No. 20-1773

In The
Supreme Court of the United States

PASADENA REPUBLICAN CLUB,

Petitioner,

vs.

WESTERN JUSTICE CENTER,
HONORABLE JUDITH CHIRLIN,
and CITY OF PASADENA,

Respondents.

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

CITY OF PASADENA'S BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent City of Pasadena is a municipal governmental entity, a charter city within California, is not a corporate party, and has not issued shares of stock to any person.

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Pasadena respectfully submits this Brief in Response to the Pasadena Republican Club's Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case involves Petitioner/Plaintiff Pasadena Republican Club's claim of political viewpoint and religious discrimination allegedly committed by an individual (the Honorable Judith Chirlin, retired) and a private, non-profit organization (the Western Justice Center) (collectively, WJC). The posed questions presented by the Club hinge on the Club's misstatements of fact and arguments that the City of Pasadena's $1-a-month lease of City-owned property to WJC, and nothing more, made the City a "joint participant" in the WJC's alleged discrimination under this Court's opinion in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

As to the WJC, the Ninth Circuit held that the undisputed facts established that the WJC was not a "state actor" under *Burton*'s "symbiotic relationship" test. As to Respondent City of Pasadena, the undisputed facts also demonstrated the absence of evidence of a City "policy" or "custom" that caused the alleged constitutional violation, precluding liability under

Monell v. Department of Social Services, 436 U.S. 658 (1978).

The Pasadena Republican Club's Petition for a Writ of Certiorari should be denied for four compelling reasons. First, the Petition completely fails to address the actual basis upon which the Ninth Circuit affirmed the judgment in favor of Respondent City – the well-established law stated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny, that preclude vicarious liability of a governmental entity for another's constitutional violations absent evidence of the municipality's "policy" or "custom" that caused the constitutional violation. The Ninth Circuit determined, on the basis of the undisputed facts in the summary judgment record, that WJC was not exercising any policy-making authority for a City function on the City's behalf and that the lease did not delegate any City final policy-making authority that caused the Club's alleged constitutional injury. The Petition is silent on this issue and, therefore, review by this Court is not warranted.

Second, the two questions upon which the Club seeks review are not presented by this case because, contrary to the Club's misstatement of facts, the Ninth Circuit concluded, based on uncontroverted facts, that the subject lease was just that – a simple permissive lease covenant – representing the conveyance of a property interest, not the delegation of City authority to WJC to make City decisions or to perform City functions on the City's behalf. Contrary to the Club's misstatements, the undisputed facts in the record

demonstrated that WJC was not "managing" City-owned property on behalf of the City.

Nor does this case involve a situation where the City "so far insinuated itself into a position of interdependence" with WJC "that it must be recognized as a joint participant." The undisputed facts proved otherwise, as the Ninth Circuit held.

Third, even if the questions posed by the Club were properly presented, there is no conflict among the circuits that would justify granting review. The Club's assertion that the Ninth Circuit's opinion conflicts with decisions of this Court and other circuit courts rests squarely on the Club's mischaracterizations of the Ninth Circuit's ruling, which simply applied the controlling authority of *Monell* to the Club's suit against the City and, as to WJC, applied the *Burton* decision to the detailed and undisputed facts of this case.

Fourth, the Ninth Circuit's opinion was correct and should not be disturbed. The Club's arguments present no issue warranting this Court's review. The Ninth Circuit's opinion, including its application of both *Monell* and *Burton* to the facts of this case, was considered, deliberate, thorough, and reasonable.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet.App. 1-24) is reported at 985 F.3d 1161

(9th Cir. 2021) and is reproduced in the Petitioner's Appendix. The decision of the District Court for the Central District (Pet.App. 25-68) is reported at 424 F. Supp.3d 861 (C.D. Cal. 2019).

JURISDICTION

The judgment of the District Court for the Central District of California was entered in favor of the City of Pasadena and other defendants on December 30, 2019. Plaintiff Pasadena Republican Club appealed. The judgment was affirmed by the Ninth Circuit Court of Appeals on January 25, 2021. The Petition for a Writ of Certiorari was filed on June 16, 2021. The jurisdiction of this Court was invoked by Petitioner under 28 U.S.C. § 1254(1).

