No. 18-1056

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Respondents Eva Moore and Brooke Shaw ("Respondents") rest their opposition to certiorari on the false premise that suing a municipal sheriff in her official capacity somehow differs from suing the municipality itself. They further claim that *Ex parte Young,* 209 U.S. 123 (1908) provides an alternative vehicle for obtaining prospective relief against *municipal* officials who are acting pursuant to a state statute. But contrary to the Ninth Circuit's decision in this case,[1] it is legal error of the highest magnitude to create a new, judge-made cause of action under *Ex parte Young* merely because respondents' existing case fails under 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Through § 1983, Congress has established a comprehensive remedy that allows for prospective relief against municipal officials acting in their official capacities under color of state law. Respondents' failure to satisfy *Monell's* "moving force" requirement should have been the end of this case, not the genesis of a new cause of action, engrafted from Eleventh Amendment jurisprudence, for use against municipal officials. Because the Ninth Circuit's decision is contrary to this Court's precedents and raises exceptionally important issues, this Court should grant certiorari.

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[1] *See* App. 25 – 37, published at *Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018).

STATEMENT OF THE CASE

The parties agree on the essential facts of this case: (1) After respondents failed to pay their rent, their landlord initiated eviction proceedings in state court utilizing Wash. Rev. Code § 59.18.375 ("§ 375"); (2) At the landlord's request, the state court issued a Writ of Restitution ("Writ"), which ordered the King County Sheriff ("Sheriff") to serve the Writ and restore the landlord's property; (3) The Sheriff faithfully served the Writ in accord with its facially-valid terms; (4) Respondents then obtained an order from the eviction court staying execution of the Writ; (5) Respondents filed a motion challenging § 375 under due process; (6) With the eviction proceedings still pending, respondents next filed a civil rights lawsuit against the Sheriff in her official capacity, which was removed to federal court; (7) The Writ expired without ever being executed; and (8) Respondents settled the eviction dispute with their landlord, withdrawing their constitutional challenge to § 375.[2]

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[2] On remand, pending this petition, the Sheriff notified the District Court that she is not taking *any position* on the constitutionality of § 375 because she has no real interest in the eviction process beyond faithfully executing Writs. Dkt. 68 at 1-2 (*Moore v. Johanknecht*, No. 16-cv-1123-TSZ (W.D. Wash.)). The Sheriff was unable to find an alternative party willing to voluntarily intervene to defend this statute. *Id.* at 2. With a substantial breakdown in the normal adversarial process, the District Court stayed summary judgment proceedings pending resolution of this petition for certiorari. Cert. Opp. at 8; Dkt. 77.

REASONS THE PETITION SHOULD BE GRANTED

A. The Ninth Circuit's Decision Conflicts with *Humphries* and *Monell*.

The Ninth Circuit erred by adopting respondents' theory that their suit could proceed separate from § 1983. Because respondents are bringing an official capacity action against a municipal official, they must comply with *Monell* and *Los Angeles County v. Humphries*, 562 U.S. 29 (2010). Certainly, respondents have no colorable claim under § 1983 that the Sheriff was the moving force behind their alleged constitutional violations because they *admit* that the Sheriff performs a "nondiscretionary act" when serving and executing Writs.[3] Opp. Cert. at 13. It is impossible for the Sheriff to be the moving force behind respondents' alleged due process deprivations – which are a lack of notice and hearing prior to issuance of the Writ – because these claimed violations are *always* choate by the time the Writ is issued, well *before* the Sheriff acts. The Ninth Circuit's conflict with *Monell* and *Humphries* justifies a grant of certiorari.

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[3] Respondents sometimes claim that the Sheriff "enforces" the Writ or § 375, but the Sheriff's sole involvement is to faithfully *execute* the state court's directives to the Sheriff in the Writ.

1. For Purposes of *Monell,* It Does Not Matter Whether Respondents Sue the Sheriff in her Official Capacity, or King County Itself.

