No. 18-1465

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO,

Petitioner,

v.

MARK MANN, et al.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THOMAS E. MONTGOMERY, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Assistant County Counsel
Counsel of Record
DAVID L. BRODIE, Chief Deputy
CAITLIN E. RAE, Chief Deputy
JEFFREY P. MICHALOWSKI, Senior Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101
(619) 531-4871
Thomas.Bunton@sdcounty.ca.gov

Counsel for Petitioner County of San Diego

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

ARGUMENT

I. RESPONDENTS' DISCUSSION OF THIS COURT'S PRECEDENT COUNSELS IN FAVOR OF *CERTIORARI*, NOT AGAINST IT.

Respondents argue that because they alleged a policy or practice, they are relieved of any burden of proving culpability. Respondents assert that the deliberate adoption of a policy or practice is enough to establish a substantive due process violation. Opposition, p. 8.

This ignores a crucial element of municipal liability under *Monell* – a plaintiff bears the burden of proving that a municipality's policy or practice **caused a violation of the Constitution**. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if the individual defendant "inflicted no constitutional injury on respondent, it is inconceivable that [the city] could be liable to respondent").

Here, the alleged violation was the provision of medical examinations to children in protective custody, without first involving their parents. The examinations, respondents contend, violate substantive due process. But as decades of precedent teaches, substantive due process is not a catch-all replacement for tort law. Rather, it only protects against conduct that shocks the conscience. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience"); *Breithaupt v. Abram*, 352 U.S. 432, 435-37 (1957) (due process

violated only if conduct "shocks the conscience and [is] so brutal and offensive that it did not comport with traditional ideas of fair play and decency").

Accordingly, whether the County had a policy or practice that authorized the examinations is only the first step in the inquiry. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 124 (1992) (it is not the case "that all harm-causing municipal policies are actionable under § 1983"). The plaintiff still must prove that the conduct at issue – provision of medical examinations to children who have been removed from their parents' care without first involving their parents – shocks the conscience. The Ninth Circuit cut its analysis short, completing only the first step. App. 19-20 ("The County's deliberate adoption of its policy or practice established that the municipality acted culpably. . . . Our analysis ends there.").

Respondents' opposition, of course, characterizes the issue differently. Respondents contend that, even in the context of substantive due process, a municipality's deliberate adoption of a policy or practice is sufficient to create *Monell* liability. Respondents are mistaken – especially in their reliance on *U.S. v. Salerno*[1] – but that is beside the point. The question at hand is not how to decide the issue of when and where the "shocks the conscience" test applies. Rather, the question is whether to decide the issue at all. Given the

[1] In *Salerno*, plaintiffs did not challenge actions taken by government employees. Rather, they mounted a facial challenge to federal **legislation**. 481 U.S. 739, 746 (1987).

conflicting readings of this Court's precedent, as well as the acknowledged split among the circuits, the issue calls out for resolution.

II. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT OVER THE "SHOCKS THE CONSCIENCE" TEST.

As Chief Judge Tymkovich noted in a concurring opinion, the law of substantive due process has caused considerable confusion across the circuits:

> The parties in this case disagree about how courts apply the "rights" approach and the "shocks the conscience" approach. They are not the only ones. The Supreme Court itself has vacillated to and fro. And the circuits have adopted varying approaches.

Dawson v. Board of Cnty. Commissioners of Jefferson Cnty., Colo., 732 Fed. App'x 624, 634 (5th Cir. 2018) (Tymkovich, C.J., concurring).

Respondents ignore this language entirely. Instead, they note that the court's "primary focus was on whether the plaintiff had asserted a violation of a fundamental right." Opposition, p. 12. But that is precisely the reason that *certiorari* is appropriate here. The circuit courts have approached the "shocks the conscience" analysis differently, with only the Ninth Circuit holding that it plays no role in the substantive due process analysis.

A. Respondents Ignore Three Decisions that Contribute to the Split.

In its petition, the County identified 14 decisions addressing the "shocks the conscience" standard. Respondents' opposition is conspicuously silent about three of them.