STATEMENT

1. Factual Background.

In 1989, the City[1] purchased certain real property, commonly referred to as the Maxwell House, and leased it to the WJC. Pet.App. 199. The lease was for an initial term of 55 years with an option to extend the lease for an additional 44 years. Pet.App. 96, 199.

[1] The original 1989 lease was actually between the Pasadena Surplus Property Authority and WJC. Pet.App. 199. The City then purchased the Property in 1994. Pet.App. 208, 221-222. For ease of reference, we refer to "the City" throughout this Response.

Under the lease, WJC was required to cover all costs related to the acquisition, improvement, repair and maintenance of the Property. Pet.App. 105, 106, 111. Through its decades of rental payments, the WJC repaid all funds loaned by the City, plus accrued interest. At all times pertinent to the subject events, the amount of rent that WJC paid to the City was $1 per month.

The Lease expressly stated that the City shall "have no obligation, in any manner whatsoever, to repair and maintain the Premises nor the buildings located thereon nor the equipment therein, whether structural or non-structural." Pet.App. 103, 112. The lease expressly prohibited WJC from discriminating against "any employee or applicant for employment" on the basis of "race, color, religion, sex, physical handicap, or national origin," and required the WJC to "establish and carry out an Affirmative Action Plan for equal employment opportunity and affirmative action in contracting." Pet.App. 153-154.

The Petition misstates the undisputed facts by falsely asserting that WJC's subletting and use of the Maxwell House was "strictly controlled" by the City. Pet. p. 7. The undisputed facts are that the Lease allowed for WJC to utilize the Property during ordinary business hours for "non-profit law related functions" including the operation of a center for the study of alternative dispute resolution and the administration of justice. Pet.App. 101-102. The only potentially "mandatory" restriction on the WJC's use of the premises during normal business hours was to prohibit WJC from

leasing the Premises "to lawyers offering legal services for profit . . . or for any profit activities." Pet.App. 102.

With regard to WJC's use of the Property during non-business hours, no restrictions existed and WJC could utilize the Property for any purpose, at its discretion, as follows:

> "Nothing herein precludes Tenant from using the Premises for community meetings and other purposes during non-business hours." Pet.App. 102.

The undisputed evidence also established, among other things, that the City acquired the property and leased it to WJC, which constitutes a conveyance of a property interest to WJC. Pet.App. 64-65, 66. With respect to WJC's rental to outside groups during non-business hours, the City "has no input or control over the entities to which the Western Justice Center may rent its meeting rooms at the premises during the evening hours." Pet.App. 30. The City "derives no income, revenue or other financial benefit on account of the Western Justice Center's rental of meeting rooms." Pet.App. 30.

Pasadena Republican Club (the "Club") contracted with WJC to rent space in Maxwell House for a speaking event. Pet.App. 76. The WJC then informed the Club that WJC decided to no longer rent the Maxwell House to political groups. Pet.App. 77. Then, shortly before the April 20, 2017 event, WJC learned that the planned speaker, John Eastman, J.D., Ph.D., was associated with a politically active group that WJC

understood to take "positions on same-sex marriage, gay adoption, and transgender rights" that were antithetical to WJC's values. Pet.App. 79-80. WJC then rescinded the rental agreement. Pet.App. 79-80.

2. Proceedings Below.

The Club filed a lawsuit against WJC, the Honorable Judith Chirlin, and the City alleging that the Club's First Amendment rights had been violated under 42 U.S.C. § 1983. Pet.App. 69. Relying exclusively on *Burton*, the Club asserted that WJC was a "state actor" and that all defendants discriminated against the Club's political viewpoints and religious beliefs in violation of the First Amendment. Pet.App. 83-88.

