit correctly observes that Respondents "would be required to proceed under 42 U.S.C. § 1983 if they sought to recover money damages," App. 17, it errs by reinvigorating its pre-*Humphries* approach of drawing a distinction between suits for monetary damages and those for prospective relief. Under *Humphries*, it is apparent that a request for either type of relief requires compliance with § 1983 and *Monell*. Because the Ninth Circuit's holding squarely conflicts with *Humphries*, this Court should grant certiorari.

B. The Ninth Circuit's Decision to Extend *Ex Parte Young* to Municipal Defendants as a Non-statutory, Judge-made Cause of Action Conflicts with *Ex Parte Young*, *Ziglar v. Abbasi*, and Circuit Court Authority.

The Ninth Circuit's decision to establish *Ex parte Young* as a stand-alone cause of action that allows official capacity suits against municipal actors conflicts with the decisions of this Court and other Circuit Courts. This unprecedented expansion of *Ex parte Young* to purely municipal officials is a remarkable holding that merits a grant of certiorari.

1. Extending *Ex parte Young* to Municipal Officials Conflicts with *Ex parte Young* Itself Because Municipalities Fall Outside the Eleventh Amendment and Are Already Subject to Suit in Federal Court.

Ex parte Young is about lawsuits against state officials – *not* local officials – because local officials fall outside Eleventh Amendment immunity. The concise, but important purpose of *Ex parte Young* is to provide a narrow exception to Eleventh Amendment immunity in order to vindicate federal rights. In *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254–55 (2011), this Court explained that *Ex parte Young* provides a method to vindicate federal rights without violating the sovereign immunity of states under the Eleventh Amendment. The doctrine "rests on the premise—less delicately called a 'fiction,' . . . that when a federal court commands a *state official* to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Id.* (emphasis added). The *Ex parte Young* doctrine creates an exception to Eleventh Amendment immunity that states might otherwise assert and provides a method to seek prospective relief against state officials to remedy an ongoing violation of federal law. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) (*Ex parte Young* allows "federal jurisdiction over a suit against a *state official*"). *See generally* Wright *et al.*, 17A Fed. Prac. & Proc. Juris. §4232 n.2 (3d ed.) ("[T]he *Ex parte Young* 'rule applies only to state officers.'").

In this light, the Ninth Circuit's application of *Ex parte Young* to municipal governments makes no sense. The Eleventh Amendment does not apply to municipal

governments so application of a doctrine developed to avoid Eleventh Amendment immunity is entirely unnecessary. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 n.54 (1978) (There is no "basis for concluding that the Eleventh Amendment is a bar to municipal liability."). This Court has explained that local governments like King County can be sued directly in federal court, whereas resort to *Ex parte Young* is necessary where the Eleventh Amendment is implicated. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). In short, the Ninth Circuit's application of *Ex parte Young* to official-action suits against *municipal* officials should be rejected out of hand because municipalities are not covered by Eleventh Amendment immunity. *See Ex parte Young*, 209 U.S. at 155–56 (Doctrine applies to "individuals who, *as officers of the state*, are clothed with some duty in regard to the enforcement of the laws of the state . . . .").

In accord with its Eleventh Amendment purposes, application of *Ex parte Young* is limited to *state* officials, including county officials who act as state officials in certain areas. This Court, in *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 783 (1997), addressed the dividing line between a local sheriff acting as a county official and a sheriff acting as a state official. The question of whether the Sheriff is operating as a state or local official "is dependent on an analysis of state law." *Id.* at 786. This Court affirmed the rule that a county is liable under *Monell* for the policy decisions of its Sheriff only if she is responsible for setting municipal policy, but not if she is acting as a state official. *Id.* at 783.

Recognizing this rule, the Sheriff and Respondents devoted substantial briefing below to determine whether the Sheriff was a state or local official when executing Writs. Respondents acknowledged, as they should, that the doctrine of *Ex parte Young* applies only when "the defendant acts as a state official when engaged in" the challenged conduct. Reply Brf. at 4 (Dkt. 28). The Ninth Circuit did not answer this question, and instead, expanded the reach of *Ex parte Young* to purely municipal officials. Citing only Ninth Circuit authority, it held that "[a]ctions under *Ex parte Young* can be brought against both state and county officials . . . , so it is unnecessary for us to resolve the parties' dispute over whether the Sheriff acts on behalf of King County or the State of Washington when [she] executes writs of restitution." App. 18.