Respondents misconstrue the abundant authority from this Court holding that an official capacity action against a local official is, in fact, a suit against the municipality itself. *See* Cert. Pet. at 15 to 16 (discussing authority). But even without this point, respondents do not dispute that *Monell* itself involved *both* municipal officials sued in their official capacity and municipal defendants sued directly. *See Monell*, 436 U.S. at 661 (listing defendants). The same "moving force" rule applied to all defendants, regardless of the official capacity pleading artifact. *Id.* at 690 n.55, 694. *See also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law.")

Respondents' efforts to create exceptions to application of §1983 and *Monell* fall flat. First, they offer no citation whatsoever for the novel claim that *Monell* does not apply when the Sheriff is enforcing state law. Opp. Cert. at 10. Such an exception would render *Monell's* moving force requirement largely irrelevant. Municipal officials are creatures of state law who derive their authority from state law. Congress does not exempt municipal officials from § 1983 because they are acting under a state-imposed duty. To the contrary, no suit can be filed under § 1983 unless a local official is acting under "color of state law." *See West v. Atkins*, 487 U.S. 42, 49 (1988) ("The traditional definition of acting under color of state law

requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"). Thus, respondents' proposed state law exception to *Monell* and *Humphries* would swallow these cases whole.

Second, respondents' citation to footnote 14 in *Graham* cannot establish their claimed exception to *Monell* because it merely points out that there is no longer a need to sue a municipal official in her official capacity when the municipality can be sued directly. 473 U.S. at 167 n.14. As noted above, it is well-established that a suit against a local Sheriff in her official capacity is the same as a suit against the municipality itself. *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997). The need to satisfy *Monell's* moving force requirement simply does not vary based on whether the plaintiff sues the municipality directly or uses the artifact of an official capacity action.[4]

Through § 1983, Congress established a "presumptively available remedy for claimed violations of federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). Its coverage "must be broadly construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991). Under

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[4] Respondents further claim that they seek no relief against King County and challenge only the "constitutionality of a *state* law that the Sheriff enforces." Cert. Opp. at 8. But, you cannot sue a statute. Should respondents ultimately prevail in this case, a decision would bind only the Sheriff and King County. The lawsuit would then need to be *repeated* in Washington's 38 other county jurisdictions. Such is the folly of respondents' approach and the Ninth Circuit's decision.

Monell, this comprehensive remedy applies to both municipal officials in their official capacities and their municipalities. With *Humphries*, it covers both damages and requests for prospective relief. In their opposition, respondents fail to make any case for a judge-made cause of action – consistent with this Court's precedent – that might allow official capacity actions against municipal officials or their municipalities absent proof of the § 1983 *Monell* factors.

Any doubt regarding the conflict between the Ninth Circuit's decision and *Humphries* is resolved by analyzing *Chaloux v. Killeen*, 886 F.2d 247, 249 (9th Cir. 1989), which this Court overruled in *Humphries*. The facts of the disfavored *Chaloux* case mirror the current one. The plaintiff in *Chaloux* sued several county sheriffs for serving writs of execution obtained from the state courts by creditors. *Id.* at 248. As in the current case, the Ninth Circuit designated the sheriffs as proper parties to defend the constitutionality of Idaho's post-judgment execution statutes because *Monell* did not apply to claims for prospective relief, and the case presented a situation where plaintiff sought "to enjoin the *enforcement* of allegedly unconstitutional *state* laws, *which by statute are enforced only by local officials.*" *Id.* at 250-51 (emphasis in original). As with the current case, the Ninth Circuit determined that plaintiff could sue under *Ex parte Young* due to the sheriffs' authority under state law to serve writs. *Id.* at 251-52.

In assessing a conflict, it is critical that *Humphries* explicitly overruled this *Chaloux* analysis. *Humphries,*

562 U.S. at 34. The Ninth Circuit's decision in the current case is merely an effort to repackage the overruled *Chaloux* analysis, thereby circumventing this Court's determination in *Humphries* that *Monell* applies to lawsuits seeking prospective relief against municipal defendants. Because the Ninth Circuit's *Moore* decision presents an irreconcilable and unnecessary conflict with *Monell* and *Humphries*, this Court should grant certiorari.