On May 1, 2019, WJC and Judge Chirlin (collectively, "WJC") moved to dismiss the Club's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. At the same time, the City moved for summary judgment. Pet.App. 36. The District Court granted WJC's motion to dismiss, holding that the operative complaint did not plausibly allege that WJC acted "under color of state law" pursuant to the "symbiotic relationship" test set forth in *Burton*. *Id*. at 44-53. The District Court also granted the City's summary judgment motion, relying upon the *Monell* line of cases, prohibiting vicarious liability and holding that the undisputed facts established that the City did not delegate to WJC any final policy-making authority of the City for a City function that caused the Club's alleged constitutional violation. *Id*. at 26, 59-67.

On appeal, the Ninth Circuit affirmed both judgments. With regard to the WJC, the Ninth Circuit acknowledged the holding in *Burton* and correctly detailed the nature of its "symbiotic relationship" test. Quoting *Burton*, the Ninth Circuit held that a "state actor" finding will be made where a governmental entity has "'so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity.'" *Id*. at 12. The Ninth Circuit recognized that the *Burton* holding "teaches us that 'substantial coordination' and 'significant financial integration' between the private party and government are hallmarks of a symbiotic relationship." *Id*. at 13.

Upon that foundational predicate, the Ninth Circuit concluded, on the basis of the uncontroverted facts presented in this case, that WJC was not a "state actor" because WJC's operations and activities were independent of the actions and operations of the City and, thus, no symbiotic relationship existed. *Id*. at 16. No allegations established that the City performs City functions on the (City-owned) Property. *Id*. All expenses related to the Property were paid by WJC, not by the City. *Id*. at 17.

The Ninth Circuit detailed the facts that distinguished this case from *Burton*. The facts established, among other things, that the City and WJC operated independently (*id*. at 16); the City did not participate financially in WJC's operations (*id*. at 16); the City realized no share of revenue from WJC's operations (*id*.

at 19), and the City did not involve itself in the decision-making involving WJC (*id*. at 20).

In affirming the judgment in favor of the City, the Ninth Circuit did not discuss or address *Burton* Pet.App. 22-24. Rather, the Ninth Circuit applied *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), which held that liability against a municipality under 42 U.S.C. § 1983, requires proof that the alleged constitutional violation "be caused by a municipality's 'policy, practice, or custom' or be ordered by a policy-making official." Pet.App. 22.

The Ninth Circuit noted that the Club's entire argument against the City was predicated on the assumption that the City's liability should be inferred "from the mere fact that a private party rented out space on the property that it had leased from the government." Pet.App. 22-23. The Ninth Circuit rejected the Club's assertion and held, based on the undisputed facts in the record below, that "a permissive lease covenant does not convert discretion into delegation" of municipal authority, stating:

> "When the City executed the Lease, it was not delegating final policy-making authority on political speaking events in the City; it was simply conveying a property interest – the right of occupancy – in the premises."

Pet.App. 23; see also Pet.App. 64-66 [No delegation of a city function occurred].

The Ninth Circuit concluded, based on the undisputed facts and the application of *Monell*, that no

evidence supported the Club's assertion that final policy-making authority on behalf of the City caused the alleged constitutional injury. Pet.App. 24.

REASONS FOR DENYING THE WRIT PETITION

1. The Ninth Circuit Applied *Monell* and Ruled for Respondent City on Grounds Ignored by Petitioner. Thus Petitioner Raises No Issue Worthy of Review.

In 1978, this Court held that a municipality qualifies as a "person" who is subject to suit and can be sued for liability under 42 U.S.C. § 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). However, municipalities cannot be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477 (1986) [§ 1983 cannot be interpreted to allow for vicarious liability of municipalities for the conduct of others].

The *Monell* Court held that a governmental entity can only be sued under § 1983 where that governmental entity takes unconstitutional action based on the local government's permanent and well-settled policy or custom. *Monell*, *supra*, 436 U.S. at 694; *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 31 (2010); *Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007) [the custom or policy must be the "moving force" behind the constitutional violation]. Thus, this Court held that the "first inquiry" into "any case alleging

municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

This Court has "consistently refused to hold municipalities liable under a theory of *respondeat superior*" and has demanded that plaintiffs identify a municipal policy or custom that caused plaintiff's injury in order to proceed under a § 1983 claim. *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403 (1997); *Barone v. City of Springfield, Oregon*, 902 F.3d 1091, 1106 (9th Cir. 2018) [the *Monell* requirement for proof of a municipal policy or custom is "well established"].