The Ninth Circuit's holding directly conflicts with the Eleventh Amendment purposes of *Ex parte Young*. It goes well beyond the narrow scope of *Ex parte Young*, which is to avoid an Eleventh Amendment bar to a suit by requiring that "state officials be restrained from enforcing an order in contravention of controlling federal law." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002). Because municipalities are not covered by the Eleventh Amendment, the Ninth Circuit's decision to expand *Ex parte Young* to official capacity actions against purely municipal officials conflicts with *Ex parte Young* itself.[5]

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[5] The Ninth Circuit's citation to *Armstrong v. Exceptional Child Care Center*, 135 S. Ct. 1378, 1384 (2015) does not support the existence of an *Ex parte Young* action against a municipal government (either directly or through an official capacity suit). *See* App. 17. To the contrary, plaintiffs in *Armstrong* brought suit

2. The Ninth Circuit's Decision to Expand *Ex parte Young* to Municipal Defendants Conflicts with *Ziglar v. Abbasi*.

After more than 100 years of consistent precedent applying *Ex parte Young* to state officials due to Eleventh Amendment concerns, the Ninth Circuit's decision to expand *Ex parte Young* to official capacity actions against local officials is jarring. The Ninth Circuit correctly acknowledges that its approach establishes a "judge-made cause of action." App. 17. However, in extending an implied cause of action under *Ex parte Young* to municipalities, the Ninth Circuit runs afoul of this Court's recent decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017).

In *Ziglar*, this Court addressed suits for damages against federal officials under *Bivens* and when it was appropriate to extend *Bivens* to new situations. 137 S. Ct. at 1854. This Court explained that *Bivens* and two related cases were decided in the "*ancient regime*" of the mid-20th century, when "the Court followed a different approach to recognizing implied causes of action than it follows now." 137 S. Ct. at 1855. In the modern era, this Court has "adopted a far more cautious course." *Id.* Especially when recognizing implied rights of action under the constitution, "it is a significant step under separation of powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* at 1856. This

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against two *state officials* in Idaho's Department of Health and Welfare. 135 S. Ct. at 1382.

Court's "expressed caution as to implied causes of action" is substantial enough that "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.* Although *Bivens* is settled law, *expanding Bivens* "is now a 'disfavored' judicial activity." *Id.* at 1857.

From these principles, this Court provided a framework for analyzing efforts to extend implied causes of action under the Constitution:

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? *Bush,* 462 U.S., at 380, 103 S.Ct. 2404.

Ziglar, 137 S. Ct. at 1857. "The answer most often will be Congress." *Id.* Importantly, when "there is an alternative remedial structure present in a certain case," where "Congress has created 'any alternative, existing process for protecting the [injured party's] interest' *that itself may 'amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages*.'" *Ziglar*, 137 S. Ct. at 1858 (emphasis added).

Although *Ziglar* addresses judicially-created *Bivens* actions, the same principles should have controlled the Ninth Circuit's decision to establish *Ex parte Young* as its own implied cause of action applicable to municipal officers in their official capacities. The important

separation of powers questions raised by implying a constitutional right of action do not end with the *Bivens* cases, nor are they limited to the type of remedy created to accompany the implied action. *See also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'"); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

The Ninth Circuit's decision to establish *Ex parte Young* as an implied cause of action against municipalities conflicts with the *Ziglar* analysis. The ready availability of § 1983 – which provides a comprehensive remedy for damages and prospective relief – is sufficient to preclude extending *Ex parte Young* as an implied cause of action against municipalities. *See Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (coverage of § 1983 must be broadly construed). There is no justification for extending *Ex parte Young* to purely municipal actors because Congress, through its adoption of § 1983, has already defined the proper scope of municipal liability.

The Ninth Circuit's analysis is purely *ancient regime*. Rather than keeping separation of powers concerns central to its decision, the Ninth Circuit violates separation of powers doctrine by extending *Ex parte Young* in a way that overrides Congress' *Monell*

requirement. The conflict between the Ninth Circuit's approach and the mandate of *Ziglar* is apparent.

3. The Ninth Circuit's View that *Ex parte Young* is its Own Cause of Action Separate from § 1983 Conflicts with the Holdings of Other Circuit Courts.