Most notably, *Mulholland v. Gov't Cnty. of Berks., Pa.*, 706 F.3d 227 (3d Cir. 2013) (*see* petition, p. 15), runs counter to the central argument of respondents' opposition – that the circuit courts are in harmony as to *Monell* claims alleging municipal liability. Respondents suggest that there is a cross-circuit consensus that *Monell* plaintiffs need not prove conduct that shocks the conscience.

Mulholland proves otherwise. There, the plaintiffs brought section 1983 claims against Berks County for violations of their substantive due process rights. *Id*. at 237. There were no claims against individual defendants. Still, the court found that "a child welfare agency abridges an individual's substantive due process rights when its actions 'exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed shocks the conscience.'" *Id*. at 241. As a district court following *Mulholland* summarized: "To establish a substantive due process violation by a municipality through a *Monell* claim, 'plaintiff must show that executive action was so ill-conceived or malicious that it shocks the conscience.'" *McLean v. City of Philadelphia*, 2016 WL 7384106 (E.D. Pa. 2016), quoting *Mulholland*, 706 F.3d

at 241. *See also Collins*, 503 U.S. at 128 (applying "shocks the conscience" test to *Monell* claim against city).

Respondents likewise ignore *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003) (*see* petition, p. 15), which questioned the district court's dismissal of a substantive due process claim based on physical examinations of minors. The *Dubbs* court acknowledged that "the 'shocks the conscience' standard applies to tortious conduct challenged under the Fourteenth Amendment," but left the door open to an alternative basis for proving substantive due process liability. Specifically, it held that protection could be warranted for fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 1203.

The *Dubbs* court declined to decide the issue, but opined that "it is not implausible" to think that medical examinations could satisfy the alternative test.

The Tenth Circuit's approach in *Dubbs* is inconsistent with that of the Ninth Circuit below. The Ninth Circuit did not engage in a fundamental rights analysis, nor did it analyze whether the purported rights were "deeply rooted in this Nation's history and tradition." *Id.* at 1203. Rather, its analysis began and ended with its finding that a policy was at issue: "The County's deliberate adoption of its policy or practice establishes that the municipality acted culpably. . . . Our analysis ends there." App. 19-20.

The Ninth Circuit's approach likewise conflicts with a Seventh Circuit decision, but respondents fail

to address that, too. In *Christensen v. Cnty. of Boone, Ill.*, 483 F.3d 454 (7th Cir. 2007) (*see* petition, p. 15), the court held that a substantive due process plaintiff must prove the existence of a fundamental right *and* conscience-shocking behavior. *Id.* at 462. In the absence of both showings, a plaintiff may not proceed. *Id.* at 465. The Ninth Circuit, again, stands in conflict. It found municipal liability without conducting either analysis.

B. Respondents Disregard One Side of the Split By Assuming That *Monell* Plaintiffs Need Not Prove Conscience-Shocking Conduct.

As petitioner previously discussed, five circuits have applied the "shocks the conscience" standard in familial association cases. Respondents shrug off five decisions contributing to the split, noting only that they do not specifically discuss *Monell* claims. *See* Opposition, p. 10 (disregarding *Southerland v. City of New York*, 680 F.3d 127 (2d Cir. 2012); *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999); *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Martin v. Saint Mary's Dep't of Soc. Servs.*, 346 F.3d 502 (4th Cir. 2003); and *Fitzgerald v. Williamson*, 787 F.2d 403 (8th Cir. 1986)).

That these cases do not expressly address one sub-set of substantive due process claims (*i.e.*, *Monell* claims) is beside the point. All of these cases hold, without limitation, that substantive due process claims require a showing of conduct that shocks the conscience.

None of these cases state that the requirement applies only to actions by individual government officials. Nor do any of these cases create a *Monell* exception. And as noted above, at least one circuit expressly held that the "shocks the conscience" requirement applies to *Monell* substantive due process claims. *Mulholland*, 706 F.3d at 241.

Respondents' discussion of additional circuit decisions is likewise unavailing. Their efforts to harmonize the decision below with *B.S. v. Somerset Cnty.*, 704 F.3d 250 (3d Cir. 2013) rests on a basic fallacy. That a policy or custom is necessary for a *Monell* claim (as the *B.S.* court held (*id.* at 276)) does not mean that a policy or custom is sufficient. Rather, a *Monell* plaintiff alleging substantive due process violations must also prove conduct that shocks the conscience.