Plaintiffs pursuing § 1983 claims against local governments must prove that their injury was caused by "action pursuant to official municipal policy," which includes the decisions of the municipality's lawmakers, acts committed by the its policymaking officials, "and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011). Only rarely will a municipality's deliberate "policy of inaction" constitute the requisite "policy" or "custom" to support a § 1983 claim. *Id*.

The Ninth Circuit's opinion in this case relied upon the well-established law of *Monell*, concluding that the City could not be held vicariously liable for the conduct of WJC based on the undisputed facts. Pet.App. 24. The Ninth Circuit's opinion was based on

the summary judgment record below and the absence of a genuine dispute as to any material fact. The undisputed facts established that WJC, as the lessee of the Property, was the sole entity that had "the authority to decide who, when, for what reason, and for how long a visitor could occupy the premises during non-business hours." Pet.App. 23. Consequently, WJC alone exercised its discretionary authority as the lessee and did not exercise policy-making authority for the City or for any City function.

The Ninth Circuit unremarkably concluded that a lease, without more, did not make the City "vicariously liable for the discretionary decisions of its lessee" and, therefore, the undisputed facts established that there was no evidence that any "final policy-making authority" was delegated to WJC that caused the Club's alleged constitutional injury. Pet.App. 24 and 66.

Monell was the sole basis upon which the Ninth Circuit affirmed the judgment for the City. The Club's Petition does not even mention *Monell* let alone seek to challenge the Ninth Circuit's application of *Monell* to this case. Nor can it.

Petitioner has no basis to suggest (and has not suggested) why the Court should revisit its well-settled principles governing municipal liability under 42 U.S.C. § 1983 as set forth in *Monell*. *Monell* presents a ground for affirming the judgment in favor of the City that has not been addressed by the Petition. It is not for this Court to raise constitutional questions not raised by the Petitioner. S. Ct. R. 14.1(a) ("Only

questions set out in the petition, or fairly included therein will be considered by the Court"); see *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972).

Because the Club does not challenge this independent basis for the judgment in favor of the City, the outcome of this case will not change even if the Court granted certiorari and reversed on the questions posed by the Club. Certiorari is not warranted and the Petition should be denied.

2. The Club Seeks Certiorari on Two Questions Not Presented by this Case.

A. The Ninth Circuit's Determination that WJC Was Not a "State Actor" Addressed Only WJC's Liability, Not the City's Liability Under § 1983. Therefore, Petitioner Raises Issues of no Import.

Only by misstating the facts and mischaracterizing the Ninth Circuit's opinion does Petitioner Pasadena Republican Club seek to obtain review from this Court on the two questions posed. The Club asserts, disingenuously, that Western Justice Center "exercised its delegated authority" allegedly given to it by the City's Lease to cancel a speaking event at City-owned property on behalf of the City. Pet. p. *i*. With that inaccurate and false premise, the Club seeks review on the question of whether the Western Justice Center is a "State Actor" for purposes of constitutional violations "[w]hile it is managing the city-owned property." Pet. at *i*. This case does not present that question,

particularly with respect to Respondent City; accordingly, this case is not a suitable vehicle for the Court's review.

First, no facts were presented by the Club that WJC was "managing" any city-owned property on the City's behalf. The undisputed facts were that the WJC had independent operations and operated the city-owned on its own behalf subject to the terms of the lease.

Second, Petitioner's Question No. 1 seeks a determination of whether the WJC is a "state actor." Pet. *i*. Question No. 1 has no bearing on the Ninth Circuit's determination of the absence of municipal liability against the City under § 1983. As to the Club's claim under 42 U.S.C. § 1983 against WJC, both the District Court and the Ninth Circuit concluded that the City's Lease to WJC did *not* delegate the City's policy-making authority to WJC to act on the City's behalf for a City function. Therefore, the Club's factual predicate of "delegation" of City authority is false.