The Ninth Circuit's decision to elevate *Ex parte Young* to a stand-alone cause of action directly conflicts with the Sixth Circuit's holding in *Michigan Corrections Organization v. Michigan Department of Corrections*, 774 F.3d 895, 905 (6th Cir. 2014). Writing for a three-judge panel, Judge Sutton explained that *Ex parte Young* does not itself create a cause of action, but rather, "provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else." 774 F.3d at 905. In order to invoke *Ex parte Young*, a plaintiff must have an underlying cause of action in § 1983 or some other statute. *Id.* at 906.

The analytical dispute between the Ninth and Sixth Circuit courts impacts case resolution. Whereas the Ninth Circuit allowed Respondents to proceed under *Ex parte Young* due to their inability to satisfy § 1983, the Sixth Circuit determined that the failure to satisfy § 1983 was dispositive. *Id.* at 907 ("No private right of action means no underlying lawsuit. . . . No underlying lawsuit means no jurisdiction. . . . And no jurisdiction means no declaratory relief."). *See also Negron-Almeda v. Santiago*, 528 F.3d 15, 24–25 (1st Cir. 2008) (Given the sweep of § 1983, "recognizing a separate (implicit) cause of action under the aegis of *Ex parte Young* would serve simply to introduce a useless artifice into the act of pleading" and "would provide no

different rights than were already available to them under section 1983."). The question of whether *Ex parte Young* is a stand-alone cause of action or just a path around sovereign immunity is a significant conflict that merits resolution by this Court.

C. This Case Presents Exceptionally Important Issues Meriting this Court's Attention.

This case is of exceptional importance meriting review. The Ninth Circuit's decision implicates the proper role of federal courts within separation of powers doctrine and raises important federalism concerns by decreasing respect for facially valid state court orders.

1. The Ninth Circuit's Decision Implicates Separation of Powers and the Scope of Federal Court Authority to Expand Implied Constitutional Causes of Action.

At the very least, the Ninth Circuit has created an implied, "judge-made" cause of action that can be asserted against municipalities in an official capacity action without regard to the requirements of § 1983. App. 17. The Ninth Circuit plainly holds that "plaintiffs do not need a statutory cause of action." *Id.* Rather, the court's expansion of *Ex parte Young* to municipal lawsuits relies upon the powers of "courts of equity to enjoin enforcement of state statutes that violate the Constitution or conflict with other federal laws." *Id.* The Ninth Circuit is essentially asserting common law powers to create new causes of action where Congress has not acted "explicitly or implicitly" to displace "the judge-made equitable remedy under *Ex parte Young*." *Id.* In so doing, it overrides both the

language of § 1983 and Congressional intent, which this Court has already determined is best reflected in the *Monell* policy or custom requirement.

The import of this case extends beyond the interests of Respondents and the Sheriff over service and execution of court orders. In accord with the *Ziglar* analysis set out above, the decision to expand the judge-made doctrine of *Ex parte Young* from state to local officials and elevate it to an independent cause of action raises significant separation of powers concerns. This case, by examining a newly implied right of action, raises important questions about the proper role of the federal courts and the role of Congress in establishing private causes of action. These are exceptionally important issues that justify granting certiorari.

2. The Ninth Circuit's Decision Reduces Respect for State Court Orders By Requiring Local Officials to Second-Guess Facially Valid Orders Prior to Execution, or Risk Being Hauled Into Federal Court.

This case is also exceptionally important because many thousands of municipalities within the Ninth Circuit now face a new and undefined cause of action where they risk being sued merely for executing a facially valid state court order. Under *Monell*, municipalities can effectively manage risk by governing their own activities to ensure Constitutional compliance, but the Ninth Circuit's decision leaves these municipalities without any reasonable course of action. Executing a facially valid judicial order obtained by a third party leaves the municipality open to a federal lawsuit, whereas a municipality's refusal to follow such a court order leaves it vulnerable to

contempt by the issuing court. The collateral damage of this intolerable situation is decreased respect for facially valid state court judicial orders, which are now subject to mandatory second-guessing by the officials ordered to execute them. It is exceptionally important for this Court to resolve this situation. *See Mays v. Sudderth*, 97 F.3d 107, 112–13 (5th Cir. 1996) (Sheriffs and other court officers enforcing facially valid orders should not have to act "as pseudo-appellate courts scrutinizing the orders of judges.").

CONCLUSION

The Ninth Circuit's decision circumvents this Court's decision in *Humphries*, and contrary to *Ziglar*, expands *Ex parte Young* to provide an independent, judge-made cause of action for prospective relief against municipalities. It ultimately violates separation of powers principles and decreases respect for facially valid state-court orders. This Court should grant certiorari.

Respectfully submitted,

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