Likewise, respondents' discussion of the recent Tenth Circuit child welfare cases – *Halley v. Huckaby*, 902 F.3d 1136 (10th Cir. 2018) and *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019) – fails to harmonize them with the decision below. Respondents claim that *Halley* creates a framework under which plaintiffs alleging any policy-based violation[2] is relieved of the obligation

[2] Respondents begin their argument by erroneously suggesting, without citation or authority, that they are challenging "legislative" action. Respondents make this argument because *Halley* and *Doe* hold that the "shocks the conscience" test applies to executive action, while a "fundamental-rights approach" applies to legislative action. But this case does not involve legislation or any action by the legislative branch.

of proving conduct that shocks the conscience. In reality, *Halley* does no such thing:

> [W]e clarify that familial association claims are grounded in the shocks-the-conscience approach to substantive due process claims challenging executive action. We have not always mentioned the shocks-the-conscience formulation, but a close look reveals our two-pronged test for these claims has been a manifestation of the shocks-the-conscience standard all along.

Halley, 902 F.3d at 1155-56. *Doe* is in accord. 912 F.3d at 1300 ("The Does' substantive due process claims – violation of the parental right to direct medical care and to familial association – challenge executive action, and therefore are 'shocks the conscience' claims.").[3]

Even assuming *arguendo* that "claims regarding policies requir[e] a finding that the government has infringed on a fundamental right" (Opposition, p. 12), that would not result in harmony between Ninth Circuit and Tenth Circuit law. In its decision below, the Ninth Circuit did not conduct a fundamental rights analysis,[4] and instead held that adoption of a policy was alone sufficient to establish *Monell* liability. App.

---

[3] Moreover, *Halley* called out for this Court's assistance – it cited extensive cross-circuit disagreement (*id.* at 1155 n. 14), and noted that its own decisions were somewhat confusing and did not provide clear answers (*id.* at 1153).

[4] The fundamental rights analysis requires the "utmost care," including a precise articulation of the purported fundamental right, and an examination of its place in the nation's history and tradition. *Wash. v. Glucksburg*, 521 U.S. 702, 720-21 (1997). The Ninth Circuit conducted no such analysis.

19-20 ("Our analysis ends there."). That is inconsistent with the Tenth Circuit's *Halley* and *Doe* decisions, and the decisions of four other circuits, too.

C. The Need for Clarity Remains Pressing.

Plaintiffs suggest that the case is moot, because the County agreed (as part of a negotiated settlement in another case) to modify its policies. Not so. The constitutionality of the Polinsky examinations continues to be actively litigated in a related case – *D.C. v. Cnty. of San Diego*, S.D. Cal. Case No. 3:15-cv-01868-MMA-NLS. The *D.C.* plaintiffs, represented by counsel for respondents here, purport to represent a class of 37,000 children who underwent examinations at Polinsky over a 20-year period.

And as the case law from the various circuits indicates, the practice of conducting medical examinations of children based on suspicion of abuse or neglect is widespread. The need for constitutional clarity and uniformity remains pressing.

III. The Ninth Circuit Erred in its Fourth Amendment Analysis By Ignoring Government Interests.

In applying the "special needs" analysis, below, the Ninth Circuit overstated the children's privacy interests while ignoring government interests wholesale.

The fact that intake procedures at Polinsky included brief full-body examinations does not mean that

heightened privacy interests are at stake. The brief examinations (which are recommended by the American Academy of Pediatrics) are no more invasive than other routine and necessary child-care practices at Polinsky – diaper changes, baths, and dressing for bed. The privacy interest at issue here is quite modest.

In contrast, the government interests are significant. Polinsky examinations are designed to protect not only the health of the child, but also the health of other children, and the health of Polinsky staff. So too do the examinations provide a record of the child's condition upon intake, which enables the County to defend against any unfounded accusations of abuse by Polinsky staff. App. 58.

The court below considered the first interest (the health of the child), but ignored the others. "[T]he County provides no other interest beyond the health of the child that would make the need to conduct the search more immediate such that providing notice and obtaining consent would impede the provision of necessary services." App. 24. *See also* Opposition, p. 19 (court below did not consider health of Polinsky staff or the need to establish a record of the child's condition upon intake).