Third, as to the City, the Ninth Circuit determined under *Monell* that the Club offered no evidence to raise a genuine dispute of material fact to establish that any City "policy" or "custom" caused the Club's alleged constitutional injury. The Ninth Circuit held, among other things, that a government contract (i.e., a lease) with a private entity does not convert the private entity into a state actor absent evidence that the private entity is "performing a traditional, exclusive public function." Pet.App. 23-24. The Ninth Circuit concluded that

renting out event space of city-owned property during nonbusiness hours for a speaking event was not a traditional, exclusive public function. *Id*. at 24.

Accordingly, answering Question No. 1 on which the Club seeks review would have no effect on the outcome of this case against the City. To the extent the Club seeks to revisit the Ninth Circuit's assessment of the summary judgment record, the Petition does not present compelling reasons for granting certiorari. As this Court's rules make clear, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. R. 10.

B. The City's Lease to WJC Was the Transfer of a Property Interest, Not the Delegation of Decision Making Authority to WJC for City functions.

Relying exclusively on *Burton v. Wilmington Parking Authority*, the Club seeks this Court's review to address Question No. 2 as to whether a municipality is liable "through inaction" for civil rights violations committed by others for making "itself a party to the [viewpoint discrimination]" and by placing "its power, property and prestige behind" that discrimination. Pet. at *i-ii*. This case does not present that question, either, and, thus, no a suitable vehicle is provided by this case for the Court to review.

First, Petitioner argues that this case is the method by which this Court should determine "whether *Burton* is still the law of the land." Pet. 3.

This is a red herring. The Ninth Circuit concluded that *Burton* is binding precedent and honored that precedent to address Petitioner's "state actor" issue against WJC based on the "symbiotic relationship" test. Pet.App. 14.

Second, it bears repeating that the Ninth Circuit did not apply *Burton* to resolve Petitioner's allegations of municipal liability for constitutional violations against the City under 42 U.S.C. § 1983.[2] Therefore, resolution of the "state actor" question under *Burton* does not affect the outcome of the case against the City.

Third, to the extent the Ninth Circuit addressed *Burton* with respect to WJC, the Ninth Circuit held that the undisputed facts presented in the record below failed to meet the *Burton* "symbiotic relationship" test. Contrary to the facts and arguments presented by the Club, the Ninth Circuit *did not hold* that *Burton* only applies upon evidence that the private entity's services are indispensable to the financial viability of the entire municipality. Pet. 20. Rather, the Ninth Circuit carefully and painstakingly engaged in an intensive factual analysis that compared the *Burton* facts to the facts of this case.

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[2] The *Burton* opinion did not specifically address a claim for constitutional violations under § 1983, nor did *Burton* involve any action against a municipality. Instead, *Burton* only addressed the "state actor" criteria against a private entity. Thus, *Burton* has little factual or legal bearing on the Club's 42 U.S.C. § 1983 claim against the City and does not present a proper vehicle to address *Burton*.

The Ninth Circuit noted that the landlord parking authority in *Burton* was a joint participant in the tenant restaurant's discrimination because the lease was designed to have an assimilation and integration between the landlord's and tenants' businesses. The lease required the landlord (the parking authority) to pay the tenants' utilities, heat, maintenance, and repairs from public funds in exchange for long-term leases that would, in turn, make the landlord's garage business more economically viable. Pet.App. 12-13. The tenants' rent defrayed the parking authority's own operating expenses. *Id*. at 16. The interdependence of the businesses was palpable in *Burton*.

Further, the Ninth Circuit acknowledged the mutual financial interdependence obtained from the symbiotic relationship of the landlord and tenants in *Burton*. The *Burton* restaurant tenant procured more patrons, business, and revenue due to the physical closeness the restaurant's customers received from the parking authority's public garage and that the garage (which was not financially self-sustaining) relied on the tenants' rentals for its financial success. Pet.App. 13. The Ninth Circuit quoted *Burton*'s express recognition that "the tenant's commercial operations 'constituted a physically and financially integral and indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit.'" *Id*.