2. Respondents' Remedies are Sufficient.

Although the lack of a viable suit under § 1983 does not inherently justify the creation of a new federal cause of action, respondents are incorrect that they lack alternative remedies. First, respondents voluntarily abandoned their state court due process challenge to § 375, which was subject to ultimate review by this Court. Second, respondents could have challenged the constitutionality of § 375 by suing an appropriate *state* official like the Washington Attorney General. *See Clark v. Seiber*, 49 Wash. 2d 502, 304 P.2d 708, 709 (1956) (When a party alleges that a statute is unconstitutional, the Attorney General may act "to protect the public, should the parties be indifferent to the result."). Finally, respondents might sue the eviction judge under § 1983 to vindicate a persistent violation of constitutional rights. *E.g. Pulliam v. Allen,* 466 U.S. 522 (1984) (§ 1983 action proper against county magistrate).

Respondents' claim that states could avoid challenge to blatantly unconstitutional laws by mandating nondiscretionary local enforcement is overwrought. *See* Cert. Opp. at 14 -15. Under §1983,

any person falling victim to respondents' hypothetical, mandatory racial arrest law could sue the enforcing officer personally and likely obtain punitive damages. Moreover, federal law contains other mechanisms to deter individuals "who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights," including criminal liability under 18 U.S.C. § 242. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

B. The Extension of *Ex parte Young* to Municipal Officials Raises Substantial Conflicts.

There is no serious dispute that the Ninth Circuit's decision extends *Ex parte Young* to purely local officials. Respondents point out their original intent to sue "the Sheriff as a *state* actor," Cert. Opp. at 13, but the Ninth Circuit followed a different path. It unambiguously held that "[a]ctions under *Ex parte Young* can be brought against *both* state and county officials," and thus, deemed "it *unnecessary* . . . to resolve the parties' dispute over whether the Sheriff acts on behalf of King County or the State of Washington when [s]he executes writs of restitution."[5] App. 18 (emphasis added). The extension of a judge-

[5] The parties remain in substantial disagreement over the Sheriff's role as a local or state actor, but this question becomes relevant only if the Ninth Circuit's *Ex parte Young* holdings are overturned. Because the question of whether the Sheriff is a state or local official "is dependent on an analysis of state law," *McMillian*, 520 U.S. at 786, and the role of sheriffs varies from state to state, *Id.* at 795, respondents' citation to cases characterizing sheriffs outside Washington State are of no moment. *See* Opp. Cert. at 13 n.3.

made cause of action to municipal officials, especially when such officials are already subject to suit under § 1983, continues to raise substantial conflicts.

1. Extension of *Ex parte Young* to Municipal Officials Conflicts with This Court's Precedent and Makes No Sense.

Respondents persistently and incorrectly claim that "equity provides a cause of action against *an official* charged with enforcing state law." *E.g.* Opp. Cert. at 9 (emphasis added). But, this paraphrase of case law is inaccurate because this Court has always limited application of *Ex parte Young* to "*state* officials." *See* Cert. Pet. at 19-20 (quoting cases). Application of *Ex parte Young* to state officials, not local ones, flows naturally from the doctrine's Eleventh Amendment roots. *Id.* Respondents do not attempt to counter any of this analysis. To the contrary, they acknowledge that municipalities have no Eleventh Amendment immunity. Opp. Cert. at 12 (*quoting Monell*). Thus, the Ninth Circuit's decision to extend *Ex parte Young* to local officials conflicts with *Ex parte Young* itself and its Eleventh Amendment foundations.[6]

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[6] Citing *Quern v. Jordan*, 440 U.S. 332, 337-38 (1979), respondents claim that *Monell* and *Humphries* "do not apply to cases brought to enjoin the enforcement of state statutes under *Ex parte Young*." Cert. Opp. at 12. The *Quern* decision – which involved a suit against a "state official," not a local one – contains no such holding. 440 U.S. at 338. This Court merely pointed out that *Monell* had no application to the state official in *Quern* because *Monell* was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Id.*

2. The Conflict with *Ziglar v. Abbasi* Remains Because § 1983 Precludes Creation of a New Judge-Made Cause of Action Applicable to Municipal Officials.