Under this Court's precedent, the "special needs" analysis requires courts to balance the privacy interest against the government interests – all of them. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). The court below failed to do so, and *certiorari* is warranted to correct the error.

IV. LANGUAGE FROM THE DECISION BELOW WILL COMPLICATE THE WORK OF THOSE WHO PROVIDE CARE TO OUR MOST VULNERABLE CHILDREN.

A. The Decision Below Risks Discouraging Teachers and First Responders from Providing Appropriate Care.

The purpose of the Polinsky examinations is not to collect evidence of crimes. They are not directed or requested by law enforcement. Any investigatory purpose is incidental and subsidiary to the primary purpose – protection of the child, other children, and Polinsky staff.

The Ninth Circuit nonetheless held that the examinations fell under Circuit authority that required parental notice and consent for examinations "undertaken for investigative purposes." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). Because the Polinsky doctors are mandated reporters, the court reasoned, the examinations are necessarily investigatory.

Respondents downplay the troubling implications of the Ninth Circuit's reasoning. As respondents would have it, other mandated reporters such as doctors, firefighters, paramedics, nurses, teachers, and day care providers need not worry about litigation. If exigency exists, they can assist a child in the moment. If exigency does not exist, they may not. Opposition, p. 16.

Respondents ignore the difficult, factually-complex, and urgent decisions that such professionals face every day. Exigency is far from black and white. It is often disputed, and frequently litigated. And when plaintiffs

sue, they name individual defendants as a matter of course.

States impose mandatory reporting duties on designated professions precisely because they are uniquely situated to discover signs of abuse. Fear of litigation will cause such professionals to hesitate before conducting appropriate inquiries and examinations, or even to look the other way.[5]

B. The Ninth Circuit's Decision Will Complicate the Role of Foster Parents and Delay the Provision of Medical Care.

As petitioner previously explained, the County's obligation to provide medical care is not limited to the intake examinations at Polinsky. Rather, medical care is an ongoing obligation for the duration of a child's out-of-home placement. Children are to receive medical care even after successful placement in a foster home. DEP'T SOC. SERVS. REG. 31-405.24.

Accordingly, a literal reading of the Ninth Circuit's language regarding parental rights – "A parent's due process right to notice and consent is not dependent on the particular procedures involved in the examination,

---

[5] The problem is compounded by an additional defect in the court's reasoning below. While prior Ninth Circuit case law held only that parents have a right to make "important medical decisions" for their children (*Wallis*, 202 F.3d at 1141), the decision below arguably holds that parents have a right to be present at medical examinations, regardless of whether important medical decisions are made. App. 16.

or the environment in which the examinations occur . . . " – would impose an inordinate strain on local governments across the circuit. California alone has 50,000 foster children, and managing a notice process for their ongoing care, in some cases for years, would be a monumental burden. So too does the court's categorical language serve as an open invitation to far-reaching litigation.[6]

Respondents argue that judicial authorization for medical examinations is the solution (Opposition, p. 20), but such an approach would cause numerous practical problems. The plaintiffs' bar will argue that the decision below created a constitutional right to notice and consent for each and every medical examination of a child. State juvenile courts have no authority to summarily override a constitutional right, or to manage ongoing medical needs on an *ex parte* basis. Instead, juvenile courts would be tasked with adjudicating a new species of child welfare disputes, and providing noticed hearings any time a dispute arose over parental attendance at a doctor's appointment.

---

[6] The better reading of the Ninth Circuit's language is that it rejects restrictions on notice and consent *only as to the particular examination at issue*. Notably, respondents declined to adopt that reading, and instead argue that the notice problem can be solved through "exceptions" to any notice rights. Opposition, p. 21. This studious effort to leave the door open to litigation is a sign of things to come – absent clarification by this Court, litigation over the Ninth Circuit's notice language is a virtual certainty.

Such a process would strain the juvenile courts and delay provision of medical care to children across the circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Assistant County Counsel
Counsel of Record
DAVID L. BRODIE, Chief Deputy
CAITLIN E. RAE, Chief Deputy
JEFFREY P. MICHALOWSKI, Senior Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101
(619) 531-4871

Counsel for Petitioner County of San Diego