The Ninth Circuit then noted that none of the hallmarks of *Burton* existed in this case. Pet.App. 16. In other words, the Ninth Circuit adopted the *Burton* criteria as the "symbiotic relationship" test and, followed

a fact-bound analysis, concluding that the undisputed evidence failed to meet that criteria.

Unlike the tenants in *Burton*, WJC paid all of the expenses related to the acquisition, renovation, and maintenance of the Property; the City paid none. *Id*. The City performed no City functions on the Property. *Id*. The City loaned money to WJC (all of which had been repaid) and no facts existed in the record to establish that WJC and the City were interdependent because of the loans provided. *Id*. at 17. The City had no obligation to cover any cost of the Property and did not mark the Property as city-owned property or otherwise hold itself out as being interdependent with WJC. *Id*.

Again, the Ninth Circuit's determination that WJC was not a state actor followed a fact-intensive examination applied to the legal principles against the *Burton* backdrop. The Petition simply does not present a compelling reason for granting certiorari to resolve what amounts to the Club's contrived, artificial dispute over various undisputed facts. S. Ct. R. 10.

3. No Conflicts Exist with this Court's Opinions or Among the Circuits as a Result of the Ninth Circuit's Opinion.

A. Contrary to the Club's Contentions, the Ninth Circuit Opinion Applied *Burton* and is Consistent with *Burton* and this Court's Decisions.

The Club contends that this Court's review is warranted to resolve both a conflict between the Ninth

Circuit's opinion and this Court's decisions as well as circuit splits regarding the continued viability of *Burton*. Pet. 10-16. Again, only by misrepresenting *Burton*'s holding and by misstating the character of the Ninth Circuit's holding in this case, does the Club make the assertion that the Ninth Circuit's opinion conflicts with *Burton* itself.

Contrary to the Club's misstatement, the Ninth Circuit did not hold that *Burton* will only apply where the lease to a private actor makes the private entity "financial indispensable" to the entire financial success of the municipality. Pet.App. 13. Like *Burton*, the Ninth Circuit looked at a multitude of factors, while acknowledging its obligation to engage in a "fact-bound inquiry" and to sift through facts and circumstances of the case in search of a symbiotic relationship between two entities. Pet.App. 11. Only one of its inquiries was whether the government profited financially from both the tenants' operations and the allegedly unconstitutional conduct. Pet.App. 14.

The court also looked to whether any financial integration occurred between the entities or whether "substantial cooperation" existed between the private party's services and the profits or finances of the government entity. Pet.App. 14. The Ninth Circuit also looked to the "physicality" of the relationship to determine whether the two entities were "entangled" with personnel, whether the nature of the leasehold relationship showed mutual interdependence, and whether "deeply intertwined processes" existed between the

private entity's services and the insinuation of the government in those services. Pet.App. 15.

With regard to this case, the Ninth Circuit observed and commented upon the absence of evidence of financial interdependence, noting that the City had no obligation to pay for WJC's operations, utilities, maintenance, repairs, or otherwise during the entirety of the lease period. Pet.App. 17. The Ninth Circuit observed the absence of any evidence showing that City functions were performed on the Property and the absence of any evidence of markings that designated the Property as City-owned land. Pet.App. 18. In short, the Ninth Circuit looked at a number of factors, including the lack of financial indispensability of WJC's services to the City and found that WJC was not a "state actor." Pet.App. 16-21.

In advancing its Petition, the Club also mischaracterizes the "symbiotic relationship" test as set forth in *Burton* by suggesting that "financial indispensability" is ***not*** one of the criteria to be considered for the "state actor" analysis. Pet. 22. It is difficult to imagine how the Club can state such a proposition in the face of the precise and exact language used by *Burton*, as follows:

> " . . . [T]he commercially leased areas . . . ***constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit.*** . . . ***Neither can it be ignored*** . . . ***that profits earned by discrimination not only contribute to, but***

> ***also are indispensable elements in, the financial success of a governmental agency***." *Burton*, *supra*, 365 U.S. at 724

Thus, contrary to the Club's claims, *Burton* considered and expressed a number of factors utilized in its analysis, which included consideration of the factor that the long-term tenant leases were "financially indispensable" to the economic viability of the parking authority's "plan" for the garage.