The Ninth Circuit's decision, by creating a judge-made cause of action to circumvent respondents' inability to prove their §1983 case, remains contrary to *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In § 1983, Congress created the type of comprehensive, "remedial structure" that precludes creation of new, judge-made remedies against municipalities or municipal officials. *See Ziglar*, 137 S. Ct. at 1858.

Respondents cannot reconcile the Ninth Circuit's decision with *Ziglar*. First, their claim that *Ex parte Young* is not "new" misses the important difference between its accepted application to state officials and the Ninth Circuit's novel application to local officials. Second, there is no basis for respondents' claim that *Ziglar* is limited to damages actions. Just as the "logic of *Monell*" dictated its application to prospective claims, the logic of *Ziglar* dictates the same result. Regardless of the relief sought, federal courts are not free to adopt new judge-made causes of action in the face of overlapping congressional enactments like § 1983. 137 S. Ct. at 1858. Finally, respondents completely miss the serious implications of allowing the Ninth Circuit to create new, judge-made causes of action in the face of existing and comprehensive statutes. The concern is not federalism, but separation of powers. Per *Ziglar*, a federal court should not extend judge-made causes of action when Congress has already determined the proper scope of municipal

liability through the enactment of comprehensive statutes like § 1983. *See Ziglar*, 137 S. Ct. at 1857 ("separation-of-powers principles are or should be central to the analysis").

3. The Ninth Circuit's Reasoning is Contrary to the Sixth Circuit's Analysis.

Respondents do not deny that the Ninth Circuit's decision conflicts with the Sixth Circuit's approach in *Michigan Corrections Organization v. Michigan Department of Corr*ections, 774 F.3d 895 (6th Cir. 2014). Instead, they claim that Judge Sutton's opinion is no longer valid after this Court's decision in *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015), but this is incorrect. As an equitable doctrine, *Ex parte Young* is "subject to express and implied statutory limitations" and cannot circumvent Congress's legislative will. *Armstrong*, 135 S. Ct. at 1385. For example, the lawsuit in *Armstrong* could not proceed against Idaho state officials in their official capacities because the Medicaid Act "implicitly" precluded plaintiff's private enforcement action. *Id.* at 1385. Because of this analysis, the *Armstrong* decision readily supports *Michigan Corrections*, which holds that *Ex parte Young* is properly conceived as a path around sovereign immunity when a cause of action already exists under another statute. 774 F.3d at 905. The Sixth Circuit thus recognizes that *Ex parte Young* can be given effect only when it is consistent with available statutory remedies like § 1983. Because respondents' arguments based on *Armstrong* fail, the split between the Ninth and Sixth Circuits on the proper role of *Ex parte Young vis à vis* § 1983 remains.

C. Separation of Powers and Respect for Facially Valid State Court Orders Are Exceptionally Important Issues.

Respondents do not dispute that separation of powers concerns constitute an exceptionally important issue. The relative roles of Congress and federal courts in establishing the grounds for municipal liability merits this Court's consideration.

The negative impacts of the Ninth Circuit's decision on respect for facially valid state court orders also raises an exceptionally important issue. Respondents claim that lawsuits seeking only prospective relief would not cause the Sheriff to second-guess facially valid state court orders, Opp. Cert. at 15 n.5, but this reasoning overlooks the substantial burden that such lawsuits impose due to defense costs and potential liability for respondents' attorney fees. *See Pulliam*, 466 U.S. at 543 (Agreeing that there is "some logic" that "the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees."). Under the Ninth Circuit's decision, the unavoidable message is execute facially valid state court orders "at your own risk."

CONCLUSION

For the foregoing reasons and those previously stated in the Sheriff's petition, this Court should grant certiorari.

Respectfully submitted,

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