Significantly, this Court in *Burton* also made it clear that its facts and circumstances were unique, and that its opinion was "by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." *Burton*, *supra*, 365 U.S. at 725.

Thus, *Burton* and the Ninth Circuit are in harmony and both opinions agree that financial indispensability and interdependence is at least one of the factors to be considered in the fact-bound analysis for the "symbiotic relationship" test.

B. Contrary to the Club's Contentions, the Ninth Circuit Opinion Applied *Burton* and Held the Facts Established No "Substantial Cooperation" Sufficient to Support a "State Actor" Determination.

Again, only through the misrepresentation of the Ninth Circuit's holding does the Club seek to suggest a conflict among circuits where none exists.

The Club contends that the First Circuit and Fifth Circuit follow *Burton* by concluding that ***where the Burton test is met***, no direct role in the particular challenged action is required for liability. Pet. 13-15. The Club then misrepresents that the Ninth Circuit's opinion conflicts with those circuits because the Ninth Circuit held that the "direct knowledge and involvement of the government in the illegal activity" is a required element of *Burton*. Pet. 13-15. The Ninth Circuit opinion did nothing of the sort.

Some of the many criteria the Ninth Circuit examined in its fact-bound inquiry on its "'state actor" analysis for WJC liability was whether "mutual benefits" existed between the City and WJC, the degree to which "substantial cooperation" existed among the entities, and whether the City involved itself in the actions of WJC and *vice versa*. Pet.App. 20. The Ninth Circuit did not issue a "conflicting" holding that imposes "direct knowledge" of the governmental entity of the constitutional violation as a condition of finding a "symbiotic relationship." Rather, the Ninth Circuit considered "substantial cooperation" as one of the factors to be analyzed to determine whether the symbiotic relationship exits.

The true facts are, as found in the record before the Ninth Circuit, that no involvement existed between the private actions of WJC in its operations and the City in its operations. Only in the context of that examination of *Burton*'s "substantial cooperation" factor did the Ninth Circuit recite the undisputed facts that the City did not initiate or cancel the subject Club

event and the City had no knowledge of the event until the lawsuit was filed. Pet.App. 20.

Certiorari is not warranted because of the uniquely fact-bound analysis under *Burton* for the symbiotic relationship test and whose resolution is of little broad importance to anyone other than the immediate parties in this case. Further, the Ninth Circuit's opinion is in complete synchronization with both *Frazier v. Board of Trustees of Northwest Mississippi Regional Med. Center*, 765 F.2d 1278 (5th Cir. 1985) and *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983). As the Petition admits, both *Frazier* and *Gerena* will attribute the act of a private entity to be a "state actor" (regardless of the role played by the governmental entity in the unconstitutional conduct) ***but only after*** "the *Burton* test is met." Pet. 14. Both cases recognized that it is only upon a finding or determination that the public and private entities "are indeed functionally symbiotic" that the "state actor" criteria is met. *Frazier*, *supra*, 765 F.2d at 1288, fn. 22.

In that regard, the Ninth Circuit and *Frazier* are more than consistent with one another. *Frazier* held that a "symbiotic relationship" requires "a level of functional intertwining whereby the state plays some meaningful role in the mechanism leading to the disputed act." *Frazier*, *supra*, 765 F.2d at 1288. The *Frazier* Court concluded no symbiotic relationship existed in that case because the facts established that the private entity retained the ultimate control over its personnel and the government had no "material involvement" in the decision making process. *Id*.

Likewise, the Fifth Circuit opinion in *Gerena* is also consistent with the Ninth Circuit's opinion. *Gerena* stated that ***when the Burton symbiotic relationship exists***, plaintiff need not demonstrate the manner in which the government "was particularly involved" in the challenged action. *Gerena*, *supra*, 697 F.2d at 451. But in *Gerena*, too, no symbiotic relationship was found to exist. No facts were found to exist in *Gerena* to demonstrate any "interdependence" between the private entity and the governmental entity. *Id*. In fact, like the Ninth Circuit, *Gerena* held that government entity funding of the private entity's facilities was insufficient to establish a symbiotic relationship. *Id*. (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982)).

Thus, even if this case presented an issue concerning the circumstances under which a municipality can be found liable for alleged constitutional violations using *Burton*'s "symbiotic relationship" test, there is no conflict among the circuits to resolve.

The existence of a conflict among circuits is feigned.

C. The Ninth Circuit Opinion Applied *Burton* and Does Not Conflict with this Court's Opinion in *Gilmore*.

Lastly, the Club also contends that the Ninth Circuit's opinion in the case at bar conflicts with this Court's opinion in *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974). The Club suggests (again using

statements contrary to the undisputed facts found in the summary judgment record by both the District Court and the Ninth Circuit) that the existence of the City lease of the Property to WJC requires that *Burton* be applied "with greater scrutiny." Pet. 15-16.

But, as established above, the Ninth Circuit applied *Burton* to its "state actor" analysis against WJC and it did so with a great deal of scrutiny. The Ninth Circuit's analysis was thorough, thoughtful, articulate and detailed. Pet.App. 11-22. This Court's opinion in *Gilmore* requires nothing more.

Gilmore expressly recognized the nature of the fact-bound inquiry under *Burton* and stated that the "state actor" analysis is dependent upon "the extent of the city's involvement in discriminatory actions by private agencies using public facilities." *Id*. at 573. In *Gilmore*, this Court observed that a finding of state action was more likely to occur upon the existence of evidence that the governmental entity ***played a role*** in whether the public recreational facilities were "rationed" to particular groups. *Id*. at 574. In other words, this Court considered it necessary to have an evidentiary showing of the municipality's "significant involvement" in the private entity's decision-making processes.

Contrary to the claims made in the Petition, the Ninth Circuit engaged in that fact-bound inquiry as recommended by *Gilmore* and found no City "significant involvement" and no "integration" of the City

into the activities and decision-making of the WJC. Pet.App. 20.

Again, no conflict exists to resolve between this Court's decision in *Gilmore* and the Ninth Circuit's decision.[3]

4. The Ninth Circuit's Opinion Was Correct.

The sole basis upon which the Ninth Circuit affirmed the City's judgment was based on *Monell*. The nucleus of this Court's *Monell* holding is the determination that only the "person" committing and causing the wrongful constitutional violation can be liable to a plaintiff under §1983. *Monell*, 436 U.S. at 694. A municipality will not qualify as a "person" liable in the absence of proof that its policies and customs caused the discrimination, not on proof of the liability of another person or entity. *Monell*, 436 U.S. at 690-91. The Ninth Circuit correctly stated and applied *Monell* here. Pet.App. 22-24.

Landowners utilize leases to surrender a property interest – possession and control of the land – to the tenant. *Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 511 (1975). Thereafter, the landowner is generally not legally responsible for the activities which the tenant

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[3] The Petition's reliance upon *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), is misplaced. The *Fernandes* court's one-sentence comment with a citation to the *Burton* case is *dicta*, at best. It made no "state actor" finding. It did not address a § 1983 claim against a governmental entity. It provides no basis for a "conflict."

carries on upon the land after the transfer. *Id*. This is particularly true where a governmental entity is the landlord and the private entity is not performing "a traditional, exclusive public function" on the property. So held the Ninth Circuit. Pet.App. 22.

Not only was the Ninth Circuit correct, it followed and applied this Court's recent pronouncement of the law in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931-33 (2019) ("merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors. . . ."). Petitioner does not challenge the Ninth Circuit's opinion. Therefore, this Court should deny certiorari.

CONCLUSION

The Club uses improper "spin" – i.e., mischaracterization and innuendo – to falsely manufacture proposed disputes for resolution by this Court that do not exist. Despite trying to manufacture facts that do not exist, the Club has failed to identify a single conflict among appellate decisions on the questions it advances. The fact that different cases come to different conclusions on different facts is no surprise. Such inevitable variation does not compel this Court's review.

For all of the foregoing reasons, this Court should deny Pasadena Republican Club's Petition for a Writ of Certiorari.

Respectfully submitted,

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